2018 IL App (1st) 150402-U

No. 1-15-0402

Order filed February 2, 2018

Fifth Division

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 22105
	)	
MELVIN HINTSON-REED,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Conviction affirmed where lower court properly denied defendant's motion to quash arrest and suppress evidence.

¶ 2 Following a bench trial, defendant Melvin Hintson-Reed was convicted of unlawful possession of a weapon by a felon ("UUWF") (720 ILCS 5/24-1.1(a) (West 2012)), and sentenced to four years' imprisonment. On appeal, defendant contends the trial court erred in denying his pretrial motion to quash arrest and suppress the firearm and ammunition recovered

because the police did not have a reasonable suspicion that defendant was involved in criminal activity when they seized him, and they did not have a reasonable suspicion that he was armed and dangerous when they frisked him. We affirm.

¶ 3 Defendant was charged with the offense of armed habitual criminal, UUWF, and two counts of aggravated unlawful use of a weapon based on his possession of a firearm. Prior to trial, defendant filed a motion to quash arrest and suppress evidence arguing that the police did not have the reasonable suspicion required to stop and frisk him. Defendant contended the gun police found was therefore unlawfully recovered and all evidence directly or indirectly flowing from the unlawful search and seizure should be suppressed from introduction into evidence. On May 1, 2014, the trial court held a suppression hearing.

¶ 4 Chicago police officer McCann testified that, on October 19, 2013, he was on duty in the area of 7130 South Talman Avenue at approximately 9:35 p.m. McCann was a part of a police team investigating robberies and shootings in the area, and for preventative patrol of ongoing gang violence and narcotics in the area. He was in an unmarked car working with his partner, Officer Brouder, wearing a bulletproof vest with his star on it and a duty belt. McCann saw defendant walk out of an alley, walk along the curb line of the street and look into cars, but not touch any. He saw defendant holding his waistband. McCann did not have an arrest warrant or search warrant and did not observe defendant in the commission of any crime. Defendant did not fit the description of any offenders.

¶ 5 Defendant's walking along the curb looking into cars caused McCann "suspicion." McCann exited his vehicle and approached defendant while he was still standing on the curb line. Defendant observed him and started to walk towards the sidewalk. McCann identified

himself as a police officer and ordered defendant to stop and show identification. McCann acknowledged that, at that point, defendant was not free to leave. Defendant turned his back and walked away while putting his hands inside his waistband or pocket. McCann asked defendant to show his hands; defendant refused. McCann reached for defendant's left arm and grabbed hold of him. He could not initially get control of defendant's right arm, but eventually did.

¶ 6 McCann testified that, while he was attempting to gain control of defendant's arms, his partner, Brouder, was in front of defendant and removed a handgun from defendant's waistband. Defendant was wearing an oversized winter jacket that came down to his waistband, but did not cover the waistband. Prior to stopping defendant, McCann had no reason to believe he was armed and dangerous. However, McCann wanted defendant to remove his hands from his pocket for safety reasons. McCann did not see a gun when he approached defendant. Brouder did not alert him to the presence of a handgun prior to retrieving it from defendant. After Brouder recovered the weapon, he conducted a protective pat-down for additional weapons.

¶ 7 Officer Brouder testified that he was driving an unmarked car in the vicinity of 7130 South "Palmer [*sic*]" Avenue with his partner, McCann. They were on routine patrol in the area because of a "recent spree" of robberies, burglaries and rival gang activity. Brouder observed defendant walk out of the alley of 71st Street onto Talman Avenue. Defendant walked across the street, onto the parkway, and continued southbound, looking into the windows of four to six cars. Brouder did not have an arrest warrant for defendant, did not observe him in the commission of a crime, and had no reason to investigate defendant based on his matching a description.

¶ 8 Brouder testified that, after making his observations, he and McCann exited their vehicle, identified themselves as police officers, and ordered defendant to stop. Defendant did not flee,

but took a "couple of more steps" and then stopped. Brouder testified that defendant turned his back to them and, as he was walking, "adjusted a heavy object." He told the police they "can't f*** with him in front of his mother's house." Defendant's hands were down by his midsection, either at his pockets or waist. Brouder had a suspicion that defendant was armed because he was "adjusting the heavy object in his waistband." Defendant became increasingly agitated as the officers approached him, and he was detained. Brouder noticed an object in defendant's waistband but did not know what it was. Defendant wore an oversized jacket that went down to about his waist. McCann "grabbed" him by his left arm and Brouder went and stood in front of him, gained control of his other arm, and conducted a pat-down. Brouder recovered a gun from defendant's mid-level area.

