

2011 IL App (2d) 100961-U
No. 2-10-0961
Order filed September 29, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 10-CF-254
)	
ALEXANDER W. MENDEZ,)	Honorable
)	John T. Phillips,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: The trial court properly granted defendant's motion to suppress evidence obtained during a frisk, as the police officer who conducted the search had no reasonable suspicion that defendant was armed; no such suspicion arose from defendant's having flashed a non-threatening gang sign and later putting his hand in his pocket in January weather.

¶ 1 Defendant, Alexander W. Mendez, was charged with one count of being an armed habitual criminal (720 ILCS 5/24-1.7(a)(1) (West 2008)), one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and four counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (3)(A), (3)(C), (3)(F) (West 2008)). Defendant successfully moved to

suppress the evidence found during a search of his person. The State appeals. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 Defendant's written motion to suppress contended that the officers' initial seizure of him was unjustified because they did not reasonably believe that he committed, or was about to commit, a crime. In addition, defendant argued that the search of his person was unjustified because the officers did not reasonably believe that he was armed and dangerous.

¶ 4 At a hearing on defendant's motion to suppress, Officer Francisco Cancino of the Waukegan police department testified as follows. At approximately 12:45 a.m. on January 23, 2010, he was on general patrol in an unmarked SUV with two other officers. He pulled into the parking lot of Club 18, a bar and liquor store. Although it was dark outside, the parking lot was well lit. While driving through the lot, Cancino observed three Hispanic males and one black male standing a couple of feet away from one of the bar's entrances. The black male appeared to be yelling and was waving his arms and shaking his head. Cancino could not hear anything that was being said, however, as the windows of the SUV were rolled up. Cancino did not observe any physical contact take place between any of the men, nor did he observe any of the Hispanic men make any furtive or suspicious movements.

¶ 5 The three Hispanic men proceeded to a Crown Victoria parked in the lot and got into it. Cancino rolled past the Crown Victoria so that the vehicles were driver's side to driver's side. As he rolled past, Cancino made eye contact with defendant, who was seated in the driver's seat of the Crown Victoria, and defendant flashed a pitchfork. The pitchfork is a hand symbol for the Folk street nation gang. According to Cancino, the pitchfork is flashed to see if the recipient is in alliance with the flasher's gang or a rival gang. The pitchfork symbol itself does not indicate violence, a

threat, or a warning to stay away. Cancino was not familiar with defendant and did not know defendant to be in a gang.

¶ 6 Although not investigating any crime, Cancino pulled past defendant's car by approximately five feet and placed the SUV in park, intending to see what was going on. Cancino got out of the SUV, just as defendant was getting out of his vehicle. Cancino was within 10 feet of defendant. No words were exchanged as the men got out of their vehicles. As defendant got out of his vehicle and began standing up, he placed his hand into the front pocket of his hooded sweatshirt. Concerned that defendant was reaching for a weapon, Cancino drew his gun and ordered defendant to place his hands in the air. Defendant put his hands up and began to shake his head, but did not act nervously. Once Cancino gave defendant the order to put his hands in the air, defendant did not make any more movements toward the front pocket of his sweatshirt. Following Cancino's order, defendant placed his hands on his car, and Cancino performed a pat-down of defendant. In the area of defendant's front sweatshirt pocket, Cancino felt what he believed to be the grip of a handgun. After further securing defendant by pressing him between the car and his body, Cancino had the other officers secure the two other men who were in defendant's vehicle. Once the other men were secured, Cancino retrieved a handgun from the front pocket of defendant's sweatshirt. During this encounter, people were coming and going through the parking lot.

¶ 7 After arguments by the parties, the trial court granted defendant's motion to suppress the seized evidence, concluding that, given the surrounding circumstances, Cancino's belief that defendant was armed and dangerous was not reasonable.

¶ 8 The State filed a motion to reconsider, which the trial court denied for the same reason that it granted defendant's motion to suppress. In addition, the trial court, although not elaborating, stated that it did not find all of Cancino's testimony to be credible.

¶ 9 The State then brought this timely appeal.

¶ 10 ANALYSIS

¶ 11 On appeal, the State argues that the trial court erred in granting defendant's motion to suppress, because Cancino reasonably believed that defendant was armed and dangerous. We disagree.

¶ 12 In reviewing the trial court's ruling on a motion to suppress, we will reverse the trial court's factual findings only if they are against the manifest weight of the evidence; however, we will review *de novo* the ultimate question of whether the evidence should have been suppressed. *People v. Queen*, 369 Ill. App. 3d 211, 214 (2006).

