STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 20, 2011
v	No. 299706 Monroe Circuit Court
EMMETT GOUCH III, Defendant-Appellee.	LC No. 10-038129-FH

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's order granting defendant's motion to suppress evidence and to dismiss the sole charge of possession with intent to deliver more than 50 but less than 450 grams of a controlled substance, oxycodone, MCL 333.7401(2)(a)(iii). We reverse the trial court's ruling and remand for reinstatement of the drug charge.

On February 9, 2009, Deputy Jeffrey Ellington noticed a Pontiac Grand Prix traveling on I-75 that was, according to Ellington, swerving within its lane. Ellington testified at defendant's preliminary examination that the car was not speeding and never went outside the lane markers, but it weaved or swerved almost continuously for three to four minutes and for three miles. A DVD produced from a camera on Ellington's police cruiser captured approximately the last minute of Ellington trailing the vehicle before the stop was made; it does not reveal the prior two or three minutes during which the Grand Prix was alleged to be swerving.[1] The DVD footage shows that the vehicle swerved two, maybe three, times within its lane of traffic. Ellington pulled the vehicle over, suspecting that the driver was intoxicated or otherwise impaired. The driver was Antonio McKelton, and defendant was a passenger. Ellington approached the car on the passenger side and asked for McKelton's license and registration, but he was given only a Michigan identification card and a rental agreement for the car that did not list McKelton or

[1] Ellington testified that the camera captures and retains footage from a minute before he activates his cruiser's overhead red and blue lights until the conclusion of the traffic stop. He stated that the DVD, therefore, did not contain footage of the entire period that he trailed and observed the car.

defendant as the authorized driver.[2] Ellington asked McKelton to exit the car and escorted him behind the car for questioning. As reflected in the DVD, McKelton clearly stated that he did not have a current valid driver's license because it had been suspended for failure to pay parking tickets, which, according to McKelton, is why he only had the identification card.[3] Ellington requested permission to search the vehicle and McKelton consented. When Ellington reapproached the passenger side of the car, he noticed a white pharmacy bag on the ground outside the vehicle which had not been there moments earlier. Deputy Ellington questioned defendant about the bag, but defendant repeatedly insisted that the bag did not belong to him and he denied dumping it out of the car when Ellington was questioning McKelton. In the bag there were several sandwich bags containing greenish-blue pills inside. The laboratory report established that there were 220 pills in the bag, totaling 59.02 grams of oxycodone. Ellington then searched the car and found several cell phones and a torn-off prescription label from Walgreen's for Oxycontin[4] written for a person other than defendant or McKelton. During Ellington's questioning of McKelton and defendant at the scene of the traffic stop, they gave divergent stories of where they were heading and they struggled to explain how they knew each other.

In the trial court, defendant filed a motion to suppress the evidence and to dismiss the charge, claiming that the traffic stop was unconstitutional because Ellington had not actually observed any particular traffic infraction; therefore, any evidence recovered as a result of the stop was inadmissible. The trial court found that Ellington should have concluded the traffic stop and allowed defendant and McKelton to go on their way as soon as Ellington learned that McKelton was not intoxicated or impaired. The trial court, therefore, found that the subsequent

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[2] In the DVD, McKelton is heard telling Deputy Ellington that McKelton's girlfriend rented the vehicle, but McKelton then indicated that his name was also on the rental agreement, which turned out not to be the case.

[3] Ellington then asked McKelton if he had anything other than a temporary paper "license," but this reference, given McKelton's concession that his license was suspended, was clearly regarding McKelton's Michigan identification paperwork. Even at the very beginning of the stop, the DVD reveals that McKelton indicated that he had no license. The DVD also reflects that Ellington was reading information from the piece of paper, checking it against McKelton's answers to questions. Had this been a temporary license and not simply a paper identification card, Ellington would not have been asking questions about why McKelton had no license. And Ellington testified during the preliminary examination that McKelton produced only a Michigan identification card, not a license. Defendant insists that he produced a temporary license to Ellington. Even were that the case, the problematic vehicle rental agreement, the fact that Ellington had yet to explore the possibility of impairment or intoxication, and the DVD's recording of McKelton telling Ellington that he had a traffic warrant, all provided a basis to continue the seizure, regardless of the license issue.