¶ 9 Prior to detaining defendant, Brouder "had a suspicion that [defendant] was armed when he was adjusting a heavy object in his waistband." Brouder testified that defendant "looked at us and reached down and adjusted something, and then continued to walk from the parkway and faded onto that sidewalk." Brouder could not tell what the object was, but believed that it appeared to be a heavier object. Officer Brouder testified he has seen people trying to conceal guns in their waistbands "several times," and defendant's behavior was consistent with Brouder's previous observations. He noticed defendant maneuvering this object while looking into the cars, and then decided to exit his vehicle. As McCann put his hands on defendant, defendant was arguing with the officers and "pulling away" and "protecting his mid-level" with his free arm. This mid-level area was where Brouder recovered the gun. Brouder described the neighborhood as a high-crime area.

¶ 10 The trial court denied defendant's motion to quash arrest and suppress evidence, finding the officers' testimony to be credible and compelling. The court stated that, while defendant's conduct "could be described as neutral conduct," it could also be "consistent with somebody thinking about *** burglaries of automobiles as well, and there have been some reports of those types of activities in the vicinity." The court stated that defendant noticed the police officers, walked away from them, adjusted some object that he had secreted in his waistband, where the police ultimately recovered a gun. The court found that, in the totality of the circumstances, there was no violation of the fourth amendment and denied the motion to suppress. Defendant filed a motion to reconsider, which the court denied. The case proceeded to a bench trial.

¶ 11 At trial, Officer McCann testified consistently with his testimony at the hearing on the motion to suppress. He saw defendant exit an alley, walk along parked cars and look into them, and then walk towards the sidewalk once the officers exited their vehicle. McCann testified "reasonable suspicion was clear, [defendant] was looking in the vehicles, which is reason to believe a crime may have been about to be committed." The officers approached defendant "for a field interview." McCann gave a verbal order to defendant to stop and show identification. Defendant kept walking. His hands were at his waistband and McCann ordered him to stop and show his hands. McCann believed defendant was adjusting his waistband to secure something. Defendant was "belligerent" and began to yell in response to the officer's direction and refused to comply.

¶ 12 Brouder was in front of defendant when McCann grabbed defendant's left hand. Brouder gained control of defendant's right arm and "at the same time" pulled the gun from defendant's waistband. On cross-examination, McCann clarified that Brouder did not immediately go to

defendant's waistband and grab the weapon. Rather, he "got control of [defendant's] right arm, and then [saw] the weapon" in plain view. Brouder did not conduct a pat down; he went straight to the waistband and grabbed the weapon. McCann did not see anything that would suggest defendant was armed, but he had his "suspicion" that defendant was armed, because defendant refused to comply with verbal directions to show his hands and an identification card and "would not remove his hands from his waistband." McCann did not see any bulges in defendant's clothing.

¶ 13 Officer Brouder also testified at trial consistently with his testimony at the hearing on the motion to suppress. He testified that he and McCann saw defendant exit the alley, cross the street, walk along the curb looking into parked vehicles, and adjust an object in his waistband. The officers exited their vehicle, and defendant started "fading" toward the sidewalk while adjusting a heavy object. The officers asked to see defendant's hands and told him to stop where he was. Defendant responded by becoming extremely agitated, turning his back to them, and sticking his hand in his waistband.

¶ 14 Brouder stated that he gained control of defendant's right arm and, "during the course of the pat-down, while gaining control of [defendant's] arm, [he] saw a wooden handle of a large-frame handgun protruding from [defendant's] waistband." Brouder recovered a loaded revolver from the same area that defendant was adjusting while walking away from the officers. While at the police station, Brouder read defendant his *Miranda* warnings. Defendant told Brouder he had bought the weapon two days earlier for protection. Brouder testified that "[in] the area [defendant] was at, with the robberies, and the burglaries, and the gang violence, it would appear that [defendant] may have been casing cars to break into."

