

No. 1-09-2443

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SIXTH DIVISION
APRIL 29, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 09 CR 5503
)	
DOMINGO ZABALA,)	Honorable
)	Lawrence E. Flood,
Defendant-Appellee.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justice Cahill concurred in the judgment.
Presiding Justice Garcia specially concurred.

O R D E R

HELD: Where police had probable cause to arrest defendant, the search of the vehicle defendant occupied was a proper search incident to arrest; the trial court's order granting defendant's motion to quash arrest and suppress evidence was reversed.

The State appeals from an order of the circuit court granting defendant's motion to quash the arrest and suppress the

evidence which resulted therefrom. Ill. S. Ct. R. 604(a)(1) (eff. July 1, 2006). The State contends that the trial court erred in granting defendant's motion because police had probable cause to arrest defendant, and the subsequent search of the vehicle he occupied was proper as a search incident to a lawful arrest. Defendant, Domingo Zabala, has not filed a brief in response; however, we may proceed under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). We reverse and remand for further proceedings.

Defendant was charged with possession of a controlled substance with intent to deliver 100 or more grams but less than 400 grams of cocaine. Defendant filed a motion to quash arrest and suppress evidence, alleging that police seized him without reasonable suspicion, probable cause, or any other lawful authority, and then acted in an illegal manner that constituted an unreasonable search and seizure. Defendant and Brian Luce, the arresting officer, testified at the hearing on the motion to suppress.

Defendant testified that on the evening of February 24, 2009, he was inside of a red Dodge pick-up truck with the driver of the vehicle at a gas station located at Interstate 55 and 26th Street in Chicago. Defendant and the driver were parked at the south end of the gas station waiting for a man named Perez to

arrive in order to conduct a drug transaction. While they waited for their contact, they were in communication with him via cell phones, but were not looking for him. Defendant had one-half kilogram of cocaine, divided into two quarter packages, inside of his pants while he waited for Perez.

A black Honda driven by Perez pulled beside the Dodge. Defendant exited the Dodge, walked several paces toward the Honda, closing his jacket when the wind hit him, and entered the Honda. While inside, defendant gave Perez one package of cocaine and kept the other one inside of his pants. Defendant and Perez agreed that Perez would leave with the cocaine and return later in order to pay defendant. Defendant exited the Honda and returned to the Dodge, where he placed the remaining package of cocaine in the compartment between the seats. Defendant stated that he did not clutch anything inside of his jacket while walking back to the Dodge. Perez then drove away in his Honda.

While defendant waited at the gas station for Perez to return with the money, police arrived and told defendant and the driver of the Dodge to exit the vehicle. Defendant denied taking a blue cloth or shirt and throwing it over the drugs in the Dodge. The driver exited first, and defendant was pulled out by police and "dropped" to the ground. In the process of being

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taken out of the Dodge, defendant hit his face on the ground and the cell phone that was in his hand broke.

Officer Brian Luce testified that he was a Chicago police officer who participated in thousands of narcotics investigations during his 10 years in the narcotics unit. On the evening of February 24, 2009, Luce was part of a narcotics investigation which was focused on an individual who was allegedly moving several kilograms of cocaine and distributing that cocaine throughout the Chicagoland area. Luce noted that nobody in either the Honda or the Dodge in question was the target of the of the investigation. Pursuant to that investigation, Luce and Officer Victor Gurrola went to a gas station at 3405 South California Avenue in Chicago. Officer Luce took a surveillance position on the south end of the gas station parking lot, away from Gurrola who was conducting surveillance in a different part of the lot.

Officer Luce observed a black Honda parked about 50 feet behind him with two individuals inside. Both people were looking around the parking lot, and one of them was on a cell phone. Luce relayed his observations to Officer Gurrola, and Gurrola told Luce that there was also a red Dodge pick-up truck in the parking lot with two individuals inside, one of whom was on his cell phone and the other one was "looking around." Luce saw the

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Dodge approximately 100 feet away from him. Luce advised Gurrola that he believed that either the Honda or the Dodge was going to meet up with each other, or the individual who was the main target of the investigation.

Officer Luce then testified that he saw the Honda relocate next to the Dodge. Defendant exited the Dodge, clutched his arm against his side, and entered the Honda. After about two minutes, defendant exited the Honda while clutching his arm against his side, and then re-entered the Dodge. The Honda drove back through the parking lot and parked in the southern part of the lot. Luce stated that his view of the events in question were never obstructed, and the lighting was very good. Luce informed Officer Gurrola that he believed a narcotics transaction occurred between the Honda and the Dodge and that he was going to drive over to where the Honda was located, which was about 100 feet south of where Luce was conducting his surveillance.

