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No. 1-10-3290

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County, Illinois,
)	County Department,
v.)	Criminal Division.
)	
JOSEPH TIMBERLAKE,)	No. 09 CR 8761
)	
Defendant-Appellant.)	Honorable
)	Rosemary Higgins-Grant
)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice LAVIN and Justice STERBA concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court properly denied the defendant's motion to quash arrest and suppress the evidence. The defendant was not placed under arrest prior to being searched, but was merely subjected to an investigatory stop pursuant to *Terry v. Ohio*, 392 U. S. 1 (1968). The police officer had "reasonable, articulable suspicion" to conduct the investigatory stop as he had sufficient basis to believe that he had just observed the defendant partaking in a narcotics transaction. The officer was also justified in conducting a pat-down search of the defendant where he was concerned for his safety. The contraband retrieved from the defendant during that pat-down search was properly seized as it was in plain view.
- ¶ 2 Following a jury trial in the circuit court of Cook county, the defendant, Joseph

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Timberlake, was found guilty of two counts of possession of a controlled substance with the intent to deliver (720 ILCS 570/401(c)(2) (West 2006)) and was sentenced to six years in prison with the condition that he participate in drug treatment. On appeal, the defendant contends that the circuit court erred in denying his motion to quash arrest and suppress the introduction of the 32 bags of suspected narcotics that were recovered from his person and introduced as principal evidence at his trial. He specifically argues that the police had no probable cause to arrest him at gunpoint, nor "reasonable, articulable suspicion" to approach him and conduct a stop pursuant to *Terry v. Ohio*, 392 U. S. 1 (1968), based solely upon their observation that the defendant had participated in a single exchange of money for an unknown object with another individual. The defendant also contends that the police's search of his shoe during this encounter went beyond the permissible *Terry* frisk (see *Terry*, 392 U. S. 1) Finally, the defendant argues, and the State concedes that his mittimus should be amended to reflect the correct offenses of which he was convicted. For the reasons that follow, we affirm and order the mittimus corrected.

¶ 3

I. BACKGROUND

¶ 4 On April 8, 2009, the defendant was charged with two counts of possession of a controlled substance with the intent to deliver in violation of sections 401(c)(1) and (c)(2) of the Illinois Controlled Substances Act (hereinafter Act) (720 ILCS 570/401(c)(1), (c)(2) (West 2006)). Count I charged the defendant with the unlawful possession with the intent to deliver more than 1 but less than 15 grams of cocaine. 720 ILCS 570/401(c)(2) (West 2006). Count II charged the defendant with the unlawful possession with the intent to deliver more than 1 but less than 15 grams of heroin. 720 ILCS 570/401(c)(1) (West 2006).

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¶ 5 Prior to trial, the defendant filed a motion to quash his arrest and suppress the narcotics evidence recovered during the course of that arrest. A hearing on his motion was held on February 1, 2010. At that hearing, the State first presented the testimony of Chicago Police Officer Abraham Lara. Officer Lara testified that at about 2:30 a.m. on April 8, 2009, together with Officers Sandoval and Nomellini, he was patrolling the 11th District near the 3300 block of West Augusta Avenue, in Chicago. Officer Lara was in plain clothes and driving an unmarked squad car when he observed the defendant driving a gold Dodge Neon with a passenger on Augusta Avenue. Officer Lara testified that he observed the defendant stop his car near 3337 West Augusta Avenue and park behind a red vehicle. Officer Lara was about one car length away from the defendant, when he saw a white female exit the red vehicle and walk over to the defendant, who was still seated in the driver's side of his Dodge Neon. According to Office Lara, the street was well lit with artificial lighting. Officer Lara observed the woman hand "what looked to be *** United States currency" to the defendant, and in exchange the defendant hand her "what [the officer] suspected to be a small object." Officer Lara could neither describe the shape or color or the object, but, testified that he certainly observed a small object. He also explained that he believed that the woman handed the defendant what he "suspected to be United States currency" because it looked like "unfolded paper." He could not, however, identify the denomination of the currency.

¶ 6 Officer Lara testified that he believed that the defendant and the woman were engaging in a narcotics transaction based on his 14 and ½ years' experience as a police officer and hundreds of narcotics investigations. As the officer averred: "it was just my suspicion from my experience

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with narcotics."

¶ 7 Officer Lara testified that after observing the transaction between the woman and the defendant, he approached the driver's side of the defendant's Dodge Neon with his flashlight and announced that he was a police officer. At that point, the woman ran to her vehicle and "took off." Officer Lara acknowledged that the defendant did not attempt to flee. Officer Lara ordered the defendant to show his hands, and then put his "gun in ready position because [the defendant] did not show [him] his hands right away." Officer Lara testified that as he moved closer and stood next to the driver's side door of the Dodge Neon, he saw the defendant stuffing an unknown object on his right side, by his right shoe. Officer Lara explained, "At that point, I didn't know if it was a weapon or something else, and I again order him to show me his hand[s]." The defendant finally showed Officer Lara his hands and since he had no weapon, Officer Lara ordered him to step outside of the vehicle. Once the defendant obliged, Officer Lara performed a protective pat-down search of him. That search included a pat-down of the defendant's shoe area. Officer Lara averred that he did not feel anything that resembled a weapon in that area, but that he did observe a plastic bag (about two to three inches of it) protruding from the defendant's right shoe. The officer could not see what was inside the plastic bag, but explained that in his experience, narcotics, like cocaine and heroin were packaged in plastic bags. He admitted, however, that legal items, such as candy could also be stored in such bags.

