STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v **No. 165233**

JEFFREY S. ARMSTRONG,
Defendant-Appellee.

Court of Appeals No. 360693
Third Circuit Court No. 21-003294-FH

PLAINTIFF-APPELLANT'S APPENDIX

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November 3, 2023

165233

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 165233
COA: 360693
Wayne CC: 21-003294-FH

JEFFERY SCOTT ARMSTRONG,
Defendant-Appellee.

/

On order of the Court, the application for leave to appeal the November 22, 2022 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing: (1) whether the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq.*, supersedes the rule that "the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement," *People v Kazmierczak*, 461 Mich 411, 426 (2000) (footnote omitted); (2) if so, whether the exclusionary rule applies to searches conducted in good-faith reliance upon *Kazmierczak,* see *Davis v United States*, 564 US 229, 241 (2011); (3) alternatively, if the holding of *Kazmierczak* has been superseded by the MRTMA, whether the smell of marijuana alone may establish reasonable suspicion to perform an investigatory stop pursuant to *Terry v Ohio*, 392 US 1 (1968); and (4) if so, whether the trial court clearly erred in concluding that the firearm recovered in this case was not in plain view during an otherwise constitutional *Terry* stop. See *People v Champion*, 452 Mich 92 (1996).

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

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

November 3, 2023

Clerk

b1031

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PEOPLE v JEFFREY ARMSTRONG - COA OPINION

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

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JEFFERY SCOTT ARMSTRONG,

Defendant-Appellee.

FOR PUBLICATION
November 22, 2022
9:05 a.m.

No. 360693
Wayne Circuit Court
LC No. 21-003294-01-FH

Before: GLEICHER, C.J., and SERVITTO and YATES, JJ.

YATES, J.

Body camera footage is an invaluable resource for courts facing suppression motions, but it rarely serves as a stand-alone source of information about a warrantless search or seizure. Here, the trial court was hamstrung in analyzing the validity of a warrantless search of defendant, Jeffery Scott Armstrong, and the subsequent seizure of a gun because the trial court was given no evidence other than body camera footage. Despite that disadvantage, the trial court dutifully made findings of fact and ordered the suppression of the gun. Because we conclude that the trial court's findings of fact were not clearly erroneous and its conclusions of law were sound, we shall affirm the trial court's suppression order.

I. FACTUAL BACKGROUND

On October 8, 2020, law-enforcement officers conducting a home-compliance check in the city of Detroit came upon a Jeep Cherokee parked on the street. They spoke to a woman who was in the driver's seat and to Armstrong, who was sitting in the front passenger's seat. What piqued the interest of the law-enforcement officers at first was the scent of marijuana emanating from the Jeep. Body camera footage shows the officers approaching the vehicle, speaking with both people in the vehicle, instructing Armstrong to get out of the vehicle, and ultimately finding a gun under the front passenger's seat. As a result, Armstrong was charged with carrying a concealed weapon, MCL 750.227, being a felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b.

In response, Armstrong moved to suppress the gun as the fruit of a search that violated the Fourth Amendment to the United States Constitution. In the trial court, both parties several times

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declined an invitation to hold an evidentiary hearing, stipulating instead to the use of body camera footage as the evidentiary basis upon which the trial court should resolve Armstrong's suppression motion. Additionally, although no police reports concerning the search and seizure were filed in the trial court, the parties included quotes from the police reports in their briefs, so the trial court considered those excerpts from the police reports. Relying upon that limited record, the trial court described the factual background of the suppression motion in the following terms:

> On October 8, 2020, Corporal Eaton and Officers Genaw, Saad, Scott, and Krzyak were driving down Seneca street in the city of Detroit to conduct a home compliance check. Corporal Eaton observed a black Jeep Cherokee parked on Seneca street, with a woman in the driver's seat and Armstrong in the front passenger seat. According to Corporal Eaton, she smelled the scent of burnt marijuana as she drove past the black Jeep Cherokee. She parked her vehicle then walked behind the black Jeep Cherokee, exited, and approached the car. The prosecution's brief in support alleges that when Corporal Eaton asked Armstrong about the scent of marijuana, she observed a black handgun lying on the floorboard of the vehicle directly in front of Armstrong. Prosecution also makes note that Corporal Eaton noticed Armstrong's hand shaking when he was being questioned. With the parties' consent to rely on the body camera footage as evidence of the initial interaction between Corporal Eaton, the driver of the vehicle, and Armstrong, the dialogue is detailed below:
>
> [*Corporal Eaton*]: How—long you been smoking weed in the car? I can smell it from outside. Don't act shocked. I can smell it.
>
> [*Defendant*]: I just . . . she just pulled up on me.
>
> [*Corporal Eaton*]: (To driver:) Ok. How much weed you been smoking in the car?
>
> *Driver*: Yeah, I'm not smoking. There's no weed in the car.
>
> [*Corporal Eaton*]: There might not be any now, but you were—you were, right?
>
> *Driver*: No. Not—
>
> [*Corporal Eaton*]: I can smell it. I mean it's ok, you're not doing it now . . . but I can smell it. Do you know who uh Tony Williams is?
>
> *Driver*: No, I just pulled up—
>
> [*Corporal Eaton*]: Where do you guys . . . I mean which house?
>
> [*Defendant*]: Right there third one.

[*Corporal Eaton*]: The—?

[*Defendant*]: Third.

[*Corporal Eaton*]: Oh the third one, I thought you said the gray one. Do you have ID sir? Could you step out for me?

Immediately after Corporal Eaton asked Armstrong to step out of the vehicle, she searched his person and put him in handcuffs. During the search of Armstrong's person, Corporal Eaton's body camera fell off and obstructed the view until it was retrieved by one of the officers on the scene. Ofc. Genaw stated in her report that "as [Corporal Eaton] began removing him from the vehicle, I observed a black handgun with an extended magazine under the front passenger seat." Ofc. Genaw began to search the passenger side of the vehicle. When Corporal Eaton walked away with Armstrong in handcuffs, Ofc. Genaw asked from a distance, "do you have a CPL Sir?" At this point, Corporal Eaton was on the other side of the vehicle with Armstrong and two other officers. She told the other officers that Armstrong had a gun in the car. Corporal Eaton then walked back over to Ofc. Genaw, who was still searching the passenger side of the vehicle, and said, "let's see it real quick," referring to the handgun. When Corporal Eaton saw it, she stated, "oh nice," as if it was her first time seeing the handgun. [Record citations omitted.]

During the hearing on the motion to suppress, the prosecution argued that: (1) the smell of marijuana, standing alone, provided probable cause to approach the Jeep; and (2) the gun found in the Jeep was in plain view when Corporal Eaton approached the passenger window. Accordingly, no warrant was required to seize the gun. Defendant argued that the smell of marijuana alone was not sufficient to establish probable cause to approach defendant and, therefore, all evidence found during the search of the Jeep should be suppressed. The trial court granted defendant's motion to suppress the evidence and dismissed the case. In its opinion, the trial court found that defendant's encounter with the law-enforcement officers was a seizure, requiring the officers to have probable cause *before* ordering defendant out of the Jeep and arresting him because the officers surrounded the vehicle and effectively prevented the driver from leaving. The trial court also determined that the smell of marijuana alone neither constituted probable cause nor justified defendant's removal from the Jeep or the officers' search of the vehicle. Finally, the trial court found that the gun was not permissibly obtained under the plain-view exception to the warrant requirement because, based upon the footage from the body camera, "the firearm was not visible until [defendant] had already been removed from the vehicle." The prosecution now appeals the trial court's decision.

