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UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan,
Plaintiff-Appellee,
v.
Angel MORENO, Jr., Defendant-Appellant.

Docket No. 294840. | June 10, 2010.

Ottawa Circuit Court; LC No. 09-033445-FH.

Before: OWENS, P.J., and O'CONNELL and TALBOT, JJ.

Opinion

PER CURIAM.

***1** Defendant appeals by leave granted[1] the trial court's order denying defendant's motion to quash and for reconsideration. We affirm.

[1] *People v. Moreno,* unpublished order of the Court of Appeals, entered December 9, 2009 (Docket No. 294840).

Defendant was charged with resisting and obstructing a police officer, MCL 750.81 d(1), and resisting and obstructing a police officer causing injury, MCL 750.81d(2). Defendant contends that police lacked probable cause and that exigent circumstances did not exist to justify a warrantless entry by officers into defendant's home. As such, defendant asserts he had a constitutional right to refuse entry and resist an illegal and forcible entry into his residence. Defendant also argues that due process was violated because no reasonable person would have known he could be charged under MCL 750.81d for defending his home from an aggressive police officer acting without a warrant or pursuant to any recognized exception to the warrant requirement. In addition, defendant asks this Court to declare that a person's right to not retreat and defend his home constitutes a defense to MCL 750.81d.

I. FACTUAL AND PROCEDURAL BACKGROUND

While on patrol, Holland police officer Troy DeWys observed an occupied vehicle parked in the street during the early morning hours of December 30, 2008. When DeWys returned to issue a parking ticket the vehicle was unoccupied. DeWys determined that the car was registered to Shane Adams, who had several outstanding warrants. DeWys then observed a vehicle pulling out of the driveway at 385 West 22nd Street in the immediate vicinity of the parked vehicle. When the driver, Rusty Hoek, saw DeWys' patrol car, he put the car into reverse, turned off the ignition and exited the vehicle. DeWys approached Hoek, who indicated that his girlfriend was inside the house with several minors and they were consuming alcohol. DeWys inquired whether Adams was inside the residence and Hoek indicated that he was unsure. At this time DeWys sought backup before making contact with individuals inside the residence.

Following the arrival of another officer, DeWys and officer Matthew Hamberg approached the home and knocked on the front and back doors. The officers were in full police uniform. DeWys could hear people running inside the residence and voices from an open window. DeWys verbally identified himself as a police officer and indicated that he wanted to ascertain the identity of people within the home. Using his flashlight, Hamberg observed approximately ten to 15 individuals "running around in the basement hiding in different areas" and a number of empty bottles of alcohol.

Approximately 15 minutes later, the homeowner, Mandy McCarry, opened the front door. DeWys told McCarry he had information that minors were in the home consuming alcohol. Although McCarry initially denied the presence of any minors, she subsequently admitted to under age drinking occurring in the residence. DeWys told McCarry that he only wanted to identify the people who were in the residence and was not interested in writing "a bunch of minor in possession tickets." Officer DeWys asked McCarry if she knew the identification of the occupants of the vehicle that was parked in the street because there was a warrant for one of the people who were believed to have arrived in the vehicle. McCarry then asked the officers if they were looking for Shane Adams, but denied his presence. McCarry declined to permit officers into the home without a warrant. At this point, the back door was secured and the house was surrounded following the arrival of three other officers at the scene.

***2** While DeWys was standing at the open door he encountered a strong odor of intoxicants and burnt marijuana. When DeWys informed McCarry that officers were entering to secure the residence while they obtained a search warrant, defendant came to the door and, using vulgar language, refused officers entry into the home. Defendant told the officers to "get off his porch," and demanded that the officers obtain a warrant to enter.

Defendant moved to close the front door. At this point, DeWys and Hamberg were not inside the house, but were positioned on the sill of the front door. The door was almost closed when Hamberg placed his shoulder to the door to prevent it being closed and a struggle ensued between defendant and the officers. During this physical confrontation, Hamberg and defendant were struggling in the doorway and may have crossed the threshold. Ultimately, the officers were able to physically subdue defendant and remove him from the home's doorway and effectuate his arrest. As a result of the struggle, DeWys incurred a tear to his hamstring and bruising to his elbow. Following defendant's arrest and before the search warrant was obtained, officers entered the home to secure the occupants who were patted down for weapons. Following receipt of the search warrant, officers discovered an ounce of marijuana and some pills in the home.