¶ 8 Officer Lara recovered the plastic bag from the defendant's shoe, which proved to contain, a "substantial amount of narcotics." Officer Lara testified that after recovering the narcotics, he placed the defendant under arrest. A subsequent custodial search of the defendant

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revealed money on his person.

¶ 9 On cross-examination, Officer Lara was impeached by testimony he had given at the defendant's preliminary hearing on April 28, 2009. He admitted that at that hearing he testified that he approached the defendant's Dodge Neon after witnessing the woman hand what he believed was money to the defendant. He admitted that in his preliminary hearing testimony he nowhere testified that he observed the defendant give a small object to the woman, in exchange for money.¹

¶ 10 Following arguments, the court denied the defendant's motion to quash the arrest and suppress evidence, ruling that Officer Lara had probable cause to stop the defendant and then sufficient probable cause to search him. In doing so, the circuit court found the testimony of Officer Lara credible and the impeachment from the preliminary hearing to be insignificant "because the officer testified that this was a transaction based on his experience of observing more than 100 narcotics arrests." As the court stated:

"So I don't find it impeaching that he immediately said at the preliminary hearing that he observed a white female tender U.S. currency because he said he couldn't actually see the object, but in his experience, he had probable cause to believe that it was a narcotics transaction."

The circuit court further found that once Officer Lara observed the defendant make a move to his ankle from which a plastic bag then protruded, he had "probable cause for the arrest *** [and] to

¹The parties do not seem to dispute that there was a finding of no probable cause at this preliminary hearing.

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get the defendant out, to search him."

¶ 11 The defendant filed a motion to reconsider the trial court's ruling. At a hearing on that motion, defense counsel argued that Officer Lara had no probable cause to approach the defendant's car, order the defendant out of the car, or to search him, based on what he had observed. Defense counsel argued that there were no weapons on the defendant and no narcotics in plain view. The State responded that the officer had observed the defendant tendering a small object to the woman. The State further argued that when Officer Lara approached and announced that he was a policeman, the defendant hesitated when ordered to show his hands and placed an object in his shoe, which was consistent with the packaging of narcotics. The circuit court denied the defendant's motion to reconsider, finding that based on the officer's experience the object in the defendant's shoe was a bag used in the packaging of cocaine. The court held that based on the totality of circumstances and the officer's experience, he was observing a "drug buy." As the court explained:

"The defendant then acted in a way that certainly indicated suspicion to this officer and based on the totality of the circumstances would establish [a] reasonable, articulable basis to believe a crime was committed when he saw the plastic bag being furtively placed into the individual's sock. That would be sufficient for the search. Not just for weapons but because he had reason to believe under the totality of the circumstances a crime had been committed."

¶ 12 The defendant's jury trial began on July 8, 2010. Immediately prior to trial, the circuit court granted several motions *in limine*, including, relevant to this appeal, the State's motion to

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preclude the defense from mentioning anywhere that at the April 28, 2009, preliminary hearing there was a finding of no probable cause in favor of the defendant.² The State agreed that the defense could use the transcript from that preliminary hearing to impeach Officer Lara, if it chose, but argued that the jury should not be permitted to hear that the outcome of that hearing was a finding of no probable cause.

¶ 13 At trial, Officer Lara testified in substantially the same manner as he had testified at the defendant's hearing on the motion to quash his arrest and suppress evidence. Specifically, Officer Lara testified that about 2:30 a.m., on April 8, 2009, while on patrol with two other officers, he observed an unknown woman approach the driver's side of the defendant's parked Dodge Neon, and give the defendant some "unfolded paper," which the officer "perceived to be United States currency." In exchange, the woman received what Officer Lara perceived to be a small item that he suspected to be narcotics. When asked how he knew that the woman received an item, the officer responded "I observed what looked like a small item and just from my experience." He stated that he was inside his unmarked squad car, about 15 feet away when he observed this transaction.

¶ 14 Officer Lara additionally testified that after observing this transaction, he exited the squad car along with the two other police officers and announced his office. The woman ran into her vehicle and drove off. Officer Lara approached the driver's side of the car, followed by Officer Sandoval, while Officer Nomellini approached the passenger side. Officer Lara stated that he

²As already noted above, the parties do not seem to dispute that there was a finding of no probable cause at this preliminary hearing.

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ordered the defendant to show his hands, but the defendant hesitated. Officer Lara testified that "at this time *** [he] had [his] weapon drawn," as well as a flashlight pointed at the defendant. He again ordered the defendant to show his hands, but as he got closer observed that instead the defendant placed what the officer believed to be an unknown object into his right shoe. The defendant then raised his hands. According to Officer Lara there was also a passenger seated next to the defendant, and that individual immediately showed his hands upon request.