II. LEGAL ANALYSIS

On appeal, the prosecution has challenged the trial court's suppression of the gun obtained after defendant was ordered to get out of the vehicle. According to the prosecution, "[t]he facts of this case . . . show that during the investigation of a civil infraction committed within the presence of a police officer, a firearm was discovered." More specifically, the prosecution asserts that the smell of burned marijuana and the totality of the circumstances rendered Corporal Eaton's actions reasonable, so the gun was properly seized under the plain-view doctrine. Our analysis of the trial court's decision involves two standards of review, one concerning the trial court's factual findings

and another concerning its application of the law. "This Court's review of a lower court's factual findings in a suppression hearing is limited to clear error, and those findings will be affirmed unless we are left with a definite and firm conviction that a mistake was made." *People v Simmons*, 316 Mich App 322, 325; 894 NW2d 86 (2016) (quotation marks and citation omitted). Thus, " '[t]he trial judge's resolution of a factual issue is entitled to deference[.]' " *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). We must review de novo the trial court's application of the law and "ultimate decision on a motion to suppress." *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). Similarly, we review "de novo whether the Fourth Amendment was violated and whether an exclusionary rule applies." *Id.*

A. SEIZURE OF DEFENDANT ARMSTRONG

First, we must determine whether law-enforcement officers seized defendant on October 8, 2020, and, if so, whether the seizure satisfied constitutional standards. Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Our Supreme Court has explained that "the Michigan Constitution is to be construed to provide the same protection as that secured by the Fourth Amendment, absent compelling reason to impose a different interpretation." *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011) (quotation marks and citations omitted). Searches and seizures, according to the United States Constitution and the Michigan Constitution, must "be conducted reasonably, and in most cases that requires issuance of a warrant supported by probable cause, in order for the results to be admissible." *People v Toohey*, 438 Mich 265, 270; 475 NW2d 16 (1991).

The prosecution contends that Corporal Eaton "was well within her authority to approach defendant, who was sitting in a car parked on a public street, and simply talk to him." This theory, however, collapses under the weight of the facts that the prosecution generally does not dispute. Although an officer may approach a person in a public area, the encounter is only consensual if "a reasonable person would feel free to terminate the encounter." *People v Anthony*, 327 Mich App 24, 39; 932 NW2d 202 (2019) (quotation marks and citation omitted). A person is seized whenever law-enforcement "officers completely block a person's parked vehicle[.]" *Id.* at 40. Here, the trial court found (and the body camera footage reveals) that the Jeep "was surrounded on all sides and front and back by Corporal Eaton and Officers Genaw, Saad, Scott, and Krzyak." Corporal Eaton's body camera footage shows four other police officers around the Jeep when Corporal Eaton parked behind it and then approached it on foot. When Corporal Eaton instructed defendant to get out of the Jeep, officers were standing in front of the Jeep, Corporal Eaton was standing on its passenger side, and two other officers were standing on the driver's side. To be sure, our review of the body camera footage does not unmistakably establish that the driver of the Jeep could not have driven forward without hitting an officer. But our cautious uncertainty on this point does not rise to the level of a "definite and firm conviction that a mistake was made" by the trial court. *Simmons*, 316 Mich App at 325. Thus, faithfully applying the trial court's factual finding that the parked Jeep was completely blocked by police officers, we conclude that a reasonable person in defendant's position would not have felt free to terminate or leave the encounter. See *Anthony*, 327 Mich App at 40. In other words, the officers seized defendant even before Corporal Eaton ordered him out of the Jeep.

Still, the prosecution insists that the officers had probable cause to approach the Jeep and seize defendant. Specifically, the prosecution argues that the officers were justified in approaching the Jeep based upon their belief that defendant was smoking marijuana in a vehicle because he was in the Jeep parked on a public street and the officers could smell burned marijuana. In support of this theory, the prosecution cites *People v Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002), which held that "[s]o long as the officer has probable cause to believe the [infraction] has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment." In this case, the trial court found (and the body camera footage confirms) that Corporal Eaton first approached the Jeep because "she smelled the scent of burnt marijuana as she drove past the black Jeep Cherokee." But the body camera footage does not show any smoke emanating from the Jeep. Nor does the footage show defendant or the driver throwing any marijuana remnants from the Jeep. When asked, defendant and the driver both denied they were smoking marijuana. Indeed, although the prosecution asserts that Corporal Eaton observed marijuana being used in a vehicle on a public street, Corporal Eaton only mentioned that she *smelled* marijuana. Accordingly, the trial court did not clearly err in finding that Corporal Eaton based her decision to approach the Jeep solely upon her stated smell of marijuana.

When marijuana was illegal for all purposes under Michigan law, our Supreme Court ruled that the " 'very strong smell of marijuana emanating from [a] vehicle' " furnished "probable cause to search for marijuana[.]" *People v Kazmierczak*, 461 Mich 411, 421-422; 605 NW2d 667 (2000). Much has changed, however, in the 22-year period since that decision was rendered. The Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq*., that was approved by voters in 2018 (prior to Armstrong's encounter with the officers) generally decriminalized use and possession of marijuana by adults aged 21 years or older. See MCL 333.27952. Under the MRTMA, adults may possess up to 2.5 ounces of marijuana. See MCL 333.27955(1)(a). But the MRTMA does not allow the use of marijuana in a public area, MCL 333.27954(1)(e), or "smoking marihuana within the passenger area of a vehicle upon a public way[,]" MCL 333.27954(1)(g), or operating a vehicle while under the influence of marijuana, MCL 333.27954(1)(a). Thus, analysis of search-and-seizure law is now much more complicated and nuanced than it was when marijuana was unlawful in all circumstances in Michigan. Arnold, *Criminal Law Issues After Passage of the MRTMA: Uncertainty Remains*, 100 Mich B J 26, 29-30 (June 2021).

Since the passage of the MRTMA, we have not established whether, by itself, the smell of marijuana furnishes probable cause to approach or seize a person without a warrant. Still, recent cases decided before the passage of the MRTMA help to distinguish defendant's case and establish the need for probable cause beyond the smell of marijuana alone. In *People v Moorman*, 331 Mich App 481, 487-488; 952 NW2d 597 (2020), the smell of burned marijuana was not the only factor supporting an officer's probable cause to seize, and later search, the defendant's vehicle without a warrant. In *Moorman*, after the defendant was stopped for a traffic violation, the defendant denied possessing marijuana in response to a question from the officer, but the defendant later admitted that he harvested marijuana earlier that day and that he had a valid registry card under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. See *id*. at 483-484. The *Moorman* Court held that the smell of marijuana *combined with* the defendant lying about his legal possession justified removing the defendant from the vehicle and searching the defendant's vehicle without a warrant. *Id*. at 487-488.

