STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EVERARD,

Defendant-Appellant.

UNPUBLISHED
November 3, 1998

No. 196341
Oakland Circuit Court
LC No. 93-128541 FH

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant also pleaded guilty to being an habitual offender, second offense. MCL 769.10; MSA 28.1082. He was sentenced to two years' imprisonment for the felony-firearm conviction, to be served consecutively to an enhanced term of two to 22½years' imprisonment for the home invasion and felonious assault convictions. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in denying his motion to suppress several statements he claims the police took in violation of his *Miranda*[1] rights. He claims that he was in custody after police officers had approached him in his driveway with their guns drawn, informed him that he had been reported as a possibly armed suspect involved in a serious offense against his ex-girlfriend, frisked him for weapons, and then locked him in the back of their police car. *Miranda* warnings are required when a person is interrogated by the police while in custody or otherwise deprived of his freedom of action in any significant manner. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). Whether a person was "in custody" at the time of the interrogation depends on the totality of the circumstances, with the key question being whether the defendant reasonably believed that he was not free to leave. *Id.* at 382-383. The ultimate question whether a person was in custody for purposes of *Miranda* warnings is a mixed question of fact and law, which must be answered independently by the reviewing court after de novo review of the record. *Id*. at 382.

The trial court suppression hearing revealed the following circumstances surrounding defendant's incriminating statements. Oxford Township Police Officer Craig Brown testified that, in

response to a police dispatch broadcast, he and his partner reported to defendant's address at approximately 6:15 a.m. The broadcast indicated that defendant was possibly armed with a handgun. The officers watched defendant, returning home, enter his driveway and continue driving to a location behind his home and out of their view. In light of the broadcast information that defendant may be armed, the officers approached defendant in his driveway with their weapons in their hands, but at no time pointed the weapons at defendant. The officers immediately patted down defendant to determine whether he was armed. On verifying that he was unarmed, the officers reholstered their weapons. They explained to defendant that they had received information that he was a suspect in an incident that had taken place in Waterford Township, and that the report indicated defendant might be armed. Officer Brown asked defendant whether he had a gun in his car, and defendant responded negatively. Officer Brown testified that when he then asked defendant whether he could search his car, defendant replied, "Go ahead." Officer Brown further testified that he explained to defendant that he was not under arrest, but that for safety reasons, because of the reported involvement of a gun, he would like defendant to sit in the back of the police car while he searched defendant's car. According to Officer Brown, defendant agreed and voluntarily sat in the back of the police car. Defendant denied giving permission to search his car. Defendant alleged that both officers told him to wait in the back of the police car, and that he felt he had no choice. Officer Brown found a bag outside the vehicle near defendant's back porch that contained a handgun and ammunition, rifle ammunition and a knife. He returned to the police car with the bag, which he sat on the police car's front seat. Officer Brown testified that he did not deliberately show defendant the bag or its contents, but that defendant subsequently made several incriminating statements before he read defendant his *Miranda* rights. Defendant indicated that one of the officers showed him the handgun, and denied ever making some of the incriminating statements regarding which the officer testified.

Our review of the record reveals that the trial court correctly denied defendant's motion to suppress the statements he made to police officers before being informed of his constitutional rights. Officer Brown's testimony established that the officers in all respects acted reasonably in light of the report that defendant was armed, that defendant was not under arrest, that he voluntarily agreed to wait in the back of the police car, and that he spontaneously made incriminating statements. To the extent that defendant's testimony contradicted Officer Brown's, the trial court found the officer's version of the events more credible than defendant's. No indication exists that the trial court clearly erred in choosing to believe the officer's testimony, and we defer to its judgment. MCR 2.613(C). Our review of the totality of the instant circumstances reveals that defendant was not in custody when he made the incriminating statements. *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997) ("custody" means that a person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest).

