

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

File No. 99-1030-AR
HON. PHILIP E. RODGERS, JR.

STEPHEN HAMILL THOMS,

Defendant-Appellee.

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Prosecuting Attorney
Daniel W. Rose (P40459)
Chief Assistant Prosecuting Attorney
Attorneys for Plaintiff-Appellant

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Attorney for Defendant-Appellee

DECISION AND ORDER REGARDING

PLAINTIFF-APPELLEE'S APPLICATION FOR LEAVE TO APPEAL

_____ The Defendant was charged in the 86th District Court, file no. 98-3083-SM, with three misdemeanor offenses - possession of marijuana, open intoxicants, and minor in possession of tobacco. These charges stem from a traffic stop during which the officers observed cigarettes in the Defendant's car and a subsequent search of the car revealed open intoxicants and marijuana.

The Defendant filed a motion to suppress. He challenged the search and seizure alleging that the officers acted unlawfully in violation of the Fourth Amendment. A hearing was held on the motion on October 23, 1998. The trial court noted in its decision that the "stop" of the vehicle, subsequent approach, and temporary detention of the occupants were not in issue. Rather, the issue was "whether a police officer may conduct a search of the passenger compartment of an automobile where the driver is in custody for a violation of the Youth

Tobacco Act, MCL 722.642.” More generally, the concern was whether a police officer may conduct a full-blown search of an automobile each time a driver of a vehicle has been stopped and is in temporary “custody” for a speeding violation or other civil infraction for which the violator could not go to jail even if convicted because the punishment is limited to a fine only.

The trial court issued its written decision on November 25, 1998 finding that the search was not a search incident to arrest and that no other exception to the warrant requirement was seriously being offered to justify the search. Therefore, the trial court granted the motion.

The parties were not immediately notified of the entry of the judgment. The People received a copy of the opinion on December 23, 1998, after the 21-day period for filing an appeal of right had lapsed. The People promptly filed this application for leave to appeal. They contend that the open intoxicants and marijuana were found during a search of the Defendant’s vehicle incident to his lawful misdemeanor arrest for being a minor in possession of tobacco. The People seek to have this Court grant leave to appeal and reverse the trial court’s ruling on Defendant’s motion to suppress. This Court has reviewed the appeal, the parties’ briefs, and the Court file. Leave to appeal is granted.

A court’s ruling on a motion to suppress evidence will not be set aside unless clearly erroneous. A ruling is clearly erroneous when the reviewing court is firmly convinced that a mistake has been made. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983); *People v Faucett*, 442 Mich 153, 171; 499 NW2d 764 (1993); *People v Bloxsom*, 205 Mich App 236, 239-240; 517 NW2d 563 (1994).

The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. A “seizure” which triggers Fourth Amendment protection occurs when, under the circumstances, a reasonable person would have believed that he was not free to leave. *People v Sinistaj*, 184 Mich App 191,195; 457 NW2d 36 (1990), citing *United States v Mendenhall*, 446 US 544; 100 SCt 1870; 64 LEd2d 497 (1980); *People v Shabaz*, 424 Mich 42, 66; 378 NW2d 451 (1985) cert dis 478 US 1017; 106 SCt 3326; 92 LEd2d 733 (1986). A search incident to an arrest is a reasonable search and, therefore, permitted by the Fourth Amendment, even

though the police do not have a search warrant. *Chimel v California*, 395 US 752, 89 SCt 2034, 23 LEd2d 685 (1969); *People v Arterberry*, 431 Mich 381, 384; 429 NW2d 574 (1988); *People v Chapman*, 425 Mich 245, 250; 387 NW2d 835 (1986). Within the warrant exception for searches incident to an arrest, the police may search the arrestee and the area within his immediate control, *Chimel, supra* at 763, 89 SCt at 2040, as well as any containers seized from the arrestee. *United States v Robinson*, 414 US 218, 94 SCt 467, 38 LEd2d 427 (1973). Furthermore, when the police have made a lawful arrest of the occupant of a vehicle, the officers may search the entire passenger compartment of the automobile, as well as any closed containers found during search of that area. *New York v Belton*, 453 US 454, 458-460; 101 SCt 2860; 69 LEd2d 768 (1981).

The exception to the search warrant requirement of the Fourth Amendment for searches conducted incident to a lawful custodial arrest, was addressed by the United States Supreme Court in *United States v Robinson*, 414 US 218, 235; 94 SCt 467; 38 LEd2d 427 (1973). The Court in *Robinson* explained that “[i]t is the fact of the lawful arrest which establishes the authority to search,” and held that “in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.” See also *Gustafson v Florida*, 414 US 260 (1973). In *New York v Belton*, 453 US 454, 460 (1981), the Court expanded upon the *Robinson* rule stating, “[a]ccordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of the arrest, search the passenger compartment of that automobile.”

Therefore, if the officers in the instant case made a lawful custodial arrest, they could lawfully search the Defendant and his automobile incident to that arrest.

The trial court was skeptical of the officers’ authority to conduct an automobile passenger compartment search when the Defendant was under arrest for an offense akin to a civil infraction as it is punishable by a fine only. The difference between a civil infraction and the misdemeanor of being a minor in possession of tobacco is, however, significant. The vast majority of traffic offenses are civil infractions for which an arrest may **not** be made. MCLA 257.6a; MSA Sec. 9.1806(1). A minor in possession of tobacco, however, is a misdemeanor. MCLA 722.642; MSA 25.282. A peace officer, without a warrant, may arrest a person who commits a misdemeanor in the peace officer’s presence. MCLA 764.15(a); MSA 28.874(a).

See also, *People v Dixon*, 45 Mich App 64; 205 NW2d 852 (1973). This applies to minors in possession of tobacco. See, Op. Atty. Gen. 1957-58, No. 2872, p. 274.

In *People v LeBeuf*, 93 Mich App 421; 286 NW2d 888 (1980), the defendant was pulled over for a traffic ordinance violation, a damaged windshield. When the officers approached the vehicle, they observed two half-quart beer cans that were half full. The defendant and his passenger were placed under arrest for transporting open intoxicants in the vehicle. A pat-down search for weapons resulted in the discovery of narcotics. The trial court granted the defendant's motion to suppress. The Court of Appeals reversed, stating the following:

The facts in the instant case disclose a search incident to a full custodial arrest for a traffic offense. The right to search incident to a lawful arrest is within the bounds of the Fourth Amendment. The search conducted in the instant matter was a valid exercise of that right. See *People v Garcia*, 81 Mich App 260, 273-278; 265 NW2d 115 (1978), (J.H.Gillis, Jr., dissenting); *People v Cavitt*, 86 Mich App 59, 62-63; 272 NW2d 196 (1978)(Bashara, Jr., dissenting).

The *LeBeuf* case is dispositive. The undisputed facts in the instant case are that the Defendant was lawfully stopped. The officers approached the vehicle and saw cigarettes on the floor. The Defendant was arrested for the misdemeanor of being a minor in possession of tobacco. Incident to the arrest, the Defendant's vehicle was searched and open intoxicants and marijuana were found. This search was valid as it was incident to the Defendant's lawful arrest. The trial court's ruling was clearly erroneous.

The trial court's decision to grant the Defendant's motion to suppress should be and hereby is REVERSED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____