In *Anthony*, 327 Mich App at 43, the smell of marijuana by itself provided probable cause for police officers to approach the defendant's vehicle on a public street. The *Anthony* Court relied on *Kazmierczak* for the proposition that the "odor of contraband, standing alone, can be sufficient to justify a finding of probable cause if smelled by a qualified person." *Anthony*, 327 Mich App at 42. The encounter in *Anthony*, however, took place before the MRTMA was passed. See *id.* at 45 n 11. Therefore, the possession and use of any quantity of marijuana was illegal when the search in *Anthony* occurred. Here, in contrast, possession and use of marijuana had generally been decriminalized long before Corporal Eaton approached defendant and searched the Jeep. See MCL 333.27955(1)(a). Indeed, the *Anthony* Court stated that, although it ultimately did not so hold for the defendant in that case, it had the "authority to consider not adhering to *Kazmierczak*'s holding" if the statute in question, i.e., the MMMA, "changed the law and thereby undermined the basis for *Kazmierczak*." *Anthony*, 327 Mich App at 44. As the *Anthony* Court noted, we are bound to follow Michigan Supreme Court decisions "except where those decisions have clearly been overruled or superseded." *Id.* (quotation marks and citation omitted). And as the *Anthony* Court reasoned, the context for the word "superseded" includes "legislative actions that change the state of the law." *Id.*

Passage of the MRTMA decriminalized possession and use of marijuana in Michigan. We conclude that this action changed the law concerning possession and use of marijuana, superseding otherwise-binding decisions that the smell of marijuana, without more, provides probable cause to search for marijuana. Therefore, in light of the MRTMA, we conclude that *Kazmierczak* no longer governs our analysis of whether the smell of marijuana, standing alone, constitutes probable cause to search for that substance. See *id.* at 45-46 n 11. As a result, we must chart our own path across the new legal landscape created by the MRTMA.

The advent of marijuana decriminalization has spawned conflicting approaches to analysis of the smell of marijuana in the calculus of probable cause. The emerging majority approach holds that, after decriminalization of marijuana, the smell of marijuana, standing alone, does not establish probable cause for a search of a vehicle or a command to the occupants to get out the vehicle. See, e.g., *Commonwealth v Cruz*, 459 Mass 459, 472; 945 NE2d 899 (2011); *People v Johnson*, 50 Cal App 5th 620, 629; 264 Cal Rptr 3d 103 (2020). The minority view states "that a law enforcement officer has probable cause to search a vehicle where the law enforcement officer detects an odor of marijuana emanating from the vehicle [if] marijuana in any amount remains contraband[.]" See *Robinson v State*, 451 Md 94, 99; 152 A3d 661 (2017). But the most persuasive approach comes from the courts that have staked out the middle ground by concluding that "the smell of marijuana may be a factor, but not a stand-alone one, in determining whether the totality of the circumstances established probable cause to permit a police officer to conduct a warrantless search of a vehicle" or to seize a driver or passenger found in the vehicle. *Commonwealth v Barr*, 266 A2d 25, 28 (Pa 2021). Under this approach, "the odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination[,]" *People v Zuniga*, 372 P2d 1052, 1054 (Colo 2016), but the smell of marijuana, by itself, does not give rise to probable cause unless it is combined with other factors that bolster the concern about illegal activity that may flow from the smell of marijuana. We adopt this middle-ground approach as the most compatible with Michigan law in the wake of the passage of the MRTMA. See *Moorman*, 331 Mich App at 487-488.

The prosecution has anticipated our middle-ground approach by contending that additional facts coupled with the smell of marijuana constituted probable cause to justify removing defendant

from the Jeep and searching the vehicle without a warrant. Specifically, the prosecution points out that: (1) defendant's hands were shaking when the police spoke with him; (2) he gave inconsistent answers about where he lived; and (3) he leaned down as Corporal Eaton approached the vehicle. But those facts identified as suspicious by the prosecution all surfaced after Armstrong was seized when the parked Jeep was boxed in by the officers on the scene. *Anthony*, 327 Mich App at 40 ("only if officers completely block a person's parked vehicle . . . is the person seized"). Therefore, the trial court correctly found that "Corporal Eaton approached the parked car that Armstrong was in *and she did so solely on the basis that she smelled marijuana emanating from the vehicle*." (Emphasis added.) Accordingly, although we readily acknowledge that the smell of marijuana—like many other factors—can be considered in the calculus of probable cause, *Moorman*, 331 Mich App at 487-488, no other factor may be permissibly considered in this case to decide whether law-enforcement officers had probable cause to seize defendant and search the Jeep. For that reason, we conclude that the trial court properly determined that defendant was unconstitutionally seized, so all of the evidence obtained after that unconstitutional seizure must be suppressed.

B. SEIZURE OF THE GUN

The prosecution insists that even if the seizure of Armstrong was constitutionally suspect, law-enforcement officers permissibly seized the gun in the Jeep under the plain-view exception to the warrant requirement. The prosecution contends that Corporal Eaton saw the gun in plain view when she first approached the vehicle, so the subsequent seizure of Armstrong has no bearing upon the validity of the seizure of the gun. "While many warrantless searches are unreasonable pursuant to the warrant requirement, the United States Supreme Court has articulated several instances in which warrantless searches are reasonable." *Slaughter*, 489 Mich at 311 (citation omitted). One example is the plain-view doctrine, which "allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent." *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996).

In this case, Armstrong was unlawfully seized when law-enforcement officers surrounded the Jeep without probable cause. Thus, any object such as a gun that was not immediately apparent as contraband to the officers before they surrounded the Jeep was not permissibly seized under the plain-view doctrine. In the body camera footage, Corporal Eaton can be heard stating on several occasions after defendant was arrested that, as she approached defendant from the rear of the Jeep, she saw him dip down and drop a gun on the floor of the vehicle. But no gun is visible in the body camera footage. In fact, defendant does not come into view until Corporal Eaton approaches the front passenger door from the rear of the Jeep. In the trial court's view, the quotes from the police reports and the body camera footage suggest that the gun was not discovered until after defendant got out of the Jeep in response to the officers' instructions. The trial court determined as a matter of fact that Corporal Eaton and Officer Genaw did not "discover any contraband prior to a search of [defendant's] person and the vehicle," and that Officer Genaw initially discovered the gun under the passenger seat after defendant was out of the Jeep.

Corporal Eaton's body camera footage does not leave us with a definite and firm conviction that the trial court erred in its factual determination on the timing issue. Despite the prosecution's assertion that Corporal Eaton saw defendant lean down in his seat as Corporal Eaton approached the vehicle, defendant's movements are unclear to us. To be sure, in her report, which the parties

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cited in their briefs on the motion, Officer Genaw stated that as Corporal Eaton "began removing defendant from the vehicle, I observed a black handgun with an extended magazine *under* the front passenger seat." (Emphasis added.) The body camera footage makes it clear that Officer Genaw saw the gun after defendant had been removed from the vehicle: her demeanor changed and she then ordered the driver to put her hands on the steering wheel. In contrast, when Corporal Eaton ordered defendant out of the Jeep, she frisked him in a location where he would have been able to reach the gun. This suggests that she may not have known the gun was there before defendant got out of the Jeep. And as the trial court explained, after Corporal Eaton moved defendant away from the vehicle, she walked back to Officer Genaw, who was still searching the passenger side of the vehicle, and said "let's see it real quick." After she was shown the gun, Corporal Eaton responded by stating, "oh nice." The trial court interpreted these statements to mean that Corporal Eaton only then saw the gun for the first time, and we have no reason to describe that interpretation as clearly erroneous. Moreover, Corporal Eaton did not mention a gun or question defendant about one until after defendant was out of the Jeep and Officer Genaw asked defendant if he had a concealed pistol license. Furthermore, Officer Genaw stated in her police report that she found the " 'handgun with an extended magazine under the front passenger seat.' " In the body camera footage, a gun is not visible on the floor area of the passenger seat when Corporal Eaton walked over to look at the gun after Officer Genaw's search. Therefore, as the fact-finder, the trial court did not clearly err when it found that this was the first time Corporal Eaton saw the gun.