¶ 15 On cross-examination, Brouder testified the officers did not have an arrest or search warrant for defendant or information that he had committed a crime. Brouder acknowledged that he could not tell what defendant was adjusting in his waistband, just that it was an object. Brouder stated defendant was not free to leave once he was ordered to stop by the officers. He acknowledged that, after he took control of defendant's right hand, he "went straight to defendant's waistband, where [he] recovered the weapon." He went underneath defendant's waist long coat, into his waistband, and recovered the weapon "in the course of a pat-down." Brouder testified he saw the gun before recovering it. When the officers were taking control of defendant's arms, his jacket came up and Brouder saw the butt of the handgun. Prior to taking hold of defendant, neither Brouder nor McCann saw a weapon.

¶ 16 After the defense rested, the State introduced into evidence a certification from the Illinois State Police showing that defendant had never been issued a FOID card and certified copies of convictions for burglary and attempted burglary in the state of Wisconsin.

¶ 17 The trial court granted defendant's motion for directed finding on the armed habitual criminal count, but found him guilty of all other counts, merging them into the UUWF count. The court denied defendant's posttrial motion based on a fourth amendment claim and sentenced him to four years in the penitentiary. This appeal followed.

¶ 18 Defendant contends that the trial court erred when it denied his motion to suppress because the officers' actions were not supported by the reasonable suspicion required for a stop and frisk pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968).

¶ 19 The fourth amendment to the United States Constitution (U.S. Const., amend. IV), which applies to the states through the fourteenth amendment (U.S. Const., amend. XIV) and article I,

section 6, of the Illinois Constitution (Ill. Const. 1970, art. I, § 6), protects against unreasonable searches and seizures. This protection generally requires a warrant supported by probable cause. *People v. Jones*, 215 Ill. 2d 261, 269 (2005) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). But the United States Supreme Court has recognized exceptions to the warrant requirement, including for an investigative stop supported by reasonable suspicion that a crime has been or is about to be committed, known as a *Terry* stop. *Terry*, 392 U.S. at 21-22; see also 725 ILCS 5/107-14 (West 2016).

¶ 20 To constitute reasonable suspicion, the evidence need not rise to the level of probable cause, and it is not necessary that the police officer witness a crime; however, a hunch is insufficient. *People v. Daniel*, 2013 IL App (1st) 111876, ¶ 33. Reasonable suspicion is based on an objective standard, with the facts viewed from the perspective of a reasonable officer at the time of the stop. *People v. Sanders*, 2013 IL App (1st) 102696, ¶ 14. A police officer must be able to point to specific articulable facts which justify the intrusion on the suspect's liberty. *Id.* These facts, taken together with natural inferences, warrant an investigative intrusion if the officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot. *People v. Jackson*, 2012 IL App (1st) 103300, ¶ 17. The decision to make an investigatory stop is based on the totality of the circumstances. *Sanders*, 2013 IL App (1st) 102696, ¶ 14.

¶ 21 A *Terry* stop and frisk entails a two-part analysis. *People v. Sims*, 2014 IL App (1st) 121306, ¶ 10. First, a reviewing court must determine whether police had reasonable suspicion that criminal activity was afoot to justify the temporary detention of the suspect. *Id.* If the investigative stop is warranted, the State must demonstrate the frisk was justified. *Jackson*, 2012

IL App (1st) 103300, ¶ 19. A frisk, "a protective patdown of a properly detained citizen for possible weapons," is justified only when the officer can further articulate a reasonable belief that the suspect was armed and dangerous. *Id.*; *Sims*, 2014 IL App (1st) 121306, ¶ 10.

¶ 22 In reviewing a ruling on a motion to suppress evidence, a reviewing court applies a two-part standard of review. *Id.* ¶ 11. The trial court's factual findings are accorded great deference, and will be reversed only if they are against the manifest weight of the evidence; however, the trial court's application of law to the facts is reviewed *de novo*. *Id.* A reviewing court may affirm a ruling on a motion to suppress on any basis supported by the record, and is free to consider trial testimony as well as the evidence presented at the hearing on the motion to suppress. *People v. Hopkins*, 235 Ill. 2d 453, 471 (2009).