After the preliminary examination, defendant was bound over for trial. Defendant filed a motion to quash based on the illegal entry of officers into the home. The trial court denied defendant's motion, but found that the officers' attempt to enter defendant's home was unlawful. Specifically, the trial court determined that exigent circumstances did not exist based on the mere possibility that evidence might be destroyed. However, the trial court noted that MCL 750.81d no longer requires that the "officers' acts or performance of their duties must be 'lawful.' " In addition, the trial court found that the evidence showed that "defendant forcibly resisted the illegal entry by grabbing Officer Hamberg and wrestling with both officers." Thus, even if Michigan recognized a privilege to resist an illegal entry, such a privilege would not apply in this case, because there was sufficient evidence to demonstrate probable cause that defendant "committed a subsequent crime against the officer."

Defendant sought reconsideration arguing that defendant had the right to act in self-defense because the officers used excessive force. While acknowledging that defendant might be entitled to a jury instruction at trial, the trial court rejected defendant's argument based on the failure to "present [ ] evidence to show that the officers' actions put him in fear of physical violence or that his fear, if any, was reasonable."

II. STANDARD OF REVIEW

As discussed by this Court in *People v. Kim,* 245 Mich.App 609, 613 n. 3; 630 NW2d 627 (2001), citing *People v. Hudson,* 241 Mich.App 268, 276; 615 NW2d 784 (2000):

> ***3** We review for an abuse of discretion a district court's decision to bind over a defendant. "The standard for reviewing a decision for an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." A circuit court's decision with respect to a motion to quash a bindover order is not entitled to deference because this Court applies the same standard of review to this issue as the circuit court. This Court therefore essentially sits in the same position as the circuit court when determining whether the district court abused its discretion. In other words, this Court reviews the circuit court's decision regarding the motion to quash a bindover only to the extent that it is consistent with the district court's exercise of discretion. The circuit court may only affirm a proper exercise of discretion and reverse an abuse of that discretion. Thus, in simple terms, we review the district court's original exercise of discretion.

* * *

> > "We review questions of statutory construction de novo and we review bindover challenges, in general, to determine whether the district court abused its discretion in finding probable cause that the defendant committed the charged offense."

To bind a defendant over, "the magistrate must always find that there is 'evidence regarding each element of the crime charged or evidence from which the elements may be inferred' in order to bind over a defendant." Further,

> [t]o bind a defendant over for trial, the magistrate must be satisfied that there is sufficient evidence that an offense has been committed and that there is

> probable cause to believe that the defendant committed it. The magistrate has the duty to pass judgment on the credibility of witnesses as well as the weight and competency of the evidence, but the magistrate should not engage in fact finding or discharge a defendant when the evidence raises a reasonable doubt regarding the defendant's guilt. The district court's inquiry is not limited to whether the prosecution has presented sufficient evidence on each element of the offense, but extends to whether probable cause exists after an examination of the entire matter based on legally admissible evidence. [Internal citations omitted.]

For the first time on appeal, defendant raises a due process challenge. We review unpreserved constitutional issues for plain error affecting a defendant's substantial rights. *People v. Carines,* 460 Mich. 750, 774; 597 NW2d 130 (1999).

III. MCL 750.81d

This Court has recently discussed the requirements to establish the propriety of a bindover on charges pertaining to MCL 750.81d, which provides, in pertinent part:

> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
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> ***4** (2) An individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties causing a bodily injury requiring medical attention or medical care to that person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.

The term "obstruct" is statutorily defined to encompass "the use or threatened use of physical interference or force or knowing failure to comply with a lawful command." MCL 750.81d(7)(a). In accordance with *People v. Corr,* --- Mich.App ----; --- NW2d ---- (2010), slip op at 2[2]:

> Under MCL 750.81d(1), the elements required to establish criminal liability are: (1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his duties. MCL 750.81d(1); MCL 750.81d(7)(b)(*v*); *People v. Ventura,* 262 Mich.App 370, 373, 374-375; 686 NW2d 748 (2004).
> In *Corr,* the defendant was a passenger in an automobile stopped by police. The defendant disobeyed instructions from the police to return to the vehicle and began physically assaulting the officers. Finding the defendant's behavior "constituted the type of conduct specifically prohibited [by] MCL 750.81d(1)," this Court determined that the statute makes it "illegal to assault, batter, resist, or obstruct an officer even if the officer is taking unlawful action, so long as the actions are done in the performance of the officer's official duties." *Corr,* --- Mich.App ----, slip op at 3, citing *Ventura,* 262 Mich.App at 377.