In sum, based on the limited factual record to which the parties stipulated in the trial court, no finding of fact made by the trial court is clearly erroneous. Therefore, we shall uphold the trial court's finding of fact that "the firearm was not visible until Armstrong had already been removed from the vehicle." Because the gun was not in plain view before defendant was unconstitutionally seized, the prosecution has provided no exception to the warrant requirement that justifies seizure of the gun. Accordingly, the trial court properly granted defendant's motion to suppress the gun, thereby making dismissal of the charges against defendant appropriate.

Affirmed.

/s/ Christopher P. Yates
/s/ Elizabeth L. Gleicher
/s/ Deborah A. Servitto

CIRCUIT COURT OPINION

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE MICHIGAN,

Plaintiff,

v

Case No. 21-003294-01-FH
HON. NOAH P. HOOD

JEFFERY ARMSTRONG,

Defendant.
_____/

OPINION

At a session of said Court held in the City of Detroit, County of Wayne,

State of Michigan on: February 8, 2022

PRESENT: HON. NOAH P. HOOD
Circuit Court Judge

I. INTRODUCTION

Presently before the Court is Defendant Jeffery Armstrong's ("Armstrong") motion to suppress, dated August 23, 2021. Armstrong asks this Court to suppress all evidence obtained during and as a result of the search of the vehicle he was in on October 8, 2020, based on the Fourth Amendment of the United States Constitution. On August 27, 2021, the prosecution filed a response in opposition. For the reasons stated below, the Court grants Armstrong's motion to suppress.

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CIRCUIT COURT OPINION

II. BACKGROUND

A. Factual Background

On October 8, 2020, Corporal Eaton and Officers Genaw, Saad, Scott, and Krzyak were driving down Seneca street in the city of Detroit to conduct a home compliance check. (Motion to Suppress, August 23, 2021, p. 1). Corporal Eaton observed a black Jeep Cherokee parked on Seneca street, with a woman in the driver's seat and Armstrong in the front passenger seat. (People's Brief in Support, August 27, 2021, p. 5). According to Corporal Eaton, she smelled the scent of burnt marijuana as she drove past the black Jeep Cherokee. *Id.* She parked her vehicle then walked behind the black Jeep Cherokee, exited, and approached the car. (Motion to Suppress, August 23, 2021, p. 1). The prosecution's brief in support alleges that when Corporal Eaton asked Armstrong about the scent of marijuana, she observed a black handgun lying on the floorboard of the vehicle directly in front of Armstrong. (People's Brief in Support, August 27, 2021, p. 5). Prosecution also makes note that Corporal Eaton noticed Armstrong's hand shaking when he was being questioned. *Id.* With the parties' consent to rely on the body camera footage as evidence of the initial interaction between Corporal Eaton, the driver of the vehicle, and Armstrong, the dialogue is detailed below:

Ofc. Eaton:	How -- how long you been smoking weed in the car? I can smell it from outside. Don't act shocked. I can smell it.
Armstrong:	I just.. she just pulled up on me.
Ofc. Eaton:	(To driver:) Ok. How much weed you been smoking in the car?
Driver:	Yeah, I'm not smoking. There's no weed in the car.
Ofc. Eaton:	There might not be any now, but you were-- you were, right?
Driver:	No. Not--

CIRCUIT COURT OPINION

Ofc. Eaton:	I can smell it. I mean it's ok, you're not doing it now.. but I can smell it. Do you know who uh Tony Williams is?
Driver:	No, I just pulled up--
Ofc. Eaton:	Where do you guys.. I mean which house?
Armstrong:	Right there third one.
Officer Eaton:	The--?
Armstrong:	Third.
Ofc. Eaton:	Oh the third one, I thought you said the gray one. Do you have ID sir? Could you step out for me?

(Ex. 1, Body Camera Video, 00:01:06.)

Immediately after Corporal Eaton asked Armstrong to step out of the vehicle, she searched his person and put him in handcuffs. (*Id.* at 00:01:47). During the search of Armstrong's person, Corporal Eaton's body camera fell off and obstructed the view until it was retrieved by one of the officers on the scene. (*Id.* at– 00:02:02). Ofc. Genaw stated in her report that "as [Officer Eaton] began removing him from the vehicle, I observed a black handgun with an extended magazine under the front passenger seat." (Motion to Suppress, August 23, 2021, p. 2). Ofc. Genaw began to search the passenger side of the vehicle. (*Id.* at 00:02:07). When Corporal Eaton walked away with Armstrong in handcuffs, Ofc. Genaw asked from a distance, "do you have a CPL Sir?" (*Id.* at 00:02:27). At this point, Corporal Eaton was on the other side of the vehicle with Armstrong and two other officers. She told the other officers that Armstrong had a gun in the car. (*Id.* at 00:02:40). Corporal Eaton then walked back over to Ofc. Genaw, who was still searching the passenger side of the vehicle, and said, "let's see it real quick," referring to the handgun. (*Id.* at 00:02:49.) When Corporal Eaton saw it, she stated, "oh nice," as if it was her first time seeing the handgun. (*Id.* at 00:02:51.)

CIRCUIT COURT OPINION

B. Procedural Background

On October 10, 2020, Armstrong was charged with carrying a concealed weapon in violation of MCL 750.227, felon in possession of a firearm in violation of MCL 750.224f, and felony firearm in violation of MCL 750.227B-A. On August 23, 2021, Armstrong filed a motion to suppress physical evidence and statements obtained from the vehicle search that took place on October 8, 2020. On August 27, 2021, prosecution filed a response to Armstrong's motion to suppress physical evidence and statements asking the court to deny Armstrong's motion. On November 1, 2021 and December 1, 2021, the Court held oral argument on the motion to suppress via ZOOM video conference. The parties agreed for the Court to rely on its review of the body camera video of the incident, in lieu of holding an evidentiary hearing.

III. LAW AND ANALYSIS

The Court grants the motion to suppress because the initial encounter and subsequent search did not comply with the Fourth Amendment. The Court finds that the warrantless search of the vehicle is not supported by probable cause and does not fall under any of the Fourth Amendment exceptions to the warrant requirement.

A. Fourth Amendment and Exceptions to the Warrant Requirement

The Fourth Amendment provides in pertinent part, "the right of the people to be secure in their persons … against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. The Michigan Constitution provides the same protection as the United States Constitution. *People v Levine*, 461 Mich 172, 178 (1999). "In order to show that a search is in compliance with the Fourth Amendment, the police must show that they had a warrant or that their conduct fell within one of the narrow, specific exceptions to the warrant requirement." *People v Kazmierczak*, 461 Mich 411, 417 (2000). Exceptions to the warrant requirement

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include: (1) searches incident to arrest, (2) automobile searches and seizures, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances." *People v. Davis*, 442 Mich 1, 10 (1993). Relevant to the circumstances here, a warrant is not required to search an automobile when police have probable cause to believe that a vehicle contains contraband. *California v Acevedo*, 500 US 565, 569 (1991).

Here, prosecution argues that the search is covered by probable cause or the plain view exception. The prosecution has argued that the smell of marijuana provides justification for the initial seizure and search of the vehicle. The warrantless search of Armstrong's vehicle, however, does not fall under any of the warrant exceptions and is not covered by probable cause.