¶ 15 Officer Lara testified that he "ordered the defendant to exit the vehicle so he could conduct a protective pat-down search for weapons." According to Officer Lara, when the defendant exited his Dodge Neon, the officer quickly observed what he perceived to be a plastic bag protruding from the defendant's right ankle. The officer walked the defendant to the back of the car and did a protective pat-down search, which included a search of the defendant's shoe. Officer Lara testified that the search of the shoe revealed a plastic bag containing numerous smaller bags with white powder. Officer Lara placed the defendant into custody and kept the plastic bag in his possession until he reached the police station, where he inventoried it. At the station, he had an opportunity to inspect the plastic bag more thoroughly, and at that time realized that it contained 28 small bags and 4 larger ones, containing white powder that the Officer suspected were narcotics.

¶ 16 On cross-examination, Officer Lara agreed that in his original arrest report and vice report, both of which were completed immediately after the incident, he noted only that the defendant "attempted" to tender a small object to the woman, whereas at trial he testified that an actual exchange had occurred. Officer Lara explained, however, that he used the word

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"attempted" in his reports because he could not verify that the woman actually received an item since she was never apprehended by the police after fleeing the scene. When asked if he could remember the color of the object he observed the defendant giving to the woman, Officer Lara responded that it was light-colored. He was then impeached with his prior testimony from the suppression hearing where he testified that he was unable to see either the color or the shape of the object in question.

¶ 17 Just as at the hearing on the defendant's motion to quash arrest and suppress evidence, on cross-examination, Officer Lara again acknowledged that he only observed the woman give the defendant "unfolded paper," and that he could not be sure it was currency.

¶ 18 The State next called Officer Paul Sandoval to the stand. Officer Sandoval testified that he was on duty with Officer Lara and Officer Nomellini on April 8, 2009. The officers were in plainclothes and inside their unmarked Chevrolet Impala, when they observed the defendant's Dodge Neon pull up and park behind a red car. Officer Sandoval testified that he saw a woman exit the red car, go to the driver's side of the Dodge Neon and lean in to talk to the defendant. Officer Sandoval testified that he did not see the interaction between the defendant and the woman and could not state whether they exchanged anything because he was sitting behind Officer Lara and his view was obstructed. Officer Sandoval stated that once the officers exited their vehicle, he followed Officer Lara toward the driver's side door of the defendant's Dodge Neon, while Officer Nomellini proceeded to the passenger side. According to Officer Sandoval, Officer Lara identified himself as a police officer and ordered the defendant and his passenger to show their hands. The passenger complied immediately but the defendant did not and instead

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made "some sort of furtive movement." Officer Sandoval testified that at that point Officer Lara ordered both men out of the car "in order to conduct a protective pat down search." Officer Sandoval acknowledged that he did not see anything on the defendant's person when the defendant exited the vehicle. After the pat-down search, Officer Lara handcuffed the defendant and transferred control of him to Officer Sandoval. Officer Sandoval searched the defendant and recovered \$90 from his front pants pocket. Later at the police station, Officer Lara gave Officer Sandoval a plastic bag he had recovered from the defendant and Officer Sandoval inventoried it. Officer Sandoval testified that the bag contained 28 smaller and four larger plastic bags.

¶ 19 Francis Manieson, a forensic chemist for the Illinois State Police crime laboratory next testified that on April 15, 2009, he analyzed the contents of the plastic bags recovered from the defendant. He stated that he received 28 bags containing a small rock like substance and 4 bags containing powder. All 28 bags with the rock like substance tested positive for the presence of cocaine, and the 4 bags with the powder contained heroin. According to Manieson, the total weight of the cocaine was 2.674 grams and the total weight of the heroin was 1.404 grams.

¶ 20 After the State rested, the defendant moved for a directed finding, but the circuit court denied the request. The defendant presented no evidence on his own behalf. After hearing closing arguments, the jury found the defendant guilty of one count of possession with the intent to deliver more than 1 but less than 15 grams of cocaine, and one count of possession with the intent to deliver more than 1 but less than 15 grams of heroin. The circuit court sentenced the defendant to six years imprisonment with the condition that he partake in a drug treatment program. The circuit court merged the defendant's conviction for possession with the intent to

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deliver heroin into his conviction for possession with the intent to deliver cocaine and only entered a sentence on Count I, the possession with the intent to deliver cocaine. The defendant now appeals.

¶ 21

II. ANALYSIS

¶ 22

A. Motion to Quash Arrest and Suppress Evidence

¶ 23 On appeal, the defendant first contends that the circuit court erred in denying his motion to quash arrest and suppress the introduction of the 32 bags of suspected narcotics that were recovered from his person and introduced as principal evidence at his trial. In reviewing a ruling on a motion to quash arrest and suppress evidence, this court applies a bifurcated standard of review. *People v. Wear*, 229 Ill. 2d 541, 561 (2008). While we "accord great deference to the trial court's factual findings, and *** will reverse those findings only if they are against the manifest weight of the evidence *** we *** review *de novo* the ultimate question of the defendant's legal challenge to the denial of his motion to suppress." *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001) (citing *In re G.O.*, 191 Ill. 2d 37, 50 (2000)); see also *People v. Surles*, 2011 IL App (1st) 100068 ¶ 20.

¶ 24

In the present case, the defendant contends that the 32 bags of narcotics found on his person were retrieved as a result of an unlawful arrest. The defendant points out that when Officer Lara, together with two other officers approached the defendant's vehicle with a weapon and ordered him to step outside, he placed the defendant under arrest. The defendant further contends that Officer Lara had no probable cause for this arrest, as it was based solely upon his observation that the defendant had participated in a single exchange of money for an unknown

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object with another individual. The State argues that the defendant was not arrested until after he was searched and the narcotics were retrieved from his person. Rather, the State contends, the defendant was subjected to a lawful investigatory *Terry* stop and frisk that ultimately resulted in the discovery of the narcotics. For the reasons that follow, we agree with the State.

