STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 04, 2024 9:48 AM
v	No. 367703 Kent Circuit Court
BRIAN DEWAYNE MCELROY, Defendant-Appellant.	LC No. 22-004093-FH

Before: BOONSTRA, P.J., and MURRAY and CAMERON, JJ.

PER CURIAM.

Defendant appeals, by leave granted,[1] his conditional-guilty-plea sentences of 1½ to 10 years' imprisonment for carrying a concealed weapon, MCL 750.227, 1½ to 10 years' imprisonment for possessing a firearm as a convicted felon (felon-in-possession), MCL 750.224f, and two years for carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arose after two Grand Rapids police officers observed defendant speeding in a residential area. The officers followed defendant without activating their lights, during which time they observed defendant fail to stop at a stop sign twice, and learned that the car's registration was expired. The officers activated their lights, pulled defendant over, and conducted a traffic stop. During the stop, the officers found what appeared to be drugs. An expanded search yielded drug paraphernalia in the car as well as a firearm under the driver's seat, which defendant confessed belonged to him. Defendant was arrested and charged as noted.

Defendant moved to suppress all evidence from the stop. During the evidentiary hearing, defendant sought to testify on his own behalf. He also wanted to call a witness to testify to

[1] *People v McElroy*, unpublished order of the Court of Appeals, entered November 6, 2023 (Docket No. 367703).

contradict the officers' prior testimonies about the facts of the stop. The trial court denied these requests, reasoning these testimonies were not relevant to the question of whether the officers had reasonable suspicion to conduct the stop. Defendant also asked the trial court to review the dashcam footage from the officers' car, which would purportedly undermine their credibility. The trial court refused to watch the videos, because the videos began only 30 seconds before the officers activated their lights, which occurred after the officers observed defendant speeding. The trial court was not convinced the slight discrepancies in the officers' recitation of the events were sufficient to undermine their credibility. Therefore, it denied defendant's motion, as well as his subsequent motion for reconsideration. Defendant now appeals.

II. STANDARD OF REVIEW

"We review a trial court's evidentiary decisions for an abuse of discretion." *People v Danto*, 294 Mich App 596, 598-599; 822 NW2d 600 (2011). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Id*. at 599. "This Court reviews for clear error findings of fact regarding a motion to suppress evidence." *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001). "Clear error exists when we are left with a definite and firm conviction that a mistake was made." *People v Abbott*, 330 Mich App 648, 654; 950 NW2d 478 (2019). The trial court's ultimate decision on a motion to suppress and the question of whether the Fourth Amendment was violated are reviewed de novo. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009); *Fosnaugh*, 248 Mich App at 450.

III. ANALYSIS

Defendant argues the trial court violated his constitutional right to present a complete defense by refusing to permit him to call witnesses at the evidentiary hearing, and by refusing to watch the requested videos. We disagree.

"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." *Hyde*, 285 Mich App at 436 (quotation marks and citation omitted). "Generally, if evidence is unconstitutionally seized, it must be excluded from trial." *People v Dillon*, 296 Mich App 506, 508; 822 NW2d 611 (2012). Stopping and temporarily detaining a driver is reasonable when an officer witnesses the driver violate the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*. *People v Dunbar*, 499 Mich 60, 66; 879 NW2d 229 (2016). This includes when an officer suspects a driver is speeding, MCL 257.628(9), failing to stop at a stop sign, MCL 257.649(8), or operating a vehicle without valid registration, MCL 257.255(1).

In this case, the officers' testimonies about the events of the traffic stop were, at times, inconsistent. Their recollections of the route they took when following defendant were different, and they both acknowledged that, after stopping defendant, they told him he failed to stop at three stop signs—not two. Further, neither mentioned the expired registration to defendant. But, even so, both officers testified they saw defendant speeding and failing to stop at two stop signs, and that the registration of the car defendant was driving was expired. The trial court heard this testimony, which included the officers' inconsistencies. Thus, the trial court was not required to hear from defendant or his witness about these inconsistencies, because they were readily apparent from the officers' testimonies.

Furthermore, a defendant's right to testify "is not absolute, and a defendant remains subject to the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *People v Thorne*, 322 Mich App 340, 351-352; 912 NW2d 560 (2017). The determination of whether an officer had reasonable suspicion to effectuate a stop "depends on whether the officer's action was justified at the inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *People v Williams*, 472 Mich 308, 314; 696 NW2d 636 (2005) (quotation marks and citation omitted). As the trial court correctly noted, "[r]easonable suspicion arises from the combination of an *officer's* understanding of the facts and his understanding of the relevant law." *Heien v North Carolina*, 574 US 54, 61; 135 S Ct 530; 190 L Ed 2d 475 (2014) (emphasis added). It is the *officer's perception*, not defendant's version of the facts, that contributes to the determination of whether reasonable suspicion existed. *Id*. As the trial court recognized, neither defendant's testimony, nor the testimony of any proposed witness, would be relevant to this determination. MRE 401; MRE 402. Thus, defendant did not have the right to present witnesses in this specific circumstance, and the trial court did not abuse its discretion in precluding him from doing so. *Thorne*, 322 Mich App at 351-352.

