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STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
JUDGES TALBOT, O'CONNELL AND K. F. KELLY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 156376
Court of Appeals No. 327881
Circuit Court No.14-004482-FH

V

LARRY GERALD MEAD,

Defendant-Appellant.

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APPELLEE'S SUPPLEMENTAL BRIEF
ORAL ARGUMENTS REQUESTED

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I

Where defendant (1) consented to be searched, (2) left his backpack in the car knowing that the driver had consented to having the car searched, and (3) did not claim ownership until after it was searched, did the officer reasonably believe that he had permission to search the backpack?

Defendant-Appellant answers:	**Yes**
Plaintiff-Appellee answers:	**No**

II

Where (1) the officer stopped the car for an expired plate and (2) neither person in the car had a valid license, would the drugs in defendant's backpack have been inevitably discovered through an inventory search?

Defendant-Appellant answers:	**No**
Plaintiff-Appellee answers:	**Yes**

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COUNTERSTATEMENT OF FACTS

With a few additions and a quibble, plaintiff accepts defendant's Statement of Facts.

The Court of Appeals' second opinion succinctly states what happened:

> On the night of May 24, 2014, Rachel Taylor was driving a vehicle, and Mead rode in the front passenger seat. [Jackson City Police] Officer Richard Burkart testified that he stopped a vehicle for an expired license plate. Officer Burkart stated that Mead had a backpack on his lap. According to Officer Burkart, Taylor consented to a search of the vehicle, Officer Burkart asked Taylor and Mead to exit the vehicle, and Mead left the backpack "on the front passenger floor board." When Officer Burkart searched the vehicle, he opened the backpack and found methamphetamine. Mead admitted that the backpack belonged to him but moved to suppress the evidence found in the backpack. The trial court denied his motion. (P 2; 320 Mich App 613, 616; 908 NW2d 555 (2017); 12a).

Subsequently, on April 8, 2015, Jackson County Circuit Court Judge Thomas Wilson sentenced defendant as a fourth felony offender, MCL 769.12, to two-10 years.[1]

Defendant incorrectly states in footnote 6 on page 4 that a court reviewing a trial court's pre-trial suppression decision may look at the facts from the subsequent trial in deciding the issue. *People v Miller*, 245 Mich 115, 117; 222 NW 151 (1928), which has never been overruled, says: "Testimony later taken on the trial, amplifying the circumstances of the search, cannot be considered." The case that defendant relies on, *People v Kaufman*, 457 Mich 266; 577 NW2d 466 (1998), does not say otherwise. It says nothing more than a trial court may decide a search-and-seizure issue based exclusively on the preliminary-examination transcript where the parties so stipulate (as happened in the present case). It has nothing to do with what an appellate court may look at when reviewing the trial court's decision. (In fact, *Kaufman*, 457 Mich 273, even cited *Miller* for this point.)

[1] Defendant was paroled three months ago.

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ARGUMENT I

Because defendant (1) consented to be searched, (2) left his backpack in the car knowing that the driver had consented to having the car searched, and (3) did not claim ownership until after it was searched, the officer reasonably believed that he had permission to search the backpack.

Under this case's narrow facts, Officer Burkhart reasonably believed that he had consent to search the backpack. Thus, for two reasons, the Court of Appeals correctly affirmed the search. First, despite what defendant says, the driver had apparent authority to consent to searching the backpack. Hence, as defendant has admitted and as the Court of Appeals ruled, this Court's decision in *People v LaBelle*, 478 Mich 891; 732 NW2d 525 (2007), is indistinguishable. Second, even if this Court concludes that *LaBelle* is wrong and should be overruled, the officer relied in good faith on it. Either way, the evidence is not to be suppressed.[2]

The facts in the present case are so extremely close to what happened in *LaBelle* that, in his Court of Appeal brief (in the original appeal), defendant said: "If one trades the marijuana for methamphetamine, the facts in *LaBelle* are indistinguishable from the facts of the present case." (P 9; 16b). Defendant also, while referring to *LaBelle*, stated at the trial level that "there is a case on point." (September 30, 2014, Motion Hearing Transcript, p 3; 42a).

In the present case, on May 29, 2014, Officer Burkart stopped a car (for an expired plate) a few blocks from the courthouse in Jackson. (Preliminary Examination Transcript [PETr], pp 6-8; 22a-23a). While Taylor drove the car, defendant was the

[2] On the other hand, defendant correctly identifies "de novo" as the proper review standard.

passenger. (PETr, p 8; 23a). At the time, defendant had his arms around a backpack which was on his lap. (PETr, p 8; 23a). Rather quickly, Officer Burkart discovered that neither occupant had a valid license to drive. (PETr, p 8; 23a). He then obtained consent from Taylor to search both herself and the car. (PETr, p 9; 24a). After searching Taylor and finding nothing, Officer Burkart had defendant come out of the car and received from him permission to search him. (PETr, p 9; 24a). Officer Burkart then searched the car, starting with the backpack that defendant had left in the car. (PETr, pp 9-10; 24a). He found both marijuana and methamphetamine. (PETr, pp 9-10, 24a).