As in *Corr,* we first evaluate whether defendant's conduct comprised the type of actions precluded by the statute. In this instance, defendant not only attempted to close the door of the home, following the officers' verbal indication they intended to enter the premises to preclude the destruction of evidence pending receipt of a search warrant, but also engaged in a physical altercation with the officers. Defendant does not dispute that he grabbed and pushed Hamberg against the door. Clearly, defendant's physical confrontation and resistance in response to the officers' verbal statements indicating their intent to secure the premises is the type of behavior the statute seeks to prohibit. As noted in *Ventura:*

> Assaulting, resisting, or obstructing an officer while he is performing his duty must be avoided for the safety of all society, regardless of the legality of the arrest. It is the immediate harm that can be attendant to an arrest when a subject engages in assaultive, resistant, or obstructive behavior that the Legislature seeks to eradicate. Solid mechanisms are in place to guarantee the safety of those arrested, and, to correct any injustices that may result from an

[2] We note that an application for leave to appeal was filed with the Michigan Supreme Court on March 15, 2010.

> illegal arrest. The statute at issue, MCL 750.81d, now serves as another mechanism to reduce the likelihood and magnitude of the potential dangers inherent in an arrest situation, thereby dually protecting both the general public and its police officers. [*Ventura,* 262 Mich.App at 377 (internal citations omitted).]

***5** In addition, credible evidence was presented at the preliminary examination to demonstrate that defendant knew or had reason to know that the individuals he assaulted were police officers in the course of performing their duties. MCL 750.81 d(1). As noted in *Corr:*

> The phrase "has reason to know" "requires the fact-finder to engage in an analysis to determine whether the facts and circumstances of the case indicate that when resisting, defendant had 'reasonable cause to believe' the person he was assaulting was performing his or her duties." [*Corr,* --- Mich.App ----, slip op at 3, quoting *People v. Nichols,* 262 Mich.App 408, 414; 686 NW2d 502 (2004).]

It is undisputed that the officers were in uniform and had verbally identified themselves as police officers when knocking on the door of the residence. In addition, the officers advised defendant that they intended to enter the residence to secure the premises pending their obtaining of a search warrant. The fact that defendant refused entry to the officers unless they obtained a search warrant is indicative of defendant's knowledge of their status as police officers and that they were engaged in the performance of their official duties. Therefore, there can be no question that defendant possessed a "reasonable cause to believe" the officers conduct in preparing to enter the premises constituted the performance of their official duties when he attempted to block their entry by closing the door and physically engaged with them in an altercation. *Nichols,* 262 Mich.App at 414. Consequently, the trial court properly bound defendant over for trial on the charges brought pursuant to MCL 750.81d.

Defendant contends that an improper, warrantless entry into his home should provide an exception or serve to negate the applicability of the statute. As recognized in *People v. Snider,* 239 Mich.App 393, 406-407; 608 NW2d 502 (2000):

> Both the United States and the Michigan Constitutions guarantee the right against unreasonable searches and seizures. The lawfulness of a search or seizure depends on its reasonableness. "Generally, a search conducted without a warrant is unreasonable unless there exist both probable cause and a circumstance establishing an exception to the warrant requirement." Probable cause requires a " ' "substantial basis for ... [concluding]" that a search would uncover evidence of wrongdoing.' " For probable cause to exist, there must be " 'a fair probability that contraband or evidence of a crime will be found in a particular place.' " However, a finding of probable cause does *not* require that "it is more likely than not that a search will turn up the type of item suspected." In *People v. Davis,* 442 Mich. 1, 10; 497 NW2d 910 (1993), the Court observed that "exigent circumstances" represents an exception to the warrant requirement. [Internal citations omitted.]

Specifically, addressing the exigent circumstances exception to the warrant requirement our Supreme Court has indicated:

> ***6** Pursuant to the exigent circumstances exception, we hold that the police may enter a dwelling without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. If the police discover evidence of a crime following the entry without a warrant, that evidence may be admissible. [*Id.* at 408 (citation omitted).]