Next, defendant contends that the trial court erroneously denied his motions to suppress duct tape and plastic restraints found in the back seat of his car, and the bag containing the handgun and ammunition that the police found in bushes outside defendant's home. First, defendant argues that the trial court erred in determining that he consented to the search of his vehicle, and consequently erred in denying his motion to suppress the duct tape and plastic restraints. Defendant claims that he was coerced into giving his consent because the officers asked for his consent only after approaching him with their guns pulled and after informing him that he was a suspect in the crime. The consent exception

to the search warrant requirement permits a search and seizure when the consent is unequivocal and specific, and freely and intelligently given. *People v Malone* 180 Mich App 347, 355; 447 NW2d 157 (1989). The trial court must review the totality of the circumstances to determine the validity of consent to a search. *People v Goforth*, 222 Mich App 306, 309; 564 NW2d 526 (1997). While we review de novo trial court decisions to suppress evidence, we review trial court decisions regarding the validity of consent for clear error. *Id*. at 310.

Our review reveals that defendant freely and unequivocally consented to the officers' search of his car. The trial court did not clearly err in finding that defendant was not coerced into consenting to the search of his vehicle, and therefore, properly admitted the duct tape and flex cuffs as evidence at trial. Although the officers had approached defendant with their weapons in their hands, they reholstered their guns after verifying that defendant was unarmed, and never pointed their weapons at defendant. Furthermore, although the officers failed to inform defendant of his right to deny consent to their proposed search, consent may still be valid absent this appraisal by police. *Malone*, *supra* at 356. The officers did inform defendant that he was not under arrest, did not restrain him in any way, and asked if they could search his vehicle. Because the record contains no indication that the police acted improperly or obtained defendant's consent under duress, we conclude that the trial court did not clearly err in finding that defendant validly consented to the search of his car. See *People v Acoff*, 220 Mich App 396, 400; 559 NW2d 103 (1996); *People v Shaw*, 188 Mich App 520, 524-525; 470 NW2d 90 (1991). Therefore, the court properly admitted the duct tape and plastic restraints.

Defendant also contends that the trial court erred in finding that the seizure of the bag containing his gun, ammunition and knife was justified under the plain view exception to the warrant requirement. The plain view doctrine 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 the item's incriminating nature is immediately apparent. *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996). "Immediately apparent" means that without further search the officers have probable cause to believe the item is seizable. *Id*. at 102.

The trial court correctly determined that the police discovery of defendant's bag was the product of a proper plain view search. First, the police were legitimately on defendant's property when Officer Brown observed the bag in plain view. Officer Brown testified that he observed the bag while standing on defendant's back porch. He explained that he had climbed the back porch, six to ten feet away from defendant's car, to ascertain whether defendant's back door was locked. Although defendant's description of the police search varied widely from Officer Brown's, we again defer to the trial court's credibility determination in favor of Officer Brown. MCR 2.613(C). Given the report that defendant was armed, the fact that the officers observed defendant's brief disappearance behind the house after he pulled into the driveway, the lack of any weapon on defendant's person, and the absence of a weapon inside defendant's car, Officer Brown's presence on the porch, for the safety-related purpose of determining where defendant may have hidden his weapon, was reasonable and permissible. *People v Houze*, 425 Mich 82, 92 n1; 387 NW2d 807 (1986) (opinion by Cavanagh, J.) ("It is not objectionable for an officer to come upon that part of the property which 'has been opened to public and common use,'" quoting 1 LaFave, Search & Seizure, § 2.3, p 318. Courts have upheld police entries onto driveways, carports, front walks and porches as nonintrusive.).[2]

Furthermore, we reject defendant's claim that the incriminating nature of the seized bag was not immediately apparent. Officer Brown received a report that defendant may have been armed with a handgun. After establishing that defendant did not have the handgun and that the handgun was not in defendant's car, Officer Brown spotted the bag in the bushes behind defendant's home. He determined that the bag had been placed there recently because it was not covered in dew like the ground and surrounding property. In light of his failure to discover the gun elsewhere, and the limited amount of time that defendant went unobserved behind the house after he arrived during which to hide the gun, Officer Brown reasoned that the bag likely contained the handgun. We conclude that these facts provided a substantial basis for inferring a fair probability that the handgun would be found in the bag. *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). Thus, the trial court properly received the bag and its contents under the plain view exception.