¶ 23 We agree with the trial court that this was a valid *Terry* stop. Based on the totality of the circumstances, a reasonable officer would have a reasonable suspicion that defendant was about to commit a crime, warranting further investigation at the scene. Both officers testified that they saw defendant exit an alley, walk along a curb, and look into the windows of four to six parked cars while in a neighborhood that had been on alert for robberies and burglaries. Defendant's conduct could lead a reasonable police officer to suspect he was, as Brouder testified at trial, "casing cars to break into."

¶ 24 In fact, defendant's conduct of looking into car windows was similar to that of the defendant in *Terry*. In *Terry*, the United States Supreme Court found reasonable suspicion when an officer observed two men on a street corner; each would walk a short distance, look into a store window, and then return to the same corner. *Terry*, 392 U.S. at 6. The men repeated this conduct 5 to 6 times each, for a total of approximately 12 trips. *Id.* The Supreme Court found

that the men engaged in a series of acts, each perhaps innocent in itself, that when viewed together warranted further investigation of the possible "thievery from stores." *Id.* at 22. Similarly here, had defendant looked into one car and walked away, it could have been considered innocent. But instead, he continued to walk along the curb peering into four to six cars, thus raising reasonable suspicion defendant was prepared to engage in criminal activity such as burglary or theft of a vehicle. Officers McCann and Brouder had sufficient articulable facts at the time of the stop to establish the requisite reasonable suspicion of criminal activity warranting an investigatory stop.

¶ 25 Defendant argues that his looking into cars could be for innocent reasons, such as "checking for occupants, looking for zone-parking stickers, or admiring a tint job." But police officers are not required to rule out all possibility of innocent behavior before initiating a *Terry* stop. *People v. Close*, 238 Ill. 2d 497, 505 (2010). In judging a police officer's conduct, a court applies an objective standard and will determine whether the facts available to the officer at the moment of the seizure would lead an individual of reasonable caution to believe that the action taken by the officer was appropriate. *People v. Hackett*, 2012 IL 111781, ¶ 20. Here, the officers were justified in having a reasonable suspicion of criminal activity when the defendant exited the alley, looked into four to six cars, and then attempted to evade them after they asked him for identification. Therefore, the *Terry* stop was valid.

¶ 26 Defendant next argues that the handgun was recovered illegally as the result of an invalid *Terry* frisk. We disagree. The handgun was lawfully recovered in the process of the *Terry* stop, and not as a result of a *Terry* frisk.

¶ 27 When an officer is justified in believing that the individual whose suspicious behavior he is investigating is armed and presently dangerous to the officer or others, the officer may conduct a physical pat-down search to determine whether the person is in fact carrying a weapon. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). Here, although Officer Brouder testified that he recovered the gun in the process of a pat-down, it appears from his other testimony and that of McCann that the gun was discovered in the process of the *Terry* stop, not during a protective *Terry* pat-down.

¶ 28 Defendant had walked away from the officers and, in order to effectuate the *Terry* stop, they both grabbed his arms to prevent him from leaving. "It would be anomalous to grant an officer authority to detain pursuant to an investigatory stop and yet deny him the use of force necessary to effectuate that detention." *People v. Roberts*, 96 Ill. App. 3d 930, 934 (1st. Dist. 1981). Thus, when defendant continued to walk away from the officers and act "belligerent," they had the authority to grab his arms to conduct a *Terry* stop. Then, in the process of effectuating the *Terry* stop, when Brouder grabbed defendant's arm from the front, he saw the handle of a firearm in defendant's waistband, and recovered it. Thus, the weapon was not recovered in the course of a protective pat-down typical of a *Terry* frisk. While Brouder characterized his grabbing of defendant's arm as a "pat down," McCann consistently testified that Brouder recovered the gun prior to any protective pat down occurring, and that they performed a protective pat-down for additional weapons after the handgun was recovered.

¶ 29 When Brouder saw the handgun in plain view while making the *Terry* stop after defendant's belligerent actions, he knew defendant was, in fact, armed and possibly dangerous and could have lawfully performed a *Terry* frisk. However, as explained above, the handgun was

discovered during the *Terry* stop, prior to a *Terry* frisk occurring. Regardless, whether recovered during the *Terry* stop or a *Terry* frisk, the handgun was recovered legally, and the trial court correctly denied defendant's motion to suppress.

¶ 30 For the foregoing reasons, we affirm the ruling of the lower court.

¶ 31 Affirmed.