¶ 25 We begin by noting that our courts have long recognized three types of police-citizen encounters, including: (1) consensual encounters, involving no detention and therefore not implicating a citizen's fourth amendment rights; (2) brief investigatory stops, referred to as *Terry* stops, which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) arrests, which must be supported by probable cause. *Surles*, 2011 IL App (1st) 100068 at ¶ 21 (citing *People v. Vasquez*, 388 Ill. App. 3d 532, 546-47 (2009) and *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006)).

¶ 26 The two latter types of encounters are governed by the United States and the Illinois Constitutions, which explicitly prohibit the government from subjecting citizens to unreasonable searches and seizures. U.S. Const., Amends. IV, XIV; Ill. Const. 1970, art. I, § 6; *People v. Lopez*, 229 Ill. 2d 322, 345 (2008).

¶ 27 For constitutional purposes, a person is seized when he is placed under arrest. *Lopez*, 229 Ill. 2d at 346. Under the fourth amendment an arrest must be accompanied by a warrant supported by probable cause. *Sorenson*, 196 Ill. 2d at 432; see also *People v. Robinson*, 167 Ill. 2d 397, 405 (1995) ("A warrantless arrest is unlawful absent probable cause."); *People v. Montgomery*, 112 Ill. 2d 517, 525 (1986) ("An arrest executed without a warrant is valid only if supported by probable cause."). "Probable cause to arrest exists when the facts known to the

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officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *Wear*, 229 Ill. 2d at 563-64 (citing *People v. Love*, 199 Ill. 2d 269, 279 (2002)). The existence of probable cause depends upon the totality of the circumstances at the time of the arrest. *Wear*, 229 Ill.2d at 564 (citing *Love*, 199 Ill. 2d at 279).

¶ 28 A *Terry* stop is a recognized exception to the probable cause requirement of the fourth amendment, which allows for an officer to detain a citizen without an arrest warrant and without probable cause where his observations create a reasonable articulable suspicion that a crime has been or is about to be committed. *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (codified in the Illinois Code of Criminal Procedure of 1963 as 725 ILCS 5/107–14 (West 2008)). Such a stop must, at its inception, be based on specific and articulable facts, which the officer can point to as a reasonable basis for such an intrusion. *People v. Thomas*, 198 Ill. 2d 103, 109 (2001).

¶ 29 Our courts have recognized that there is no bright-line test for determining whether an encounter is a *Terry* stop or an arrest. See *Surles*, 2011 IL App (1st) 100068 ¶ 24; *Vasquez*, 388 Ill. App. 3d at 549. Generally, an arrest occurs when a person's freedom of movement is restrained by physical force or a show of authority. *Vasquez*, 388 Ill. App. 3d at 549; see also *Lopez*, 229 Ill. 2d at 346 (" 'An arrest occurs when the circumstances are such that a reasonable person, innocent of any crime, would conclude that he was not free to leave.' [Citation.] ") In determining whether an encounter is a *Terry* stop or an arrest, our courts have analyzed several factors, including, but not limited to: (1) the time, place, length, mood, and mode of the encounter; (2) the number of officers present; (3) use of handcuffs, weapons, or other formal restraint; (4) the intent of the officers; (5) whether the defendant was told he could refuse to

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cooperate or that he was free to leave; (6) whether the defendant was transported by the police in a police car; and (7) whether the defendant was told he was under arrest. *Surles*, 2011 IL App (1st) 100068 ¶ 24; see also *Vasquez*, 388 Ill. App. 3d at 549.

¶ 30 In the present case, the defendant contends that he was placed under arrest the moment when Officer Lara approached his vehicle because Officer Lara was armed and followed by three other officers. A review of the evidence presented at the defendant's motion to suppress hearing as well as trial³, however, directly belies the defendant's allegations and establishes that the aforementioned factors weigh heavily in favor of finding that the defendant was not placed under

³We note that "[b]ecause the defendant asks that we review the trial court's decision on the motion to suppress, we may consider not only the evidence presented at the suppression hearing, but also that introduced at trial." *People v. DeLuna*, 334 Ill. App. 3d 1, 11 (2002); see also *People v. Kidd*, 175 Ill. 2d 1, 25 (1996); *People v. Brooks*, 187 Ill. 2d 91, 127 (1999) (a reviewing court may consider evidence at trial in affirming a ruling at a prior pretrial hearing because this "is akin to a harmless error analysis"--whether there was sufficient evidence to support the court's pretrial determination is irrelevant when its decision is supported by evidence introduced at trial); *People v. Caballero*, 102 Ill. 2d 23, 34-36 (1984) (a reviewing court "may consider trial evidence in determining whether the trial court's decision denying a motion to suppress was correct" because "the pretrial ruling on suppression is not final and may be changed or reversed at any time prior to final judgment"); see also *People v. Sims*, 167 Ill. 2d 483, 500-501 (1995) (we may affirm a trial court's suppression ruling for any reason in the record, even if not articulated by that court in reaching its decision).