[4] "Oxycontin contains oxycodone, which is listed as a schedule 2 controlled substance pursuant to MCL 333.7214(a)(i)." *People v Waltonen*, 272 Mich App 678, 680 n 1; 728 NW2d 881 (2006).

search and continued seizure of the vehicle and its occupants were impermissible. Accordingly, the court suppressed the evidence recovered from the stop and dismissed the drug charge brought against defendant.

On appeal, the prosecution argues that defendant lacked standing to challenge the search and seizure of the evidence and that the length of time that the vehicle and its occupants were detained was reasonable. As reflected below, there are multiple reasons why the search was constitutionally sound.

We review for clear error a trial court's factual findings at a suppression hearing, but the application of constitutional standards concerning searches and seizures to uncontested facts receives less deference, and the court's ultimate ruling on the motion to suppress is reviewed de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

The Fourth Amendment of the United States Constitution and Article 1, § 11, of the Michigan Constitution guarantee a person's right to be free from unreasonable searches and seizures. *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011). The touchstone of the constitutional analysis regarding searches and seizures is reasonableness. *Williams*, 472 Mich at 314. Searches conducted absent a warrant are per se unreasonable aside from a few well-delineated exceptions. *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967); *People v Reed*, 393 Mich 342, 362; 224 NW2d 867 (1975). These established exceptions to the warrant requirement include automobile searches and searches that are performed pursuant to consent. *Florida v Jimeno*, 500 US 248, 250-251; 111 S Ct 1801; 114 L Ed 2d 297 (1991); *In re Forfeiture of $176,598*, 443 Mich 261, 266; 505 NW2d 201 (1993). "'In order to effectuate a valid traffic stop, a police officer must have an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law.'" *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009) (citation omitted). Here, given the testimony of swerving or weaving of the vehicle for several minutes and miles, along with the DVD that shows some swerving in the final minute before the stop, reasonable suspicion existed that the driver was intoxicated or otherwise impaired; therefore, Deputy Ellington acted within his constitutional authority to make the traffic stop. *Id.* at 437 ("erratic driving, such as swerving within a lane" provides "reasonable suspicion of intoxication justifying an investigatory stop").

Once the valid traffic stop was made by Ellington, it was within the scope of the stop and constitutionally permissible for him to ask for identification and vehicle paperwork. *Williams*, 472 Mich at 316 (Fourth Amendment allows an officer to ask reasonable questions "in addition to asking for the necessary identification and paperwork"). Upon a proper request for license and registration, Ellington was simply given a Michigan identification card and a rental agreement for the car that did not list either McKelton or defendant as the authorized driver. McKelton later informed Deputy Ellington that his license was suspended.[5] "[W]hen a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised." *Id.* at 315. Because no driver's license was produced

[5] As indicated above, we additionally note that, on viewing the DVD, McKelton is heard telling the deputy that he had an outstanding traffic warrant.

and the rental agreement indicated that neither McKelton nor defendant was authorized to operate the vehicle, Ellington was justified in extending the detention. Furthermore, Ellington had yet to explore whether McKelton was intoxicated or impaired, and, after directing McKelton to exit the car, Ellington questioned him about his destination, alcohol use, and other matters that might have affected his driving ability. An officer "may . . . ask questions relating to the reason for the stop, including questions about the driver's destination and travel plans." *Id.* at 316. We note that McKelton gave Ellington a destination that was 20 miles in the opposite direction of where the vehicle was heading. At this point, McKelton gave Ellington consent to search the vehicle, and the consent provided the deputy with the constitutional authority to proceed with the search of the car. *Id.* at 317-318; see also *People v LaBelle*, 478 Mich 891; 732 NW2d 114 (2007) (the defendant passenger's challenge of a vehicle search after a lawful traffic stop failed where "[t]he search of the interior of the vehicle was valid because the driver consented to the search"). Additionally, with respect to the multiple cell phones and the prescription label found in the vehicle, there was no evidence that defendant had a possessory or proprietary interest in any item (box, bag, suitcase, etc.) that may have encased or concealed the phones and label, thereby negating the potential need to obtain defendant's separate consent.[6]

