Order

Michigan Supreme Court
Lansing, Michigan

March 5, 2019

158870

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 158870
COA: 341741
Kent CC: 14-003216-FH

MICHAEL CHRISTOPHER FREDERICK,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the October 25, 2018 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

p0225

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 5, 2019

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v MICHAEL CHRISTOPHER FREDERICK, Defendant-Appellee.	UNPUBLISHED October 25, 2018 No. 341741 Kent Circuit Court LC No. 14-003216-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v TODD RANDOLPH VAN DOORNE, Defendant-Appellee.	No. 341742 Kent Circuit Court LC No. 14-003215-FH

AFTER REMAND

Before: BOONSTRA, P.J., and O'CONNELL and TUKEL, JJ.

PER CURIAM.

In this consolidated appeal, the prosecution appeals as of right after remand the trial court's ruling on defendants' motions to suppress evidence and to dismiss the cases against them. This case is unusual, in that appellant in its brief on appeal

> acknowledge[s] that this Court is bound by the doctrine of the law of the case and cannot overturn the decision of the Michigan Supreme Court. . . . As a result, the People expect that this Court will affirm the decision of the trial court, as the People are not arguing that the trial court's finding on the issue of attenuation was an abuse of discretion. The following arguments are offered solely to preserve the issues for further review.

Appellant correctly understands how we are constrained in this circumstance and why we are bound to affirm the decision of the trial court.

The Michigan Supreme Court summarized the facts and procedural history in this case in *People v Frederick*, 500 Mich 228, 231-234; 895 NW2d 541 (2017), as follows:

> During the predawn hours on March 18, 2014, seven officers from the Kent Area Narcotics Enforcement Team (KANET) made unscheduled visits to the defendants' homes. Both defendants were employees of the corrections division of the Kent County Sheriff Department. Their names had come up in a criminal investigation, and KANET decided to perform these early morning visits to the defendants' homes rather than waiting until daytime to speak with the defendants (or seeking search warrants). KANET knocked on defendant Michael Frederick's door around 4:00 a.m. and on defendant Todd Van Doorne's door around 5:30 a.m. Lieutenant Al Roetman, who was present at both searches, testified that everyone appeared to be asleep at both houses.
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> Both defendants and their families were surprised and alarmed by the intrusions. Van Doorne considered arming himself, as did Frederick's wife. Nonetheless, both defendants answered the door after a few minutes of knocking—each thinking that there must have been some sort of emergency.
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> Instead, each defendant found himself confronted with a group of police officers. The officers asked each defendant about marijuana butter that they suspected the defendants possessed. After a conversation with each defendant, during which the defendants were read their *Miranda* rights, both defendants consented to a search of their homes and signed a consent form to that effect. Marijuana butter and other marijuana products were recovered from each house.
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> The defendants were charged with various drug offenses. Both moved to suppress evidence of the marijuana products found in their homes. The trial court denied both motions. The court concluded that KANET had not conducted a search by approaching the home and knocking, and that the subsequent consent search was a valid, voluntary search. The court distinguished *Florida v Jardines*, 569 US 1; 133 S Ct 1409, 185 L Ed 2d 495 (2013), noting that the police here did not use a drug-sniffing dog or otherwise try to search the home without knocking. Rather, because the police approached the home and knocked, the trial court held that these were valid knock and talks.
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> The defendants sought interlocutory leave to appeal, which the Court of Appeals denied. The defendants then sought leave to appeal in this Court. In lieu of granting leave to appeal, we remanded the cases to the Court of Appeals for consideration as on leave granted. *People v Frederick*, 497 Mich 993 (2015); *People v Van Doorne*, 497 Mich 99 (2015). We directed the Court of Appeals to address "whether the 'knock and talk' procedure conducted in [these cases] is consistent with US Const, Am IV, as articulated in *Florida v Jardines* . . . ." *Frederick*, 497 Mich 993; *Van Doorne*, 497 Mich 993.