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arrest until after he was searched and the narcotics were found on his person. Specifically, the record reveals that Officer Lara observed the defendant, sitting inside his Dodge Neon, partake in a transaction with a woman who approached his car. The officer observed the woman give the defendant what the officer perceived to be money in exchange for a small object. Based on his 14 years experience as a police officer, with over 100 narcotics investigations, Officer Lara believed that he had observed a narcotics sale. He therefore exited his unmarked squad car with two fellow officers and approached the defendant's vehicle. The woman involved in the transaction immediately fled from the scene in her car. The record further reveals, contrary to the defendant's contention, that Officer Lara did not initially approach the defendant's vehicle with his weapon drawn. Rather, since it was around 2:30 a.m., and the defendant was inside his car, together with another occupant, Officer Lara approached the Dodge Neon with his flashlight ordering the occupants to show him their hands. The officer drew his gun only after the defendant refused to comply with his repeated requests and instead stuffed an unknown object into his right shoe. Officer Lara testified that at this point he did not know if the defendant had attempted to conceal a weapon in his shoe, and therefore removed the defendant from the vehicle in order to determine whether he was armed. Officer Lara's testimony was corroborated by that of Officer Sandoval who averred that when Officer Lara approached the defendant's vehicle and ordered its occupants to show their hands, the defendant refused and instead made "some sort of furtive movement." Both officers testified that the defendant was not placed under arrest until after the pat-down search revealed narcotics on his person.

¶ 31 Accordingly, the record below establishes that the encounter between the defendant and

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the police was brief, that it occurred in the middle of the night and on a public street, that a weapon was employed by Officer Lara only to ensure the safety of himself and the other officers, and that the defendant was never told that he was under arrest, until he was searched and subsequently handcuffed. Under these circumstances, we find that the detention of the defendant and his removal from the vehicle constituted an investigatory *Terry* stop, rather than an arrest. See *People v. Arnold*, 394 Ill. App. 3d 63, 71 (2009) ("there are situations in which concerns for the safety of the police officer or the public justify [employment of arrest-like measures] *** for the brief duration of an investigatory [*Terry*] stop."); *People v. Nitz*, 371 Ill. App. 3d 747, 754 (2007) ("when arrest-like measures *** are employed, they must be 'reasonable in light of the circumstances that prompted the [investigatory] stop or that developed during its course.' [Citations.]"); see also *United States v. Acosta-Colon*, 157 F. 3d at 9, 18-19 (1st Cir. 1998) ("when the government seeks to prove that an investigatory detention involving the use of [arrest-like measures] did not exceed the limits of a *Terry* stop, it must be able to point to *some* specific fact or circumstance that could have supported a reasonable belief that the use of such restraints was necessary to carry out the legitimate purposes of the stop without exposing law enforcement officers, the public, or the suspect himself to an undue risk of harm" (emphasis in original)).

¶ 32 The defendant next argues that even if we conclude that his encounter with Office Lara did not rise to the level of an arrest, but merely constituted a *Terry* stop, we should nevertheless find that this investigatory stop was neither reasonable nor justifiable. The defendant contends that Officer Lara had no "reasonable, articulable suspicion" to approach him and conduct a *Terry*

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stop (see *Terry*, 392 U. S. 1), based solely upon his observation that the defendant had participated in a single exchange of money for an unknown object with the unidentified woman. He further argues, that even if the police had "reasonable, articulable suspicion" to conduct a *Terry* stop, the search of his shoe went beyond the scope of what constitutes a permissible *Terry* pat-down search (see *Terry*, 392 U. S. 1). For the reasons that follow, we disagree.

¶ 33 As already noted above, under *Terry*, an officer may detain a citizen without an arrest warrant or probable cause where his observations create a reasonable articulable suspicion that a crime has been or is about to be committed. *Terry*, 392 U.S. at 22 (1968); see also *Minnesota v. Dickerson*, 508 U.S. 366, 372-73 (1993) (quoting *Terry*, 392 U.S. at 30) (" ' where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot *** ,' the officer may briefly stop the suspicious person and make 'reasonable inquiries' aimed at confirming or dispelling his suspicions"); *Sorenson*, 196 Ill. 2d at 432; see also 725 ILCS 5/107-14 (West 2008) ("A peace officer ***may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense ***.") In evaluating whether reasonable suspicion exists, a court objectively considers, whether the facts available to the police officer at the time of the stop " 'would warrant a person of reasonable caution to believe a stop was necessary to investigate the possibility of criminal activity.' [Citation.]" *People v. Delaware*, 314 Ill. App. 3d 363, 368 (2000). To justify the investigatory stop, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences therefrom, reasonably warrant such a detention.

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Thomas, 198 Ill. 2d at 110. As our supreme court has explained:

"The facts supporting the officer's suspicions need not meet probable cause requirements, but they must justify more than a mere hunch. The facts should not be viewed with analytical hindsight, but instead should be considered from the perspective of a reasonable officer at the time that the situation confronted him or her." *Thomas*, 198 Ill. 2d at 110.