B. The Michigan Regulation and Taxation of Marihuana Act Legalized Possession of Marihuana in the State of Michigan.

The Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq.*, legalizes adult use of marijuana under state and local law for individuals 21 years of age and older. *See* MCL 333.27952. Section 333.27955(1) of the MRTMA states, in relevant part:

> Notwithstanding any other law or provision of this act, except as otherwise provided in section 4 of this act, the following acts by a person 21 years of age or older are not unlawful, are not an offense, are not grounds for seizing or forfeiting property, are not grounds for arrest, prosecution, or penalty in any matter, are not grounds for search or inspection, and are not grounds to deny any other right or privilege:
>
> (a) except as permitted by subdivision (b), possessing, using or consuming, internally possessing, purchasing, transporting, or processing 2.5 ounces or less of marihuana, except that not more than 15 grams of marihuana may be in the form of marihuana concentrate;

MCL 333.27955(1)(a). The explicit purpose of the act, by allowing possession and use of marihuana up to 2.5 ounces, "is to prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age or older." MCL 333.27952.

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The act does not authorize operating, navigating, or being in physical control of any motor vehicle under the influence of marijuana, MCL 333.27954(1)(a). It also does not authorize consuming marihuana in a public place, MCL 33.27954(1)(e), or consuming marijuana while in the passenger area of a vehicle upon a public way, MCL 333.27954(1)(g).

This Court is unaware of Michigan cases addressing the impact of the MRTMA on whether the smell of burnt marijuana in a vehicle, absent other indicators of present consumption, still provides probable cause to seize an occupant or search a vehicle.

C. The Officers Did Not Have Probable Cause to Seize Armstrong or Search the Vehicle.

At the threshold, the Court finds that the encounter between Armstrong and the police was not consensual. For Fourth Amendment purposes, a consensual civilian-police encounter occurs when a reasonable person feels free to terminate the encounter. *United States v Drayton*, 536 US 194, 201 (2002). "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification… provided they do not induce cooperation by coercive means." *Id.* Law enforcement officers do not violate the Fourth Amendment prohibition of unreasonable seizures merely by approaching an individual in public places and putting questions to them, if they are willing to listen. *Id.* at 200. Moreover, unless there is coercive behavior, a police officer may initiate a consensual encounter by parking his police vehicle in a manner that allows the defendant to leave. *United States v Gross*, 662 F3d 293, 315 (6th Cir 2011)(Gilman, J., concurring)(an encounter does not become compulsory when an officer flashes his blue police lights or when a person identifies himself as a police officer); *See also United States v Carr*, 674 F3d 570 (6th Cir 2012)("Because the police vehicle allowed Carr to exit the carwash, albeit with "some maneuvering," Carr's car was not blocked for Fourth Amendment purposes").

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However, "once a consensual encounter escalates to the point where the individual is 'seized,' the police officer must have a reasonable suspicion of criminal activity to justify a *Terry* stop, or probable cause to justify an arrest, in order for the seizure to comply with the Fourth Amendment." *United States v Campbell*, 486 F.3d. 949, 954 (6th Cir. 2007). The test for probable cause is whether the facts and circumstances known to the officers would warrant a person of reasonable prudence to believe that evidence of a crime or contraband sought is in a stated place. *People v Martinez*, 187 Mich App 160, 169 (1991). In order to lawfully arrest a person without a warrant, a police officer must have reasonable cause to believe that a felony has been committed and that the particular person committed the felony. *People v Cohen*, 294 Mich App 70, 74 (2011); *See also People v Reese*, 281 Mich App 290, 294-295 (2008)("a police officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant has committed it); *See also People v Champion*, 452 Mich 92, 115 (1996)("probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonable 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). Therefore, if the officers had probable cause before or at the moment the arrest was made to believe that an individual had committed or was committing an offense, the arrest would be lawful. *United States v Caicedo*, 85 F3d 1184, 1192 (6th Cir. 2004).

Here, the encounter between Corporal Eaton and Armstrong was not a consensual civilian-police encounter, and Corporal Eaton and Ofc. Genaw did not have probable cause to remove Armstrong from the Jeep Cherokee or to conduct a search of his person or the vehicle.

Although an officer does not need any level of justification to approach an individual's parked vehicle on a public street and is free to observe whatever could be discerned from the

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outside, the individual must feel free to leave or otherwise terminate the encounter. *People v Barbee*, 325 Mich App 1, 10 (2018). Here, Armstrong was not free to leave or terminate the encounter. The vehicle that Armstrong was in was surrounded on all sides and front and back by Corporal Eaton and Officers Genaw, Saad, Scott, and Krzyak. (Ex. 1, Body Camera Video, 00:0:51 – 00:1:02). The driver and Armstrong could not have driven forward or in reverse to leave the scene, otherwise they would have hit one of the five surrounding officers. *See id.*

Given that the encounter was not consensual, Corporal Eaton and Ofc. Genaw would have needed probable cause to believe that the vehicle contained contraband *before* ordering Armstrong out of the car, before arresting him and searching his person, and before searching the vehicle he was in. *People v Clark*, 220 Mich App 240, 242 (1986); *See also People v Freeman*, 413 Mich 492, 496 (1982)(the search was unlawful because the officers seized the defendant in an investigative stop *before* having reasonable suspicion that criminal activity was afoot).

Corporal Eaton did not have probable cause to believe that the vehicle contained more than 2.5 ounces of marijuana, which would be over the amount that an individual is allowed to possess under MCL 333.27955(a), or specific evidence of a crime, such that the driver or Armstrong possessed an illegal substance, were under the influence, or were smoking marijuana in the vehicle. When Corporal Eaton walked up to the car, she did not see Armstrong toss out marijuana from the vehicle nor did she see any smoke emanating from either the driver or passenger side of the vehicle. There were no signs that the driver and Armstrong were smoking marijuana in the vehicle or possessing more than the allowed amount of marijuana in the vehicle, per MCL 333.27955(a). The body camera footage corroborates these facts indicating that Corporal Eaton did not discover any contraband when she was questioning Armstrong prior to requesting he get out of the car and arresting him. Simply put, the odor of marijuana alone did

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not constitute a specific fact suggesting criminality, and therefore, Corporal Eaton did not have probable cause to request that Armstrong get out of the vehicle, arrest and search his person, and conduct a warrantless search of the vehicle.

States are split on the issue of whether the odor of marijuana establishes probable cause for law enforcement officers to conduct a warrantless search of a vehicle. Courts in states where marijuana is now legalized are beginning to address the issue; some indicating that odor of marijuana will continue to provide officers with probable cause to conduct a warrantless search of a vehicle. Courts in other states say that odor emanating from a vehicle is no longer a basis for allowing warrantless vehicle searches.

Michigan courts have not yet determined whether the odor of marijuana suffices as probable cause to a warrantless search of a vehicle. In February of 2020, the Michigan Court of Appeals addressed the odor of raw marijuana in the context of vehicle searches, but the case was very specific to the manipulated facts and did not establish a clear cut rule. In *People v Moorman*, Michigan State Police Trooper Alan Park ("Trooper Park") stopped Defendant's vehicle for speeding. 331 Mich App 481, 483 (2020). Trooper Park testified that when he made his way to the vehicle, he smelled a strong odor of raw marijuana emanating from the vehicle. *Id* at 483. Defendant denied having any marijuana in the car, but when he was questioned further, he stated that he had harvested marijuana earlier that day and claimed to have a medical marijuana card. *Id.* Trooper Park testified that "a search of the vehicle was performed to verify that defendant was within the regulated amount of 2.5 ounces of marijuana. When asked what justification he had for the search, he responded 'just the odor of marijuana.'" *Id* at 484. The search of the vehicle turned up pills for which Defendant did not have a prescription for, carrying a concealed weapon, and obtaining a pistol without a license. *Id.*