The destruction or removal of evidence has been recognized as meeting the criteria to establish an exigent circumstance. Specifically:

> As pointed out by the Court in *People v. Blasius,* 435 Mich. 573, 583; 459 NW2d 906 (1990), "the risk of destruction or removal of evidence may constitute an exigent circumstance exception to the warrant requirement." The *Blasius* Court, after observing that the "precise contours of the exigent circumstances exception remain hazy," stated that " '[o]ur decisions

> have recognized that a warrantless entry by criminal law enforcement officials may be legal where there is compelling need for official action and no time to secure a warrant,' " where this Court found that there were exigent circumstances justifying the police entry into the defendant's home if the police officers were not in a position to secure the premises and to wait for the issuance of a warrant without putting themselves at risk or running the risk that the crime in progress might continue. [*Snider,* 239 Mich.App at 408-409 (internal citations omitted).]

However, contrary to defendant's position, the legality of the officers' conduct in attempting to enter into the home does not serve to determine the applicability of MCL 750.81d. As previously explained by this Court in *Ventura* when comparing the newly enacted MCL 750.81d with the earlier resisting arrest statute[3]:

[3] MCL 750.479.

> "The goal of judicial interpretation of a statute is to ascertain and give effect to the intent of the Legislature." To accomplish this objective, the court must begin by examining the language of the statute. *Id.* "If the language is clear and unambiguous, 'no further construction is necessary or allowed to expand what the Legislature clearly intended to cover.' " "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." This Court has also stated:
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> > "Courts must read the statutory language being construed in light of the general purpose sought to be accomplished. Where the language is so plain as to leave no room for interpretation, courts should not read into it words that are not there or that cannot fairly be implied."
>
> ***7** Examining the language of the MCL 750.81d, unlike in MCL 750.479, we find no reference to the lawfulness of the arrest or detaining act. The language of MCL 750.81d is abundantly clear and states only that an individual who resists a person the individual knows or has reason to know is performing his duties is guilty of a felony. MCL 750.81d. Because the language of the statute is clear and unambiguous, further construction is neither necessary nor permitted, and we decline to " 'expand what the Legislature clearly intended to cover' " and "read in" a lawfulness requirement.
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> "Courts and legislatures in other jurisdictions have found the right to resist an unlawful arrest to be outmoded in our contemporary society." In *[People v.] Wess* [, 235 Mich.App 241; 597 NW2d 215 (1999)], after finding that a citizen's right to use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest does not extend to third-party intervenors, this Court discussed the status of Michigan's unlawful-arrest theory. The *Wess* Court stated:
>
> > We share the concerns of other jurisdictions that the right to resist an illegal arrest is an outmoded and dangerous doctrine, and we urge our Supreme Court to reconsider this doctrine at the first available opportunity and to bring Michigan in line with the majority view as articulated in *State v. Valentine,* 132 Wash 2d 1; 935 P.2d 1294 (1997). We see no benefit to continuing the right to resist an otherwise peaceful arrest made by a law enforcement officer, merely because the arrestee believes the arrest is illegal. Given modern procedural safeguards for criminal defendants, the "right" only preserves the possibility that harm will come to the arresting officer or the defendant.
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> When the Legislature enacts statutes, it has knowledge of existing laws on the same subject and it is not within our province to disturb our Legislature's obvious affirmative choice to modify the traditional common-law rule that a person may resist an unlawful arrest. When prosecuting a charge drawn upon MCL 750.81d, we adopt the modern rule that a person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal under the circumstances of the occasion. [*Ventura,* 262 Mich.App at 375-377 (internal citations omitted).]

Based on this reasoning, defendant cannot assert self-defense or receive an instruction on this defense at trial.

Finally, defendant asserts for the first time on appeal that his right of due process was violated by a lack of notice, claiming no reasonable person would have been aware or known he or she could be charged under MCL 750.81d for defending his own home against an aggressive police officer acting without either a warrant or under any recognized exception to the warrant requirement. Statutes "may be challenged for vagueness on three grounds: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been

committed; (3) its coverage is overbroad and impinges on First Amendment freedoms." *Nichols,* 262 Mich.App at 410. "A defendant has standing to raise a vagueness challenge to a statute only if the statute is vague as applied to his conduct." *People v. Cavaiani,* 172 Mich.App 706, 714; 432 NW2d 409 (1988).

***8** MCL 750.81d clearly provides that a defendant cannot assault, batter, wound, resist, obstruct, oppose, or endanger a police officer acting in the performance of his duties. Under the circumstances of this case, it is clear that the officers were in the process of performing their official duties and that defendant's attempt to close the door and push the officers out of the doorframe was precisely the type of conduct prohibited by the statute. As such, MCL 750.81d provided sufficient notice of the type of conduct it sought to preclude and cannot be construed as being void for vagueness when applied to defendant's conduct.

Affirmed.