¶ 34 In the present case, a review of the record supports the conclusion that Officer Lara had reasonable suspicion to briefly detain and investigate the defendant for the possibility of criminal activity. As already elaborated above, Officer Lara testified that in the early hours of April 8, 2009, he observed the defendant park his vehicle behind a red car and a woman exit the red car and approach the defendant. From about only 15 feet away, Officer Lara observed the woman hand the defendant folded paper, which he presumed was money and in return receive a small object from the defendant. Although Officer Lara could not describe the color or the shape of the object, he was certain that an object had been exchanged. Officer Lara explained that based on his 14 years experience on the police force and more than 100 narcotics related arrests, he believed that he had just witnessed a narcotics transaction. Under these facts, and the rational inferences to be drawn therefore, we conclude that Officer Lara was justified in believing that a criminal activity had just been committed, so as to warrant an investigatory *Terry* stop. See *Delaware*, 314 Ill. App. 3d at 368.

¶ 35 In coming to this conclusion, we have considered the decision in *People v. Moore*, 286 Ill. App. 3d 649, 653 (1997), cited to by the defendant and find it inapposite. In *Moore*, the

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defendant, who was charged with possession of cocaine with the intent to deliver, filed a motion to suppress the narcotics retrieved from his person during an investigatory *Terry* stop. *Moore*, 286 Ill. App. 3d at 650. At that hearing, the police officer who performed the *Terry* stop testified that he was in front of a tavern that was "frequented by gang members" where "many narcotic activities and shootings" had occurred, when he observed the defendant speaking to someone seated in a parked van. *Moore*, 286 Ill. App. 3d at 650-51. The officer testified that he then observed what appeared to be an exchange of money, but admitted that because of the distance (about 75 to 100 feet away) and lack of light he was not able to tell who was giving or receiving the money or if anything else was exchanged, or if the exchange was part of an illegal transaction. *Moore*, 286 Ill. App. 3d at 653. The officer testified that he approached the defendant and ordered him to stop but that the defendant started running. The defendant was subsequently apprehended in a nearby alley and a pat-down search for weapons revealed a plastic bag of cocaine on his person. *Moore*, 286 Ill. App. 3d at 653.

¶ 36 Based on this evidence, the trial court granted the defendant's motion to suppress the evidence, noting that the evidence was insufficient and that more articulable facts were necessary to justify the *Terry* stop. *Moore*, 286 Ill. App. 3d at 651. The appellate court agreed, finding relevant that the officer had admitted that he was 75 to 100 feet away and that because of "the distance and lack of light" he could not tell if the "apparent exchange was part of an illegal transaction." *Moore*, 286 Ill. App. 3d at 653. The appellate court further deferred to the trial court's finding that "besides the possibility of a drug buy, this exchange could have merely been the paying off of a bet, splitting the cost of dinner or even a simple shake of hands." *Moore*, 286

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Ill. App. 3d at 653.

¶ 37 Unlike in *Moore*, where the officer testified that because of the "distance and lack of light" he was not able to tell if the apparent exchange was part of an illegal transaction, here Officer Lara testified that he had a clear view of the transaction and that based on his observations and experience he believed it had been an illegal narcotics transaction. Moreover, in the present case, Officer Lara specifically testified that when he observed the transaction, he was only one and a half car lengths (about 15 feet) away from the defendant and that there was sufficient street lighting on Augusta Avenue. In addition, unlike the trial court in *Moore*, the trial court below found the testimony of Officer Lara credible, and after a review of the record, we find nothing manifestly erroneous about that conclusion.

¶ 38 The defendant nevertheless contends that even if Officer Lara was justified in temporarily detaining him pursuant to *Terry*, the subsequent pat-down search of his shoe from which the inculpatory narcotics were retrieved, far exceeded the scope of a permissible *Terry* frisk. See *People v. Thomas*, 198 Ill. 2d at 109-10 ("Whether an investigatory stop is valid is a separate question from whether a search for weapons is valid") (citing *People v. Flowers*, 179 Ill. 2d 257, 263 (1997)). For the reasons that follow, we, again, must disagree.

¶ 39 *Terry* held that "when the officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, the officer may conduct a pat-down search to determine whether the person is in fact carrying a weapon." *Sorenson*, 196 Ill. 2d at 432 (citing *Terry*, 392 U.S. at 30). Such a pat-down search is permissible only if the officer has a reasonable articulable suspicion that he or

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another is in danger of attack because the defendant is armed and dangerous. See *Sorenson*, 196 Ill. 2d at 432; see also 725 ILCS 5/108–1.01 (West 2008). The search is not for the purpose of discovering evidence, but must be limited to a search for weapons, and if it goes beyond what is necessary to determine if a suspect is armed it will no longer be valid under *Terry* and the evidence gathered therefrom shall be suppressed. *Sorenson*, 196 Ill. 2d at 432.

¶ 40 "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Sorenson*, 196 Ill. 2d at 433 (citing *Terry*, 392 U. S. at 27). In determining whether the officer acted reasonably in such circumstances, due weight must be given to the specific reasonable inference which the officer is entitled to draw from the facts in light of his experience. *Sorenson*, 196 Ill. 2d at 433 (citing *Terry*, 392 U. S. at 27).