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The court in *Moorman* argued that although Defendant was a verified marijuana caregiver, if his "possession was lawful, it is reasonable to believe that he would simply admit to marijuana being in the vehicle and produce his registry card to establish its lawfulness." *Id.* at 488. Instead Defendant's initial deception about the presence of marijuana in the vehicle "gave rise to probable cause to believe that the amount possessed was greater than that permitted under the Michigan Medical Marihuana Act" ("MMMA"). *Id.* at 488-89. The court concluded that the Defendant denying possession of marijuana in his vehicle, and his behavior during the denial being inconsistent with lawful possession of marijuana, combined with the officer smelling the odor of fresh marijuana, gave the officer probable cause to support the warrantless search of Defendant's vehicle. *Id.*

Moorman focuses on the MMMA and is very fact specific in that the odor of marijuana was not the court's only justification in allowing the search of the vehicle. Additionally, the Michigan Court of Appeals in *Moorman* did not solely rely on the odor of marijuana as justification for the warrantless search of Defendant's vehicle. It held that there was probable cause because the odor of marijuana emanating from the vehicle, combined with Defendant lying when the officer asked him questions, gave the officer reason to believe that Defendant possessed more marijuana in the car than he was allowed under the MMMA. *Moorman*, 331 Mich App at 483-84. Unlike *Moorman*, where there was a traffic violation as a basis for the stop, here, Corporal Eaton approached the parked car that Armstrong was in and she did so solely on the basis that she smelled marijuana emanating from the vehicle.

In *People v Anthony*, the Michigan court of Appeals held that officers had probable cause to conduct a warrantless search of defendant's vehicle. 327 Mich App 24 (2019). There, Detroit police officers were driving down a public street, where they noticed Defendant's vehicle

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parked. *Id.* at 30. As the police car approached Defendant's vehicle, one of the officers smelled a strong odor of burned marijuana. *Id.* On that basis, the officer determined that he had probable cause to investigate possible offenses involving marijuana. *Id.* Both officers walked up to the car, asked Defendant to step out, handcuffed him, and put him in the backseat of the police car. *Id.* The officers searched the vehicle thereafter, and found residue of smoked marijuana in a cup holder inside the truck as well as a pistol. *Id.*

The Michigan Court of Appeals in *Anthony* argued that the officers' decision to drive down the street where Defendant's vehicle was parked did not implicate the Fourth Amendment because the officers did not need justification to approach the individual on a public street. *Id.* at 33. The court also decided that no seizure occurred when the officers' vehicle arrived and parked alongside the Defendant's vehicle because it did not block the vehicle from driving forward or in reverse to leave. *Id.* at 39.

Both *Moorman* and *Anthony* were fact specific, and are distinguished from the instant case. The court in *Moorman* did not rely on the odor of marijuana alone to justify a search under the Fourth Amendment. The court in *Anthony* is also distinguishable in that the offense occurred prior to the passage of the Michigan Regulation and Taxation of Marijuana Act (MRTMA), MCL 333.27951 *et seq.*, where use and possession of any quantity of marijuana was illegal on the date that the search took place.

Some states, where the possession of small quantities of marijuana is decriminalized, say that the odor of burnt marijuana alone does not provide police officers with probable cause to order occupants to exit their vehicles and subsequently conduct a warrantless search of said vehicle. Following the decriminalization of the possession of small amounts of marijuana, without at least some other additional fact to bolster a reasonable suspicion of criminal activity,

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the odor of burnt marijuana alone could not reasonably provide suspicion of criminal activity to justify the search. *See Zullo v Vermont*, 209 Vt. 298, 205 A3d 466, 346-50 (2019)(finding that officer's detection of the faint odor of burnt marijuana following traffic stop is not a determinative factor as to whether probable cause exists to conduct a search); *See also Commonwealth v Overmyer*, 469 Mass 16, 11 NE3d 1054 (2014) (holding that strong or very strong odor of unburnt marijuana emanating from defendant's vehicle, standing alone, did not provide probable cause for police officers to search defendant's automobile; odor of burnt marijuana alone does not constitute probable cause to believe that a vehicle contains a criminal amount of contraband or specific evidence of a crime, such that the automobile exception to the warrant requirement may be invoked); *See also Massachusetts v Craan*, 469 Mass 24, 13 NE3d 569, 578-79 (2014)(any violation of federal law by defendant's possession of one ounce or less of marijuana did not justify warrantless search of defendant's vehicle); *See also Pennsylvania v Barr*, 240 A3d 1263, 2020 PA Super 236 (2020)(the plain odor of marijuana alone, absent any other circumstances, cannot provide individualized suspicion of criminal activity to conduct a warrantless search since Pennsylvanians can lawfully produce that odor under the Medical Marijuana Act; because the police cannot discern lawful from unlawful conduct by the odor of marijuana alone, the police may need to rely on other circumstances to establish probable cause).

Other states, where the possession of small quantities of marijuana is also decriminalized, say that the odor of burnt marijuana does provide police officers with probable cause to conduct a warrantless search of a vehicle. *See Robinson v. Maryland*, 451 Md 94, 152A3d 661 (2017) (despite decriminalization of less than 10 grams of marijuana, marijuana remains contraband and the odor of marijuana emanating from vehicle provides probable cause to search a vehicle); *See also Colorado v Zuniga*, 372 P3d 1052, 2016 Co 52 (2016) (holding that the odor of marijuana in

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defendant's vehicle could contribute, under the totality of circumstances test, to determine that trooper's search of the vehicle was supported by probable cause even though possession of one ounce or less of marijuana was legal under state law).

Here, despite what the prosecution describes as furtive movements, the officers appear to have removed Armstrong from the vehicle and begun their search based on the smell of burnt marijuana. Standing alone, this no longer provides probable cause to search.

D. Corporal Eaton and Officer Genaw Did Not See the Firearm in Plain View.

The search of the vehicle to recover the firearm is not covered under the plain view exception because the firearm was not visible until Armstrong had already been removed from the vehicle. The exception allows a police officer who is lawfully in a position to view a particular area to seize items in plain view if the evidence is "obviously incriminatory." *People v Galloway*, 259 Mich App 634, 639 (2003). For an item to be "obviously incriminatory," its incriminating character must be "immediately apparent." *Horton v California*, 496 US 128, 129, 110 S Ct 2301, 110 LEd2d 112 (1990); *People v Champion*, 452 Mich 92, 101 (1996); *See also United States v Beal*, 810 F2d 574, 577 (6th Cir 1987)(explaining that only the executing officer's observations "*at the time* of discovery of the object" are relevant to determining whether an item's incriminating nature was immediately apparent)(emphasis in original).

In *People v Cohen*, the Michigan Court of appeals held that probable cause supported the officer's decision to arrest defendant in light of the discovery of the digital scale and cocaine residue inside the vehicle. 294 Mich App 70, 72-73 (2011). Defendant rode as a passenger in a vehicle. *Id* at 72. The officer stopped the vehicle because the license plate was registered to a different vehicle. *Id.* When the officer walked up to the vehicle, he observed a clear plastic measuring cup on the center console between the defendant and driver of the vehicle containing

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a digital scale and plastic brown bag. *Id.* Defendant and driver were both arrested for joint constructive possession of the drug paraphernalia. *Id.* Probable cause supported the officer's decision to arrest the passenger in the motor vehicle, in light of the discovery of paraphernalia containing cocaine residue in plain view. The evidence indicated that an offense occurred, which was possession of an illegal substance, and that the defendant committed it, and thus justified the resulting arrest and search. *Id.* at 76.