Officer Luce drove up to the Honda, exited his vehicle, announced that he was a police officer, and told the occupants of the Honda to get out of the car. The two men in the Honda fled, and Luce saw a clear plastic bag that contained about \$28,000 inside of the Honda. After taking control of the money, Luce drove up to the Dodge, exited his vehicle, announced his office, and pulled a man out of the driver's seat. While Luce was at the

driver's side door pulling out the driver, he saw defendant pushing a blue cloth towards the floor. When Luce realized his handcuffs were in his police vehicle, he went back to his car, got his handcuffs, and as he was walking back to the Dodge, he observed defendant breaking cell phones. Luce put both men into the rear of the Dodge and handcuffed them. After detaining defendant and the driver, Luce retrieved the blue cloth, which turned out to be a shirt, and saw a clear plastic bag containing cocaine inside of it.

Following argument, the trial court granted defendant's motion to quash arrest and suppress evidence. In doing so, the court found that a seizure occurred. It also found that police did not have probable cause to arrest, but did have a reasonable suspicion to justify the investigatory stop of defendant pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Under *Terry*, however, the court stated that there was no exception to the search warrant rule that allowed police to go back to the Dodge during the course of the investigatory stop and search the vehicle. Therefore, the court found that although police could make an investigatory stop of defendant, the search of the Dodge that resulted from that investigation went beyond the scope of what is permissible in a *Terry* stop.

Following the court's ruling, the State filed a motion to reconsider arguing that probable cause existed for defendant's arrest and for the subsequent search of the Dodge. Defendant filed a reply arguing that no probable cause existed because police did not see an exchange from inside the Honda, and no one involved in this case was the target of the investigation. After a hearing on the State's motion to reconsider, the trial court denied the motion, finding that the search of the Dodge went beyond the scope of a *Terry* stop.

On appeal, the State contends that based on the totality of the circumstances, Officer Luce had probable cause to arrest defendant. The State further maintains that because Officer Luce reasonably believed that the vehicle defendant occupied contained contraband, the search of the vehicle was proper as a search incident to a lawful arrest.

Review of a trial court's ruling on a motion to suppress involves mixed questions of law and fact. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). The court's factual findings will be upheld unless against the manifest weight of the evidence, but we review the ultimate determination of whether the evidence should be suppressed *de novo*. *Pitman*, 211 Ill. 2d at 512.

The fourth amendment guarantees a person's right against unreasonable searches and seizures. U.S. Const., amend. IV.

Cases have recognized three types of police-citizen encounters. The two encounters relevant to the case at bar include brief investigative stops, and arrests which require probable cause. *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006).

During a brief investigative stop, an officer may temporarily detain an individual for questioning where the officer reasonably believes the individual has committed, or is about to commit, a crime. *Terry*, 392 U.S. at 21-22; *People v. Jones*, 215 Ill. 2d 261, 270 (2005). To justify a *Terry* stop, officers must point to specific, articulable facts which make the intrusion reasonable when considered with rational inferences. *People v. Shafer*, 372 Ill. App. 3d 1044, 1048 (2007). Although less stringent than probable cause, an officer's hunch or unparticularized suspicion is insufficient. *People v. Lampitok*, 207 Ill. 2d 231, 255 (2003).

Arrests require proof of probable cause. *People v. Robinson*, 368 Ill. App. 3d 963, 970-71 (2006). Probable cause consists of sufficient facts and circumstances within the arresting officer's knowledge which would warrant a reasonable person's belief that the individual who was arrested committed a crime. *Robinson*, 368 Ill. App. 3d at 970-71.

The determination of whether a seizure complies with the fourth amendment depends on the facts and circumstances known to

the officers when the arrest is made. *People v. Krogh*, 123 Ill. App. 3d 220, 223 (1984). "The standard for determining whether probable cause, or reasonable suspicion, exists is not governed by technical legal rules, but rather by commonsense considerations that are factual and practical." *People v. Walton*, 221 Ill. App. 3d 782, 785 (1991). As such, a police officer's practical knowledge, based on prior law-enforcement experience, is relevant in determining whether probable cause exists. *People v. Bradford*, 187 Ill. App. 3d 903, 920 (1989). When officers are acting in concert in investigating a crime, probable cause to arrest, or reasonable suspicion to detain, can be established from all the information collectively received by the officers. *People v. Fox*, 155 Ill. App. 3d 256, 263 (1987).

Here, we find, similarly to the trial court, that a seizure occurred when police detained defendant. However, we find that the trial court failed to give the evidence its proper weight, and erroneously concluded that the case was governed by a *Terry* analysis rather than a probable cause to arrest analysis.