In *LaBelle*, the officers stopped the car for not coming to a complete stop at a stop sign. The driver did not have a valid license. The defendant was the car's passenger. She had a backpack with her. The car's driver then consented to have the officer search the car. Before the officer searched the car, the defendant exited it while leaving the backpack in the car. The officers then searched the backpack and found marijuana. The circuit court suppressed the evidence and the Court of Appeals affirmed. This Court, however, summarily reversed finding that the search was legal:

> Authority to search the entire passenger compartment of the vehicle includes any unlocked containers located therein, including the backpack in this case. Moreover, defendant did not assert a possessory or proprietary interest in the backpack before it was searched but, rather, left the backpack in the car she knew was about to be searched. 478 Mich 892.

Therefore, the Court of Appeals correctly affirmed, finding that *LaBelle* is materially indistinguishable:

> We cannot distinguish Mead's case from the Supreme Court's order in *LaBelle*. Mead was a passenger in a motor vehicle driven by Taylor. Officer Burkart stopped the vehicle. Mead has not challenged the validity of the stop.

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> After the stop, Taylor consented to a search of the vehicle. Officer Burkart then searched an unlocked backpack in the vehicle's passenger compartment. Therefore, under *LaBelle*, Mead lacked standing to challenge the search, and Officer Burkart had authority to search the backpack. *LaBelle* is binding on this Court. [Citation omitted.] Because Mead lacks standing to challenge the search, any challenge to the search must fail. (P 2; 320 Mich App 617; 13a).

Defendant's otherwise valid arguments about his having standing to challenge the search to his backpack (even though he was a mere passenger in the car) misses this case's facts—he abandoned the backpack. He (1) consented to being searched himself, (2) left the backpack in the car knowing that the car's owner (and driver) had consented to having it searched, and (3) never did assert any ownership interest in it while it was being searched. Abandonment is stronger in the present case than in *LaBelle*. In *LaBelle*, while knowing that the driver had given consent to search the car, the defendant (passenger) left the car while her backpack was on the floor in front of her. In the present case, on the other hand, while knowing that the driver (car's owner) had given consent to search the car, defendant (passenger) left the backpack in the car after taking it off of his lap.[3]

Therefore, this Court's first two questions can be answered. *Illinois v Rodríguez*, 497 US 177, 181, 183-189; 110 S Ct 2793; 111 L Ed 2d 148 (1990), says that a search is proper even if the consenting person did not have that authority as long as the police reasonably believed that she did.[4] Officer Burkhart could reasonably believe that he had

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[3] As it is, *LaBelle*, of course, is binding precedent under *stare decisis*—binding unless overruled. And this Court's order does not ask the parties to address whether it should be overruled.

[4] Defendant's claim that this Court should reject *Rodríguez*'s apparent-authority analysis misses the anti-exclusionary provision in 1963 Const, art 1, sec 11. As stated in *People v Chapman*, 425 Mich 245, 252; 387 NW2d 835 (1986), "[t]he search and seizure provision of the

consent to search the backpack. The car's driver (and owner) had consented to searching the car (which, as defendant admits, usually extends to the car's containers). Defendant then left the backpack in the car knowing that it was about to be searched. In fact, as he correctly points out, he was quite cooperative during the entire encounter. He did not say a word when the officer searched the backpack. Any reasonable officer under the circumstances would have thought that he had permission to search it.

Second, even if this Court now has second thoughts about *LaBelle* and concludes that the search is improper, nothing is to be suppressed as the officer relied in good faith on this Court's decision. *People v Short*, 289 Mich App 538, 549-551; 797 NW2d 665 (2010), lv den 489 Mich 989; 800 NW2d 69 (2011).[5]

Michigan Constitution . . . affords defendant no greater rights upon which to support the suppression than the Fourth Amendment." In any event, Michigan anticipated *Rodríguez* by four years. *People v Gary*, 150 Mich App 446, 453; 387 NW2d 877 (1986). Thus, by missing *Gary* and ignoring the anti-exclusionary provision, the Court of Appeals incorrectly concluded that Michigan has not adopted *Rodríguez*. (P 4; 320 Mich App 620; 14a).

[5] The Court of Appeals opinion mentions that the 2009 police officers' manual cites to *LaBelle* for what police officers may do when searching a car. (P 4; 320 Mich App 621; 14a).