The fact that the focus was on McKelton relative to the possible intoxicated or impaired operation of the vehicle and the lack of adequate paperwork did not mean that defendant's seizure or detention during the stop was unconstitutional. "For the duration of a traffic stop, . . . a police officer effectively seizes 'everyone in the vehicle,' the driver and all passengers." *Arizona v Johnson*, 555 US 323, 327; 129 S Ct 781; 172 L Ed 2d 694 (2009). In a traffic stop setting, a legal investigatory stop occurs "whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation." *Id.* Here, as discussed above, the traffic stop was lawful. "The police need not have, in addition, cause to believe that any

[6] We note that, generally, "consent must come from the person whose property is being searched or from a third party who possesses common authority over the property." *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008). With respect to the vehicle in the case at bar, the evidence reflected that McKelton did not own or otherwise have a valid possessory interest in the vehicle, given the authorization in the vehicle rental agreement that named neither McKelton nor defendant and the lack of any other vehicle paperwork. However, it was reasonable for Deputy Ellington to believe that McKelton, as the driver and supposedly the boyfriend of the authorized rental operator, possessed the authority to give consent, so the consent was legally sound. *Id.*; see also *LaBelle*, 478 Mich 891. Moreover, if McKelton and defendant lacked any authority to be operating and using the rental vehicle, it would deprive them of standing to challenge the search of the vehicle. *United States v Kennedy*, 638 F3d 159, 161 (CA 3, 2011) ("we find that the driver of a rental car whose name is not listed on the rental agreement generally lacks a legitimate expectation of privacy in the car"); *United States v Seeley*, 331 F3d 471, 472 n 1 (CA 5, 2003) (the defendant "lacked standing to challenge the search of the rental car, as he . . . was not the renter or an authorized driver"); *United States v Roper*, 918 F2d 885, 887-888 (CA 10, 1990) (the defendant did not have standing to challenge search of vehicle he was driving because vehicle had been rented by another and the defendant was not listed as an additional driver in rental contract).

occupant of the vehicle is involved in criminal activity." *Id.* Accordingly, it was proper to detain defendant while Ellington dealt with and focused on McKelton, despite the fact that there was no initial indication that defendant was engaged in unlawful conduct. See also *People v Armendarez*, 188 Mich App 61, 70; 468 NW2d 893 (1991) ("Once the police make a valid investigative stop, the insistence by the police that the occupants remove themselves from the vehicle is not a serious intrusion upon the sanctity of the person"). The first discussion that Ellington had with defendant was immediately after Ellington spoke with McKelton and found the bag containing Oxycontin, at which time defendant denied possessing the bag and gave conflicting information about the pair's destination and how they knew each other. These facts permitted the deputy to continue his investigation of defendant; there was never any unreasonable delay in conducting the stop.

Additionally, Deputy Ellington had not even technically commenced searching the vehicle pursuant to the consent when he found the bag of Oxycontin pills on the ground outside of the car. Given the location of the bag, defendant lacked standing to challenge the search and seizure of the bag and pills because there was no legitimate or reasonable expectation of privacy in the place or location searched. *People v Brown*, 279 Mich App 116, 130; 755 NW2d 664 (2008). Defendant denied that he had anything to do with the bag. The bag containing the Oxycontin was effectively abandoned; therefore, it was reasonable for Ellington to seize and then search the bag. *People v Taylor*, 253 Mich App 399, 406; 655 NW2d 291 (2002) (search and seizure of abandoned property is presumptively reasonable as "the owner no longer has an expectation of privacy in the abandoned property").

Finally, given the discovery of 220 pills that equaled 59.02 grams of oxycodone just outside the door of the car, which had not been there moments earlier, along with the conflicting stories and the fact that there was no paperwork indicating that McKelton or defendant had the authority to be operating the vehicle, there was probable cause to search the inside of the car for evidence associated with drug possession or trafficking regardless of the earlier consent. *Arizona v Gant*, 556 US 332; 129 S Ct 1710, 1721; 173 L Ed 2d 485 (2009) (if there is probable cause to believe a vehicle contains evidence of criminal activity, police are authorized to search any area of the car in which the evidence could be found).[7]

We reverse the trial court's ruling suppressing the evidence and remand for reinstatement of the drug charge. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens

[7] Defendant argues that even if the search was permissible under the United States Constitution, the evidence must still be suppressed under the Michigan Constitution. We disagree. "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." *Slaughter*, 489 Mich at 311 (internal quotations omitted), quoting *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991). No compelling reasons exist here to impose a different construction.