¶ 41 In the present case, the record reveals that the information known to Officer Lara at the time he performed the *Terry* stop, was sufficient to create a reasonable suspicion that the defendant was armed and dangerous, such that a pat-down search was warranted. As already noted above, Officer Lara testified that when he approached the defendant's vehicle, he ordered both of its occupants to show him his hands. Although the passenger immediately placed his hands in the air, the defendant disobeyed Officer Lara's repeated request and instead made a movement toward his leg and placed something in his right shoe. Officer Sandoval corroborated Officer Lara's account, stating that when ordered to show his hands the defendant refused and instead made "some sort of furtive movement." The officers approached the defendant's vehicle on a street at 2:30 a.m., after observing what Officer Lara concluded was a narcotics transaction.

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Under these circumstances, and Officer Lara's extensive experience with narcotics investigations, it would not have been unreasonable for the officer to conclude that the defendant was attempting to hide a weapon and that the officers' safety was being jeopardized. As Officer Lara himself testified, "At this point, I didn't know if it was a weapon or something else." Accordingly, we affirm the trial court's conclusion that the pat-down search was proper. See, e.g., *Sorenson*, 196 Ill. 2d at 434 (holding that a protective pat-down search was lawful where the officer testified that "he was primarily concerned with the possibility that the defendant possessed a weapon" and noting that "[t]he fact that the officer may have also believed that the defendant possessed illegal drugs did not negate the officer's concern for his safety."); see also *People v. DeLuna*, 334 Ill. App. 3d 1, 10 (2002) (holding that a protective pat-down search was proper even where the officer nowhere testified that he observed the defendant with a weapon, but "repeatedly stated that he performed the search for his 'safety' "; noting that based on the officer's "experiences and observations of the circumstances at hand," he was justified in performing the pat-down search).

¶ 42 In coming to this conclusion, we have considered the decision in *People v. Marchel*, 348 Ill. App. 3d 78, 80 (2004), cited to by the defendant and find it inapplicable to the facts of this case. Contrary to the defendant's presentation, the issue in *Marchel*, was not whether the police would have been justified in performing a protective pat-down search for weapons, but rather whether the defendant's actions were sufficient to justify a *Terry* stop in the first place. *Marchel* held that a police officer did not have a reasonable, articulable suspicion that the defendant was involved in criminal activity where the officer only observed the defendant make a furtive movement towards his mouth. *Marchel*, 348 Ill. App. 3d at 80. Moreover, even if the issue had

been the validity of the pat-down search, the facts in *Marchel* are clearly distinguishable from the facts at bar. The act of furtively placing something in one's mouth is nothing like the act of shoving an object into one's shoe, especially when done in response to an officer approaching a vehicle and ordering the individual to show his hands. While a reasonably prudent officer could easily conclude that a defendant was attempting to hide a weapon in an article of clothing, it is highly unlikely that anyone would hide a weapon inside one's mouth. Accordingly, for all of the reasons articulated above, we find that Officer Lara was justified in his protective pat-down search of the defendant.

¶ 43 Moreover, we also find, contrary to the defendant's contention, that Officer Lara's search of the defendant's shoe fell squarely within the scope of a legitimate *Terry* frisk. In that respect, we note that under the "plain feel" or "plain touch" doctrine, if, while conducting a lawful pat-down search, an officer feels an object that he believes is not a weapon but whose shape or weight makes its identity apparent, he may seize it if he has probable cause to believe that the object is contraband." *DeLuna*, 334 Ill. App. 3d at 13; see also *People v. Coylar*, 407 Ill. App. 3d 294, 305 (2010) ("An officer may seize an object discovered during a *Terry* stop if the officer has probable cause to believe that the object is contraband.") Similarly, the "plain view" doctrine allows a police officer to seize an object if: "(1) he views the object from a place he is legally entitled to be, and (2) the object is immediately apparent to him to be evidence of a crime, contraband, or otherwise subject to seizure." *DeLuna*, 334 Ill. App. 3d at 13.

¶ 44 To invoke either the "plain touch" or "plain view" doctrine, a police officer must have probable cause to conduct a proper search. As already noted above, "probable cause [requires]

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more than an mere suspicion that an offense has been committed and the individual in question committed it; however, probable cause does not require evidence sufficient to convict." *DeLuna*, 334 Ill. App. 3d at 13; see also *People v. Hopkins*, 235 Ill. 2d 453, 472 (2009) ("[W]hether probable cause exists is governed by commonsense considerations, and the calculation concerns the probability of criminal activity, rather than proof beyond a reasonable doubt."); *People v. Jackson*, 232 Ill.2d 246, 275 (2009) (" 'Indeed, probable cause does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false.' [Citations.]" [Citation.]); see also *People v. Sims*, 192 Ill. 2d 592, 614-15 (2000) (because an arrest not only serves the function of producing persons for prosecution but also serves an investigative function, courts have not ruled that an arrest can occur only when the known facts indicate that it is more probable than not that the suspected individual has committed the crime); *Love*, 199 Ill. 2d at 279 (" 'In dealing with probable cause, *** we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar v. United States*, 338 U.S. 160, 175 (1949)"). Whether probable cause exists at the time the police officer feels the object during a pat-down search " 'must be determined from the standpoint of the officer, with *his skill and knowledge* being taken into account, and the subsequent credibility determinations must be made by the trial court.' [Citation.]" (Emphasis in original). *DeLuna*, 334 Ill. App. 3d at 13; see also *People v. Stout*, 106 Ill. 2d 77, 87 (1985) (what constitutes probable cause must be determined from the police officer's standpoint in the particular situation based upon the officer's experiences, and not from that of the average citizen under similar facts). This determination

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must be made by "viewing the evidence taken as a whole." *DeLuna*, 334 Ill. App. 3d at 13; accord., *Moody*, 94 Ill.2d at 8 (while "pieces of evidence" in the police officer's possession individually did not amount to probable cause, it existed when the evidence was reviewed as a whole).