¶ 13 The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Generally, a warrant is necessary to satisfy the reasonableness requirement of the fourth amendment. *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001). In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court recognized an exception to the warrant requirement. Under *Terry*, an officer may, without a warrant, stop a person for temporary questioning if the officer reasonably believes that the person has committed, or is about to commit, a crime. *People v. Flowers*, 179 Ill. 2d 257, 262 (1997). In addition, if the officer reasonably believes that the person stopped is armed and dangerous, the officer may conduct a limited pat-down search to determine whether the person is, in fact, carrying a weapon. *Sorenson*, 196 Ill. 2d at 432; *Flowers*, 179 Ill. 2d at 262.

¶ 14 An objective standard is used in assessing the validity of a frisk under *Terry*. *Flowers*, 179 Ill. 2d at 264. Our Supreme Court has explained:

“The question is whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger. [Citation.] The officer conducting the frisk must be able to point to specific, articulable facts which, when taken together with natural inferences, reasonably warrant the intrusion. [Citations.] These facts need not meet probable cause standards, but must constitute more than a mere hunch. [Citation.] Although the standard is an objective one, the officer’s subjective belief regarding the safety of the situation is one of the factors that may be considered in determining whether a weapons frisk was valid under *Terry*.” *Flowers*, 179 Ill. 2d at 264.

¶ 15 The State argues that the trial court erred in finding that Cancino lacked a reasonable belief that defendant was armed and dangerous. After reviewing the record, we conclude that Cancino did not reasonably believe that defendant was armed and dangerous. Although Cancino initially observed defendant standing with a black male who appeared to be yelling, neither defendant nor his companions were seen doing anything suspicious and no contact was made between any of the men. Defendant was not seen doing anything suspicious until he flashed a gang symbol at Cancino. Cancino, however, testified that the symbol simply questioned whether Cancino was in an aligned or rival gang; the symbol did not represent violence, a threat, or a warning to the recipient. While it is true that defendant placed his hand in the front pocket of his sweatshirt, he could have done so for innocuous reasons such as keeping his hands warm in the cold January weather. See *People v. Davis*, 352 Ill. App. 3d 576, 581-82 (2004) (the defendant’s repeated placing of his hands in his pockets did not justify the frisk of him, even given his nervousness, because he could have been placing them in his pockets for numerous innocuous reasons); *People v. Dotson*, 37 Ill. App. 3d 176, 177 (1976) (the defendant’s placement of his hands in his pockets, shifting of weight on his feet, and backing away from officers did not justify a frisk of the defendant, because the defendant’s actions

“merely suggest[ed] an individual trying to keep warm”); *cf. People v. Smith*, 331 Ill. App. 3d 1049, 1054 (2002) (although the defendant was standing in front of a known drug house, refused to remove his hands from his pockets despite repeated orders to do so, acted nervously when asked to remove his hands from his pockets, and backed away from the officers, these facts were insufficient to give rise to a reasonable belief that the defendant was engaged in criminal activity, because “defendant’s behavior in backing away from the officers and refusing to remove his hands from his pockets *** were consistent with his right, in the context of a consensual police-citizen encounter, to ignore the police requests and go on his way”). Moreover, the record does not indicate that defendant was even aware that Cancino was approaching him, much less intended to harm Cancino, as Cancino testified that he parked his vehicle behind defendant’s, defendant was just getting out of his car and standing up as he moved his hand toward his pocket, and no words were exchanged between Cancino and defendant. There was no evidence that defendant saw Cancino park the SUV and get out or that he even made eye contact with Cancino before reaching for his pocket. In addition, none of the other surrounding circumstances suggest that the officers were in danger: the parking lot was well lit and there were numerous people coming and going through the lot.

¶ 16 We recognize that the frisk of defendant revealed that he was, in fact, in possession of a handgun. That fact, however, was not learned until *after* the frisk was conducted and thus could not have served as a ground for Cancino to have reasonably suspected that defendant was armed and dangerous. See *Florida v. J.L.*, 529 U.S. 266, 271 (2000) (“The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.”).

¶ 17 Because we conclude, based on the circumstances surrounding the frisk of defendant, that the trial court was correct in finding that the frisk was improper, we need not address whether the seizure of defendant was justified.

¶ 18

CONCLUSION

¶ 19 For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

¶ 20 Affirmed.