The evidence at the hearing established that Officer Luce had probable cause to arrest defendant. Luce had been assigned to the narcotics unit for about 10 years and conducted thousands of narcotics investigations. Luce suspected a narcotics transaction was about to occur when he and Officer Gurrola

observed four individuals, two inside of a Honda and two inside of a Dodge pick-up truck, looking around a gas station while on cell phones. See *People v. Holman*, 157 Ill. App. 3d 764, 773-74 (1987) (relying heavily on the officer's narcotics experience in finding that he had probable cause to arrest defendant based on what the officer observed). Officer Luce then believed a narcotics transaction occurred after seeing the Honda relocate next to the Dodge, defendant exit the Dodge and enter the Honda, and then defendant exit the Honda two minutes later and re-enter the Dodge. Luce noted that defendant clutched his arm against his side while he walked back and forth between the vehicles. See *Krogh*, 123 Ill. App. 3d at 224 (finding that probable cause existed where defendant's actions were suspicious and the agents were experienced in identifying drug transactions).

After Officer Luce announced his office to the individuals inside of the Honda, the two men inside that car fled on foot, and Luce recovered \$28,000 from inside the Honda. See *People v. Parker*, 354 Ill. App. 3d 40, 45 (2004) (evidence of large amounts of cash is proper circumstantial evidence to infer a narcotics transaction occurred). Luce then drove up to the Dodge, and when he announced he was a police officer, he saw defendant push a blue shirt to the floor as though he was covering something. Luce detained the two individuals inside, including defendant,

searched the Dodge, and found a clear plastic bag containing cocaine. Based on the totality of the circumstances, we find that Luce had probable cause to arrest defendant due to his reasonable belief that defendant had been involved in a drug transaction.

In finding that Luce had probable cause to arrest defendant, we further find the search of the Dodge defendant occupied was proper as a search incident to an arrest because Luce reasonably believed that narcotics were inside the vehicle. *People v. Clark*, 394 Ill. App. 3d 344, 347 (2009) (stating that a warrantless search of a vehicle incident to an arrest may be conducted when it is reasonable to believe the vehicle contains evidence of the offense of arrest); citing Arizona v. Gant, 556 U.S. __, __ 129 S. Ct. 1710, 1723-24 (2009).

For the foregoing reasons, we reverse the judgment of the circuit court and remand for further proceedings.

Reversed; cause remanded.

PRESIDING JUSTICE GARCIA, specially concurring:

I write separately to explain where I believe the circuit court erred.

First, the trial judge never issued findings of fact and conclusions of law as mandated by section 114-12(e) of the Criminal Code of 1961. 725 ILCS 5/114-12(e) (West 2006) (order

granting or denying a motion to suppress "shall state the findings of fact *** upon which the order *** is based"). It makes it difficult to give deference to the trial court's factual findings when no express factual findings were issued in the proceedings below.

Second, the circuit court characterized Officer Luce's decision to approach the Honda as based on nothing more than a "hunch." We are not told by the circuit court, however, how that characterization fits into its Fourth Amendment analysis. I submit that Officer Luce acted on a "hunch" makes no difference because an officer is free to approach a citizen present on the public way. See *People v. Luedemann*, 222 Ill. 2d 530, 549, 857 N.E.2d 187 (2006) ("the law provides that a police officer does not violate the fourth amendment merely by approaching a person in public to ask questions if the person is willing to listen"). However, there is significance to the reaction of those in the Honda to Officer Luce's approach on the issue of probable cause for the arrest of the defendant. Officer Luce approached the Honda shortly after the defendant exited it. When Officer Luce approached, the occupants of the Honda fled. With the car abandoned and its doors wide open, Officer Luce discovered approximately \$28,000 in cash in the Honda. This was not an everyday occurrence. See *People v. Parker*, 354 Ill. App. 3d 40,

45, 820 N.E.2d 1066 (2004) (the presence of a large amount of cash was a proper factor in probable cause finding). That the occupants of the Honda fled after Officer Luce announced his office is also a circumstance suggesting that criminal activity was afoot. See *People v. Clay*, 133 Ill. App. 2d 344, 347, 273 N.E.2d 254 (1971) (flight properly triggers an officer's inquiry).