¶ 45 In the present case, as already discussed above, Officer Lara observed the defendant engage in a hand-to-hand transaction with an unknown woman during which the defendant gave a small object to the woman in exchange for money. Officer Lara also testified that as he was standing next to the defendant, he observed the defendant "stuffing" an unknown object into his right shoe. Once the defendant exited his Dodge Neon, and Officer Lara began his pat-down search for weapons, he observed a plastic bag protruding from that shoe. Accordingly, since the officer observed the bag in "plain view," during a lawful *Terry* pat-down search, he was entitled to seize the contraband. See, e.g., *DeLuna*, 334 Ill. App. 3d at 13 (holding that police officer had probable cause to believe that the package he felt during his pat-down search of the defendant was contraband where the officer testified that he felt a "bulge" or "lump" protruding from the defendant's front waistband, and that based on "his experience as a narcotics detective" he believed that the object was contraband.)

¶ 46 In coming to this conclusion, we have considered the decision in *People v. Cox*, 295 Ill. App. 3d 666, 671 (1998), cited to by the defendant and find it distinguishable. In *Cox*, several police officers stopped the defendant because he fit the description of a robbery suspect. *Cox*, 295 Ill. App. 3d at 668. The officers approached the defendant and told him to put his hands on the squad car. *Cox*, 295 Ill. App. 3d at 669. The defendant put his hands on the squad car, but

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then put his left hand in his pants pocket, pulling something out while maintaining a fist. *Cox*, 295 Ill. App. 3d at 668. One of the officers grabbed the defendant's arm and the defendant opened his fist, revealing a clear plastic bag containing cocaine. *Cox*, 295 Ill. App. 3d at 668-69. Based on these facts, the reviewing court held that while the officers had enough articulable suspicion to stop the defendant as a suspect in the robbery, the subsequent search of the defendant was impermissible because the officers never testified that they believed that the defendant was armed, or that they were in fear for their safety. *Cox*, 295 Ill. App. 3d at 673-74. The court rejected the State's argument that the search of the defendant's fist was reasonable because the officers could have believed that it contained a weapon. *Cox*, 295 Ill. App. 3d at 674. In doing so, the court noted that there was no evidence that the defendant was doing anything suspicious at the time of the stop or that the circumstances may have appeared dangerous. *Cox*, 295 Ill. App. 3d at 674.

¶ 47 Unlike in *Cox*, in the present case, as already detailed above, Officer Lara was justified in performing the pat-down search of the defendant, including the defendant's shoe. The record here establishes that after observing what he considered to be a narcotics transaction, Officer Lara watched as the defendant refused to comply with his order to show his hands while still seated in his car, and instead made a furtive movement, stuffing something in his right shoe. Officer Lara was thus justified in frisking the defendant's leg and shoe area for weapons. Since, during that frisk he observed a plastic bag "in plain view," sticking out from the defendant's shoe, he was justified, under the circumstances (including his prior observations of the presumed narcotics transaction and his previous narcotics experience), in searching that shoe and seizing

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the plastic bag containing the narcotics.

¶ 48 For all of the aforementioned reasons, we conclude that there is sufficient evidence in the record to support a finding that Officer Lara had a reasonable articulable suspicion to conduct a *Terry* stop and frisk, and that the search of the defendant's shoe fell squarely within the permissible scope of such a frisk. Accordingly, we find that the circuit court properly denied the defendant's motion to quash arrest and suppress evidence.

¶ 49 B. Correction of Mittimus

¶ 50 The defendant next argues, and the State concedes, that the mittimus must be amended to reflect the proper title of the offenses of which he was convicted. The mittimus reflects that defendant was convicted of "MFG/DEL 1<15GR COCAINE/ANLG," and "MFG/DEL 1<15GR Heroin/ANALOG," respectively. As already indicated above, however, the defendant was charged with and convicted of two counts of possession of a controlled substance with the intent to deliver, namely more than 1 but less than 15 grams of cocaine (Count I) and more than 1 but less than 15 grams of heroin (Count II). See 720 ILCS 570/401(c)(1),(c)(2) (West 2006). The defendant was not convicted, as the current order of sentence and commitment reflect, of manufacturing or delivering the substances.

¶ 51 Accordingly, we instruct the clerk of the circuit court to amend the mittimus to reflect the proper names of the convictions. See Ill. S. Ct. R. 625(b)(1) ("[o]n appeal the reviewing court may *** modify the judgment or order from which the appeal is taken"); *People v. Jones*, 371 Ill. App. 3d 303, 310 (2007); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("[r]emandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to

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make the necessary corrections"); see also *People v. Blakey*, 375 Ill. App. 3d 554, 560 (2007).

¶ 52

III. CONCLUSION

¶ 53 For all the foregoing reasons, we affirm the circuit court's denial of the defendant's motion to quash arrest and suppress evidence and we direct the clerk of the circuit court to correct the defendant's mittimus.

¶ 54 Affirmed; mittimus corrected.