Here, unlike *Cohen*, Corporal Eaton and Ofc. Genaw did not discover any contraband prior to a search of Armstrong's person and the vehicle. Ofc. Genaw discovered the handgun after Armstrong was already ordered out of the car and arrested, when she searched the vehicle, and under the front passenger seat. During the initial encounter with Armstrong and the driver of the vehicle, Corporal Eaton did not mention nor question Armstrong about a handgun. The body camera fell seconds after Corporal Eaton began searching Armstrong's person and during that 10-second window where there was no footage, neither Corporal Eaton nor Ofc. Genaw verbalized that they discovered a handgun in the vehicle. (*Id.* at– 00:02:02).

After Corporal Eaton removed Armstrong from the vehicle and put him in handcuffs, Ofc. Genaw searched the car. (*Id.* at 00:02:07). It was not until then that she discovered the black handgun. Neither Corporal Eaton nor Ofc. Genaw had mentioned seeing a handgun before Armstrong had been removed from the vehicle. Notably, Ofc. Genaw stated in her report that "as [Officer Eaton] began removing him from the vehicle, I observed a black handgun with an extended magazine under the front passenger seat." (Motion to Suppress, August 23, 2021, p. 2). The body camera footage corroborates Ofc. Genaw's statement that the gun was found under the front passenger seat, and therefore not in plain view before the search took place.

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It is also unclear whether Corporal Eaton saw the handgun herself or found out that it was in the vehicle when Ofc. Genaw asked Armstrong if he had a concealed pistol license. When Corporal Eaton walked away with Armstrong in handcuffs, Ofc. Genaw asked from a distance, "do you have a CPL Sir?" (*Id.* at 00:02:27). At this point, Corporal Eaton was on the other side of the vehicle with Armstrong and two other officers. She then told the other officers that Armstrong had a gun in the car. (*Id.* at 00:02:40). Corporal Eaton walked back over to Ofc. Genaw, who was still searching the passenger side of the vehicle, and said, "let's see it real quick," referring to the pistol. (*Id.* at 00:02:49.) When Corporal Eaton saw it, she stated, "oh nice," as if it was her first time seeing the handgun. (*Id.* at 00:02:51.) Based on these facts, Corporal Eaton did not see the handgun in plain view, but rather, discovered it after Armstrong was already removed from the vehicle and when Ofc. Genaw searched the vehicle.

IV. CONCLUSION

For the reasons stated above, the Court grants Armstrong's motion to dismiss the evidence obtained as a result of an unlawful search and seizure.

Dated: February 8, 2022

Judge Noah P. Hood
Third Judicial Circuit of Michigan
Criminal Division

TRANSCRIPT - SEPT. 3, 2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
File No. 21-003294-01-FH
vs. 19-001360-02-FH & 21-002888-01-FH

Pretrial

JEFFREY ARMSTRONG,

Defendant.
_____/

PROCEEDINGS TAKEN BY WAY OF ZOOM RECORDING in the above-entitled cause, before the HONORABLE NOAH HOOD, Judge of the 3rd Judicial Circuit Court, City of Detroit, at Frank Murphy Hall of Justice, Courtroom 802, Detroit, Michigan, on September 3, 2021.

APPEARANCES:

RHONDA HAIDAR & JESSICA STEPHENS, Assistant Wayne County Prosecutors, appearing on behalf of the People.

ANDREW SULLIVAN & SHARON CLARK-WOODSIDE, Attorneys-at-Law, appearing on behalf of the Defendant.

* * *

Zoom hearing transcribed by:
ANNETTE L. SEGUIN, RPR/CSR-2184
Official Court Reporter

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evidence and statement.

The question that I have for the parties and, Mr. Sullivan, it's largely directed at you, but really I think we need consent from both sides for this. The prosecution has already filed a response in opposition. Normally this sort of motion would require I think an evidentiary hearing unless there is a consensus among the parties that I can rely on, say, just the preliminary exam transcript.

I guess starting with the defense is there a demand for an evidentiary hearing and then the same question for the prosecution.

MR. SULLIVAN: Your Honor, I understand that that is typical, but I do think in this case my argument could rely and does rely entirely on the police record, the police reports and body worn camera, specifically the body worn camera of Officer Eaton and the supplementary police report of Officer Genaw, G-e-n-a-w.

So I understand that scheduling an evidentiary hearing is going to cause quite a delay and I don't think that that's necessary, your Honor. So we would stipulate to entry of the body worn camera and the police reports and ask your Honor to rely on those records in your determination.

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THE COURT: Okay. Just so I'm clear on this before I turn to the prosecution, you would stipulate to the Court relying on the body worn camera, the police reports and the exam transcript or --

MR. SULLIVAN: Yes.

THE COURT: Okay.

MS. HAIDAR: There was no exam in this case.

THE COURT: Oh, all right. Well, we kind of have to have an evidentiary hearing. APA Haidar, what's the -- the burden is with the prosecution. What's the prosecution's position on this?

MS. HAIDAR: I mean, if the Court wishes to hold an evidentiary hearing, but I believe that -- you know, I don't really have a say in that necessarily and I believe the Defendant's right and within the Court's discretion.

I did speak with Mr. Sullivan prior to the hearing and I do stipulate to the admission of the body worn camera footage of Corporal Treva Eaton (ph) and that captures the entirety of the encounter. It's about twenty-four minutes long. I'm not sure if the Court wants to review that in lieu of testimony or would like to hear testimony from -- from Corporal Eaton.

THE COURT: I'll put it like this. Based

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TRANSCRIPT SEPT. 3, 2021

on the filings the parties have submitted it seems that -- it seems like there may be enough there on the body cam for me to rely on that and if there's -- I need to double check the rule here to make sure I'm not messing this up, but if there's consensus from both sides for me just relying on the body cam we can do that, I think.

I want to double check that rule and in the interim, APA Haidar, are you able to send the Court a link to the body cam on this?

MS. HAIDAR: Yes, Judge, the entirety of the body cam is twenty-four minutes and the most likely encounter happens in the first like five minutes. So I can share that with you via evidence.com, if that's okay.

THE COURT: That's perfect. I put my preferred e-mail in the chat box. APA Haidar, you can just send that to the Court. I'll have a chance to review it in camera and, folks, what I'd like to do is review the video, see if there's any lingering questions that I have about this and then we'll set -- we'll continue the pretrial conference to another date.

At that date we'll have argument on the pending motion and to the extent that the case moves forward we'll set additional dates as necessary. Starting with the defense, Mr. Sullivan, any objection to

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TRANSCRIPT SEPT. 24, 2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

File No. 21-003294-01-FH
21-002888-01-FH

vs.

JEFFREY SCOTT ARMSTRONG, Pretrial/Motion

Defendant.
_____/

PROCEEDINGS TAKEN BY WAY OF ZOOM RECORDING in the above-entitled cause, before the HONORABLE NOAH HOOD, Judge of the 3rd Judicial Circuit Court, City of Detroit, at Frank Murphy Hall of Justice, Courtroom 802, Detroit, Michigan, on September 24, 2021.

APPEARANCES:

RHONDA HAIDAR & JESSICA STEPHENS, Assistant Wayne County Prosecutors, appearing on behalf of the People.

ANDREW SULLIVAN, Attorney-at-Law, appearing on behalf of the Defendant.

* * *

Zoom hearing transcribed by:
ANNETTE L. SEGUIN, RPR/CSR-2184
Official Court Reporter

TRANSCRIPT SEPT. 24, 2021

with. I'm not sure that I'm clear on what exactly that means.