Third, the trial judge did not expressly resolve the factual disputes between the defense and the State. I note at least four factual disputes between the parties. One, the defendant testified that he was in truck 20 - 30 minutes before the officer approached and ordered him out. The video suggests that approximately 7 minutes elapsed from the time the defendant returned to the truck and Officer Luce approached the truck. Fortunately, the time period makes little difference on the issue before us, except to call into question the credibility of the defendant. Two, the defendant testified that the officer, in taking him out of the truck, forced him to the ground, which caused his face to strike the ground and his cell phone to break. In its decision, the circuit court quoted Officer Luce's testimony that he first pulled the driver out of the truck and then the defendant and took both to the rear of the vehicle. According to Officer Luce's testimony, he never forced the

defendant to the ground. Nor did the trial judge so find. Also, Officer Luce testified that 3 cell phones were recovered, all of which were destroyed. Given the trial judge's decision to quote Officer's Luce's testimony regarding the manner in which the defendant was arrested, I can only deduce he found Officer's Luce more credible than the defendant on this point. Three, the defendant testified he returned to the truck from the Honda with a 1/4 kilo. He testified he placed the 1/4 kilo in the center compartment between the front seats of the truck. In contrast, Officer Luce said he observed the defendant make a motion to cover something with a blue polo shirt as he approached the truck. According to Officer Luce, the 1/4 kilo was discovered under the blue polo, which he also inventoried into evidence. The trial judge did not tell us how he resolved this factual dispute. I deduce he believed Officer Luce rather than the defendant consistent with quoting Officer Luce regarding the manner in which the defendant was removed from the truck. During his cross-examination, the defendant claimed a lack familiarity with the truck: "[The] truck did not belong to me and I did not look around." The defendant also claim he arrived at the gas station with the two packages of cocaine always "in the same spot. *** They were always in the front waistband area [of his pants.]" Yet, the defendant claimed he put the 1/4 kilo in the

center compartment of a truck he did not own. His testimony makes clear that he did not conceal the packages in the center compartment on the way to the meeting gas station. The defendant offered no explanation for placing the remaining package in the center compartment rather than simply covering the cocaine with the blue polo shirt as Officer Luce observed.

To recap, I find the circuit court believed Officer Luce when he testified that he took the defendant out of the truck and placed him at the rear of the vehicle; that he observed the defendant breaking cell phones; that he observed the defendant toss a blue polo shirt, and that the 1/4 kilo was discovered under that blue polo. The circuit court's decision to grant the suppression motion reflects its conclusion that these observations amounted only to a valid *Terry* stop, not to probable cause to arrest the defendant and search the truck. In finding only enough for a *Terry* stop, the circuit court appeared not to consider Officer's Luce's testimony regarding the Honda and its occupants, testimony that was never challenged and unquestionably part of the totality of the circumstances.

Regarding its Fourth Amendment analysis of the arrest of the defendant, the circuit court mistakenly began with Officer Luce's decision to park his undercover vehicle behind the defendant's truck. The parking of the vehicle may constitute a seizure if it

prevented the defendant from otherwise leaving. See *People v. Beverly*, 364 Ill. App. 3d 361, 370, 845 N.E.2d 962 (2006) (seizure occurred when, with his car in reverse and preparing to back out, the squad car blocked the defendant from leaving). No such testimony was elicited from the defendant. That the defendant's truck could not leave made no difference when there was no testimony that it sought to leave.

The dispositive question was whether the removal of the defendant from the truck amounted to a *Terry* stop or one supported by probable cause. If the defendant's seizure was supported by probable cause that a narcotics transaction occurred then the search of the truck was necessarily incident to that lawful arrest. A vehicle may be lawfully searched "incident to a recent occupant's arrest only if *** it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v. Gant*, 556 U.S. ___, ___, 173 L. Ed. 2d 485, 501, 129 S. Ct. 1710, 1723 (2009).

"Whether probable cause is present is governed by common-sense considerations [citations], and the calculation concerns '[t]he probability of criminal activity, rather than proof beyond a reasonable doubt.'" *People v. Montgomery*, 112 Ill. 2d 517, 525, 494 N.E.2d 475 (1986), quoting *People v. Tisler*, 103 Ill. 2d 226, 236, 469 N.E.2d 147 (1984).

Officer Luce made his observations against the backdrop of an ongoing narcotics investigation. Was Officer Luce reasonable in concluding that his observations were consistent with a drug deal rather than an innocent transaction? There is no doubt that the observations were at least sufficient to trigger a *Terry* stop as the circuit court found. But the totality of the circumstances when the Honda events are taken into account established more; I agree with the majority that the totality of the circumstances established probable cause. This is necessarily the case when the circuit court made no factual findings contrary to the clear implication of Officer Luce's testimony, which the circuit court appeared to accept. Compare *People v. Gherna*, 203 Ill. 2d 165, 183, 784 N.E.2d. 799 (2003) (circuit court issued "explicit factual findings" to support the grant of the defendant's motion to suppress).