> On remand, the Court of Appeals issued a split opinion. The majority concluded that the knock and talk procedures at issue were permitted by the Fourth Amendment. *People v Frederick*, 313 Mich App 457, 461; 886 NW2d 1 (2015). The majority emphasized that the officers approached the home, knocked, and waited to be received, and "*Jardines* plainly condones such conduct." *Id*. at 469. Though the police visits here occurred during the early morning hours, the majority concluded that they were nonetheless within the scope of the implied license because homeowners would be unsurprised to find a predawn visitor delivering a newspaper or seeking emergency assistance. *Id*. at 481.
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> Judge SERVITTO dissented. She concluded that the police conduct violated the defendants' Fourth Amendment rights. *Id*. at 496 (SERVITTO, J., dissenting). First, Judge Servitto noted that the *Jardines* majority and dissent had seemed to agree, in dicta, that nighttime visits would be outside the scope of the implied license. *Id*. at 487-488. Further, Judge SERVITTO reasoned that the validity of a knock and talk is premised on "the implied license a homeowner extends to the public-at-large." *Id*. at 496. Because the hours the police arrived at the defendants' homes are not times at which most homeowners expect visitors, she concluded that the visits were outside the scope of a proper knock and talk. *Id*.

The Michigan Supreme Court considered the constitutionality of the two early morning searches of defendants' homes and concluded that the police officers had not conducted permissible "knock and talks" but instead conducted unconstitutional warrantless searches. *Frederick*, 500 Mich at 231. The Court opined that "the defendants' consent to search—even if voluntary—is invalid unless it is sufficiently attenuated from the illegality." The Michigan Supreme Court, therefore, reversed this Court's decision and remanded the cases to the trial court for further proceedings. *Id*. Specifically, the Court directed the trial court to "determine whether the defendants' consent to search was attenuated from the officers' illegal search." *Id*. at 244.

On remand, the parties filed briefs explaining their positions regarding whether defendants' respective consents to the police officers' illegal searches were attenuated under the attenuation doctrine articulated in *Brown v Illinois*, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975), and more recently summarized and explained by the United States Supreme Court in *Utah v Strieff*, ___ US ___; 136 S Ct 2056, 2061-2062; 195 L Ed 2d 400 (2016). The attenuation doctrine provides an exception to the exclusionary rule that requires suppression of evidence obtained by an illegal search and seizure. The exception applies and the evidence may be admitted "when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence." *Id.* at 2061 (quotation marks and citation omitted). The doctrine, therefore, required that the trial court consider three factors: (l) the temporal proximity of the illegal act and the alleged consent, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *Id*. at 2062. The trial court considered each factor and the evidence presented to the trial court and found that all three factors weighed in favor of suppression of the evidence obtained by the illegal searches and seizures in both cases. Consequently, the trial court granted defendants' motions to suppress and dismissed both cases because the prosecution

requested that the cases be dismissed if defendants' motions were granted. The prosecution now appeals.

The prosecution does not contend in this appeal that the trial court erred in any manner. Rather, the prosecution argues that the Michigan Supreme Court wrongly decided *Frederick* and that the United States Supreme Court decisions on which the Michigan Supreme Court based its *Frederick* decision lack validity, requiring the United States Supreme Court to overrule its previous decisions.

The prosecution did not raise these issues before the trial court nor could the trial court take any action on remand that is inconsistent with the judgment of an appellate court. *City of Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). This Court also lacks authority to overrule the Michigan Supreme Court's *Frederick* decision or any other decision of our Supreme Court. "The Court of Appeals is bound to follow decisions by [the Supreme] Court except where those decisions have clearly been overruled or superseded and is not authorized to anticipatorily ignore our decisions where it determines that the foundations of a Supreme Court decision have been undermined." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016) (emphasis omitted). Therefore, while the People may ask the Supreme Court to overrule one of its prior decisions, and can preserve that argument by asking us to do so, we may not reach such a result, as the People forthrightly recognize.

Decisions of the United States Supreme Court that have decided rights under the United States Constitution are controlling, and the Michigan Supreme Court and this Court are bound by the United States Supreme Court's decisions regarding federal constitutional rights. *People v Cross*, 30 Mich App 326, 333-334; 186 NW2d 398 (1971), aff'd 386 Mich 237 (1971). Further, the Michigan Supreme Court has long held that the United States Supreme Court is the sole authoritative interpreter of the United States Constitution and that Michigan courts must give effect to the interpretation adopted by the majority of the United States Supreme Court until it overrules itself. *People v Gonzales*, 356 Mich 247, 262-263; 97 NW2d 16 (1959).

In sum, the prosecution seeks review of the Michigan Supreme Court's *Frederick* decision and the United States Supreme Court's precedent relied upon by the *Frederick* Court. But, as the prosecution acknowledges, we are bound by those decisions and lack the authority to overrule them. Therefore, we cannot grant the relief requested.

Affirmed.

/s/ Mark T. Boonstra
/s/ Peter D. O'Connell
/s/ Jonathan Tukel