Next, defendant claims that the trial court erred in refusing to dismiss the charges against him pursuant to the Interstate Agreement on Detainers (IAD), MCL 780.601 *et seq.*; MSA 4.147(1) *et seq*. Article I of the IAD explains that its purpose is to encourage the prompt disposition of outstanding charges against a prisoner incarcerated in another jurisdiction. The relevant IAD provisions are as follows:

> Article III
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> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer … written notice of the place of his imprisonment and his request for a final disposition ….
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> * * *
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> (c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.
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> Article IV
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> (e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment … such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. [MCL 780.601; MSA 4.147(1).]

A detainer is an informal notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction. *People v Wilden (On Rehearing)*, 197 Mich App 533, 537; 496 NW2d 801 (1992).

Defendant claims that the prosecutor did not bring the case to trial within 180 days of filing a detainer with federal prison officials, and that defendant's failure to file a written request for final disposition was excused because the federal officials failed to inform him of the detainer, as required by Article III(c). However, defendant has not established that a detainer was filed against him. No authority supports the contention advanced by defendant that any communication notifying a foreign jurisdiction of charges pending against one of its inmates constitutes a detainer. Although federal prison authorities received in November 1993 a writ for defendant's appearance in Oakland Circuit Court, defendant was never transported to Oakland County; nor under Michigan case law does a writ constitute a detainer. *Wilden, supra*. While the Oakland County prosecutor acknowledged contacting federal prison authorities in November 1993 regarding the writ, this oral communication also falls outside the definition of a detainer. *People v Gallego*, 199 Mich App 566, 574; 502 NW2d 358 (1993). Defendant further contends that an October 1993 detainer must have been filed with federal authorities because a hold on him existed within his federal records, and a letter from his federal probation officer to a federal corrections manager detailed the Oakland County charges pending against him. However, a hold that is not acknowledged by the sender or recipient as a detainer is insufficient to activate the IAD. *Id.*; *People v Shue*, 145 Mich App 64, 71; 377 NW2d 839 (1985). Regarding the letter, because no indication exists within the record that this intrafederal communication was acknowledged by either federal or Oakland County authorities as an invocation of the IAD, this written communication was also insufficient to qualify as a detainer. *Shue*, *supra* at 70-71. The prosecutor lodged a formal, written detainer with federal officials in February 1994, requesting defendant's presence for trial in Oakland County. Because defendant was brought to trial within 180 days of this date, no IAD violation occurred. Thus, we conclude that the trial court properly denied defendant's motion to dismiss pursuant to IAD Article III.

Defendant also argues that Article IV(e) of the IDA requires dismissal of the charges against him because the prosecutor failed to try him after writting him out of federal custody. However, defendant has waived this argument by failing to raise it below. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Furthermore, defendant's argument lacks merit because the writ, issued in November 1993, preceded the February 1994 detainer. *Gallego, supra* (IAD does not apply until a detainer has been filed).

Finally, defendant contends that the trial court erred in admitting the victim's testimony of defendant's uncharged stalking acts, in violation of MRE 404(b). However, by failing to object on this ground in the trial court, defendant has failed to preserve our review of this issue. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Nevertheless, we conclude that the testimony was properly admitted and relevant to rebut defense counsel's prior suggestions that the victim had no reason to fear defendant, *People v Figgures*, 451 Mich 390, 398-399; 547 NW2d 673 (1996), and was sufficiently probative to prevail under the balancing test of MRE 403. *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997).

Affirmed.

/s/ Hilda R. Gage
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

[1] See *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Only Justice Riley joined Justice Cavanagh's opinion concluding that police surveillance through a garage door window did not constitute a search because it was limited and reasonable under the circumstances. *Id*. at 92, 94. However, three other justices concurred in the result reached by Justice Cavanagh. Writing for these three justices, Justice Boyle clarified that in their view, no search had occurred because the defendant had no reasonable expectation of privacy in the common access area from which the police viewed the criminal activity. *Id*. at 84-85 (opinion by Boyle, J.).