Second, is there an explanation as to why the other officers are already there? If that's covered in your motions I apologize for missing it, but it's not clear to me what exactly is going on with the other officers that are already on the scene.

MS. HAIDAR: Yes, Judge, I can clarify for you and that's not -- I don't make any mention of that in my statement of facts. So a home compliance check, it's my understanding that --

THE COURT: Miss Haidar, let me -- sorry to interrupt you. Please let me get all the questions out --

MS. HAIDAR: Oh, I'm sorry.

THE COURT: -- and then I'll turn to Mr. Sullivan.

MS. HAIDAR: Okay.

THE COURT: The questions that I have related to the meat of the motions is for the defense, are you arguing that it's a bad stop even if they did, in fact, smell burnt marijuana? Are you saying that it's still a bad stop even assuming the officers did smell burnt marijuana from this car that's parked on a public road from the passenger side of a car that's parked on a

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public road? It's your argument that it's still a bad stop despite that?

MR. SULLIVAN: Yes, Judge. Oh, I'm sorry.

THE COURT: That's okay. Let me get 'em all out and then we'll go to each side.

MR. SULLIVAN: Okay.

THE COURT: And then for both sides, but really targeted at the prosecution, People versus Anthony found at 327 Mich. App. 24, I think it may have been in the process of being published when the prosecution filed their response.

My read of it is that it deals with the Medical Marijuana Act, not necessarily MCL 333.27954, the adult use act, and I guess is the prosecution arguing that it should be -- that analysis should be expanded to the adult use statute which still doesn't allow use of marijuana on a public road, but my understanding is it's no longer necessarily a criminal infraction and if that's not the case how does that effect the motion?

So to summarize those questions, what is the home compliance check? Why are the other officers there? Substantively is the defense arguing it's a bad stop even assuming that the officers shelled -- or truthfully saying they smelled burnt marijuana and, finally, is Anthony -- does Anthony really apply to this

TRANSCRIPT SEPT 24, 2021

case or does Section 27954 change whether or not they have probable cause?

If adult use is now legal is there still probable cause and how does Anthony fit into that? Counsel, I'm looking and Mr. Armstrong has dropped off the call again. There's a telephone number that's patching in.

MR. SULLIVAN: Yeah, I see him. Mr. Armstrong, can you hear us?

DEFENDANT ARMSTRONG: Yeah.

THE COURT: Oh, okay. All right. My apologies. So let's hear first from the prosecution and then from two defense. The common question for both sides, with these questions does that mean we need to have an evidentiary hearing. So, Miss Haidar, you can go first.

MS. HAIDAR: Do you want me to answer your questions or do you want me to answer if we need an evidentiary hearing?

THE COURT: I guess both.

MS. HAIDAR: Okay. As to the evidentiary hearing I don't think that we need one and then as to the first question for the home compliance check, my understanding of what and what I've seen law enforcement do particularly -- oh, also I'd like to correct the

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TRANSCRIPT FEB. 7, 2022

STATE OF MICHIGAN
THIRD JUDICIAL CIRCUIT COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN File No. 21-003294-01-FH

v

JEFFERY ARMSTRONG,

Defendant.
_____/

PRETRIAL/EVIDENTIARY HEARING
BEFORE THE HONORABLE NOAH P. HOOD
Detroit, Michigan - Monday, February 7, 2022

APPEARANCES:

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01:28 I'll note presently before the Court is Armstrong's Motion to Suppress, which was dated August 23rd. He asked the Court to suppress evidence that was obtained as a result of the search of his vehicle on October 8th, 2020, based on the Fourth Amendment of the United States Constitution and the corresponding provisions of the Michigan Constitution.

On August 27th, the prosecution filed a Response in Opposition. The parties consented to allow the Court to rely on the video of the interaction between Armstrong and Officer Eton -- excuse me -- Cpl. Eton.

The Court reviewed that video *in camera*. And I'll note, for the reasons stated in an Opinion and Order, which will be filed at the conclusion of this hearing, we are granting the Motion to Suppress.

I'll note the Court grants the Motion to Suppress because the initial encounter and subsequent search did not comply with the Fourth Amendment.

The Court finds that the warrantless search of the vehicle was not supported by probable cause, and does not fall under any exception to the Fourth Amendment exception to the warrant requirement.

Specifically, the officers did not have probable cause for the initial seizure or search of the vehicle. In the Opinion on this matter, I explain the facts, as I understand them from reviewing the video, including the

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seizure of the vehicle with officers both in front of the vehicle and on the sides of the vehicle.

For Fourth Amendment purposes, consensual civilian/police encounters occur when a reasonable person feels free to terminate that encounter.

And as I review it, a reasonable person would not have felt free to terminate the encounter that Mr. Armstrong was having with Cpl. Eton and her colleague.

Specifically, there was an officer on each side of the vehicle. There were also officers on the street, including in front of the vehicle, related to some other enforcement check.

Specifically, the initial interaction between Cpl. Eton and Armstrong related to, ostensively, the smell of blunt marijuana in the vehicle.

And the Opinion and Order goes into detail about why that, in and of itself, does not support, as I understand it under the Michigan law as it stands right now, that no longer, in and of itself, supports probable cause to search the vehicle.

That may have been the case two years ago. That may have been the case under the Medical Marijuana Act. But under the current statutory framework, that, in and of itself, is not a sufficient basis to remove Armstrong from the vehicle.

Here, Armstrong was removed from the vehicle prior

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01:31 to any observations of the firearm on the floor of the vehicle.

And I'll note this decision relies on the nuances and the differences between the Medical Marijuana Act and the Michigan Regulation Taxation of Marijuana Act, which as I read it, the smell of burnt marijuana, even if he's sitting in the passenger's seat of the vehicle, there's not smoke or other indication that he is smoking in a vehicle on a street, there's not probable cause that he's violated the Michigan Regulations Taxation of Marijuana Act or any other Michigan law.

The officers in this case were not task force officers, and the evidence in the record does not support that. And so there is not any indication that there's probable cause for any other unlawful conduct.

I'll note that the firearm was not seen in plain view until the initial seizure when he is pulled out of the vehicle.

The Opinion goes into extensive detail about what is occurring at different portions of the video based on the time stamp in the video.

Because the firearm's not in plain view until after the initial seizure, and because the initial seizure was violative of the Fourth Amendment, we are granting the Motion to Suppress.

I will note that this relies heavily on the fact that the Michigan Regulation and Taxation of Marijuana Act legalized possession of marijuana in the state of Michigan -- that's MCL 333.27951 *et seq* -- legalizes adult use of marijuana for individuals 21 years of age and older.

The explicit purpose of the Act, while allowing possession and use of marijuana of up to 2.5 ounces, is to prevent arrest and penalty for personal possession or cultivation of marijuana by adults 21 or older.

Although the Act does not authorize operating, navigating, or being in physical control of a motor vehicle while under the influence of marijuana, and it does not authorize the consumption of marijuana in public places, or while in the passenger area of a vehicle that's on a public street, absent any other indicator of present consumption with just the smell of burnt marijuana coming from the vehicle, that no longer provides probable cause to seize the occupant of the vehicle or to search the vehicle.

Because that's the genesis of the search that leads to the discovery of the firearm in the vehicle, the firearm and the fruits of the search will be suppressed.

The Order and Opinion will be filed later today. APA Haidar, if there is -- I'll note from my viewpoint, this is dispositive. And I understand that as a matter of legal authority, there may be a question as to whether or not this