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ARGUMENT II

Because (1) neither person in the car had a valid license and (2) the car had an expired plate, the drugs in defendant's backpack would have been inevitably discovered through an inventory search.

In the alternative, even assuming a bad search, the evidence is still not to be suppressed as the police would have inevitably discovered the drugs anyway through an inventory search. Not only could neither in the car legally drive the car away (as neither had valid licenses), but no one could legally drive it away anyway (as it had an expired plate). Rather than just keep the car there, the police would have impounded it, allowing them to inventory the car (as its contents). Because the police would have inevitably discovered the drugs anyway, they are not to be suppressed.

As pointed out in Baughman, "Michigan Criminal Law and Procedure, Search and Seizure," 2013 edition, p 604, "the inevitable discovery doctrine, discussed by the U.S. Supreme Court in *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984), has been embraced in Michigan also." Here, the car was stopped on the road (S. Jackson and W. Cortland, downtown Jackson, a few blocks from the courthouse). (PETr, pp 6-7; 22a-23a). Neither occupant had a valid license to drive (meaning neither could lawfully drive the car away). (PETr, p 8; 23a). In addition, the car's plate had expired (meaning that *no one* could lawfully drive the car away). (PETr, pp 7-8; 23a). The police therefore had the right to impound the car. *People v Roberson*, 80 Mich App 241, 243; 263 NW2d 42 (1977). Once they impounded the car, they had the right to inventory it. *People v Boutell*, 80 Mich App 216, 218; 263 NW2d 36 (1977).

Therefore, because the police would have inevitably discovered the drugs through an inventory search, the evidence is not to be suppressed. In *State v Romero*, 130 NM 579; 28 P3d

1120 (2001), cert den 130 NM 558; 28 P3d 1099 (2001), the police concluded that the defendant had assaulted his girlfriend and searched him finding cocaine. The prosecutor then appealed the trial court's suppressing the evidence, claiming nothing but inevitable discovery. The New Mexico Court of Appeals agreed with the prosecutor. Because the police had probable cause to arrest the defendant for domestic assault, if they had done so, they would have had the right to an inventory search which would have inevitably discovered the cocaine. 130 NM 583.

Later, in *Commonwealth v Bailey*, 2009 Pa Super 230; 986 A2d 860 (2009), app den 606 Pa 660; 995 A2d 350 (2010), the Pennsylvania Superior Court approved inevitable discovery in a situation where a car was searched. The police had found the weapons after an invalid consent search. However, because the police had the right to arrest the defendant anyway (with an outstanding valid arrest warrant) and had the right to tow the car away, because, if they had done so, the subsequent inventory search would have inevitably discovered the weapons, the evidence is not to be suppressed. 986 A2d 863.

Likewise, in *Camacho v State*, 119 Nev 395; 75 P3d 370 (2003), the Nevada Supreme Court found that the inevitable-discovery doctrine saved the evidence even though the police had found the drugs by improperly searching the car. Because they would have found it later anyway during an inventory search, the evidence is not to be suppressed. 119 Nev 402-403.

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In rejecting both the inventory-search and inevitable-discovery theories, the Court of Appeals mistakenly failed to put the two together. (Pp 6-7; 320 Mich App 625-626; 16a). Although neither is sufficient by itself, when put together, the two justify the search.[6]

Under any of these theories, the evidence should not be suppressed. First, Officer Burkhart reasonably believed that he had permission to search the backpack. Second, he reasonably relied on this Court's decision that has still not been overruled as of four years later. Third, the drugs would have been inevitably discovered anyway through an inventory search after the car was impounded (as neither person had the right to drive the car from where it was parked on the street in downtown Jackson).

[6] On the other hand, in the alternative, if this Court concludes that the record is insufficient for this justification, then it can remand for an evidentiary hearing as was done in *People v Spencer*, 154 Mich App 6; 397 NW2d 525 (1986), and *State v Rodrigues*, 122 Haw 229, 238; 225 P3d 671 (2010). After all, given that defendant admitted that *LaBelle* is on point (September 30, 2014, Motion Hearing Transcript, p 3; 42a) at the trial level, no one needed to explore this theory at the time. *Spencer*, 154 Mich App 18, said:

> We are cognizant of the fact that in all likelihood there was not an inventory search. However, if the people can establish that the search would have been conducted as a valid inventory search, then there is no reason to suppress the evidence because the stolen parts would inevitably have been discovered and seized.

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RELIEF

ACCORDINGLY, plaintiff asks this Court to affirm.

Dated: June 21, 2018 Respectfully submitted,

/S/ Jerrold Schrotenboer
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The undersigned certifies that this document was served upon:

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By Truefiling. I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: June 21, 2018

/s/ Brooke Slusher
BROOKE SLUSHER
LEGAL SECRETARY

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