Defendant also claims the trial court abused its discretion by refusing to review the video evidence, because it undermined the credibility of the officers, thus calling into question whether they had reasonable suspicion. While we conclude the trial court abused its discretion by refusing to watch the videos, any error was harmless. The videos were relevant insofar as they concerned the officers' credibility, which was directly at issue when considering whether they had reasonable suspicion. MRE 401; MRE 402. The officers testified they saw defendant fail to stop twice, but the dashcam footage shows defendant stopping, albeit very briefly, at one of the stop signs noted by the officers before continuing. This evidence could have been used to undermine the officers' credibility in that they claimed defendant failed to stop.

However, the trial court, in refusing to review the videos, stated that even if it had watched the videos and seen that defendant did not run the stop sign, this would not "negate everything else the officer[s] testified to." After acknowledging defendant's concerns, the trial court still found the officers to be credible, and this Court defers to the trial court's assessment of a witness's credibility. *People v Ryan*, 295 Mich App 388, 396; 819 NW2d 55 (2012). It is undisputed that the videos do not show the time at which the officers claimed to see defendant speeding. While there were some slight discrepancies in the officers' recollections, and an acknowledged error in the police report, there is nothing in the record or the video that would have caused the trial court to find the officers' testimonies unbelievable. Because this testimony sufficiently supported the officers' reasonable suspicion, *Hyde*, 285 Mich App at 436, there is no indication that the trial court's ruling would have changed had it watched the videos.

Affirmed.

/s/ Mark T. Boonstra
/s/ Thomas C. Cameron

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MURRAY, J. (*concurring*).

I concur with my colleagues in rejecting defendant's arguments on the merits. However, there is an additional basis which precludes defendant's appeal: the law of the case doctrine. "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). "Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Id*. "The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Id*. The doctrine applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administration v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

As we noted in dicta in *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 144-145; 946 NW2d 812 (2019), when an application for leave to appeal is denied for lack of merit, it is a ruling on the merits, and thus the law of the case doctrine attaches to that decision:

> In exercising the discretion afforded it when reviewing an application for leave to appeal, *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328; 57 NW2d 901 (1953), the Court has numerous options: it can grant the application and hear the case on the merits, deny the application, enter peremptory relief, or take any other action deemed appropriate. See MCR 7.205(E)(2). If the assigned panel determines that an application (late or otherwise) from a final order should be denied, the panel often—as was done here—indicates that it is for "lack of merit on

the grounds presented." In contrast to interlocutory applications for leave to appeal from nonfinal orders, where the Court generally does not express an opinion on the merits, applications for delayed appeal address whether to allow an appeal (filed after the 21-day period has elapsed) on a merits challenge to a final order. Hence, when we deny an application from a noninterlocutory order for lack of merit in the grounds presented, the order means what it says—it is on the merits of the case. Consistent with this conclusion, this Court has previously applied the law of the case doctrine to orders denying applications for "lack of merit in the grounds presented." See *People v Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1983), *People v Hayden*, 125 Mich App 650, 662-663; 337 NW2d 258 (1983), and *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981).

The first four issues raised in defendants' and Agresti's appeal briefs were raised in defendants' prior application for delayed appeal from the July 17, 2017 judgment. Additionally, appellants have not shown a change in the material facts or an intervening change in the relevant law. Because this Court previously denied defendants' application for delayed appeal "for lack of merit on the grounds presented," even if we had jurisdiction to address the merits challenge to the July 17, 2017 judgment, we would not address the merits of those issues under the law of the case doctrine.

This Court in *Hayden*, 125 Mich App at 662-663, addressed the same situation as presented here, i.e., when the issue raised by a defendant in his appeal of right (a 180-day rule violation) was previously raised in an interlocutory application for leave to appeal, which was denied for lack of merit. A majority[1] of the Court held that law of the case precluded defendant from challenging the prior merit-based decision:

The 180-day-rule argument was previously before this Court in the form of an application for leave to appeal. The application was denied "for lack of merit." *People v Wright* (Docket No. 77-4364, order of February 27, 1978, lv den 402 Mich 950m [1978]).

Generally, a prior ruling concerning the same question of law in the same case is the law of the case and is controlling. *People v Conte*, 104 Mich App 73, 76; 304 NW2d 485 (1981). A legal issue raised in one appeal may not be raised in a subsequent appeal after proceedings held on remand to a lower court. *Conte*, supra, at 76. The instant order, however, was a denial of leave to appeal. Generally, denials of applications for leave to appeal do not import an expression of opinion on the merits of a cause, but rather are acts of judicial discretion. *Malooly v York Heating & Ventilating Corp*, 270 Mich 240, 247; 258 NW 622 (1935); *People v Berry*, 10 Mich App 469, 473-474; 157 NW2d 310 (1968). Thus, denials of

[1] Interestingly, this discussion is in a concurring opinion signed by a majority of the Court, but was contained in a concurrence because those judges also agreed with the lead opinions resolution of the issues. See *Hayden*, 125 Mich App at 662-663.

> applications for leave to appeal have been held not to constitute rulings on the merits of a case. *People v Hines*, 88 Mich App 148, 152; 276 NW2d 550 (1979).
>
> In the instant case, however, this Court did not deny leave without considering the merits of the case. While denials of leave are generally for "failure to persuade the Court of the need for immediate appellate review", the order in the instant case denied leave expressly "for lack of merit". Thus, the Court was expressing a decision on the merits on the 180-day issue when it denied defendants' application for leave to appeal.

For these same reasons, because defendant previously appealed the trial court's denial of his motion to suppress, and this Court denied that application for lack of merit, and because nothing in the law or facts have changed since then, defendant should not be afforded a second bite of the apple.

/s/ Christopher M. Murray