2018 IL App (3d) 150326-U

Order filed March 15, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0326 Circuit No. 14-CF-1516
WILLIE R. FLEMINGS,	)	Honorable Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held*: Trial court erred in denying defendant's motion to suppress evidence that was recovered during a pat-down search following defendant's arrest where the officer's observations of defendant did not give rise to reasonable suspicion of criminal activity to justify a fourth amendment intrusion.

¶ 2 Defendant, Willie R. Flemings, was arrested for trespassing. Following a pat-down search, officers discovered several pills in a plastic bag in his pocket, one of which tested positive for Xanax. Defendant was convicted of unlawful possession of a controlled substance

(720 ILCS 570/402(c) (West 2014)) and sentenced to six years in prison. On appeal, defendant argues that (1) the trial court erred in denying his motion to quash arrest and suppress evidence, (2) his sentence is excessive, and (3) the trial court erroneously imposed a $100 street value fine. Because the officer's observations did not give rise to a reasonable articulable suspicion of criminal activity, we reverse.

¶ 3 At the motion to suppress hearing, Officer Patrick Cardwell testified that around 3 p.m. on August 1, 2014, he was patrolling the 200 block of North Eastern Avenue in Joliet. In the weeks leading up to August 1, several incidents of criminal activity had been reported in the area. As he drove past the apartment building located at 210 North Eastern, he noticed two men sitting on the steps leading down to the basement apartment. Cardwell testified that the city of Joliet has a trespass agreement with the building's owner. He had never seen the two men in the area before, and they did not appear to be residents of the apartment. Since officers had arrested individuals for possession of weapons and narcotics at the same apartment a few days earlier, Cardwell decided to investigate.

¶ 4 Cardwell contacted "a couple" officers that were in the neighborhood and asked them to cover "in the perimeter-type area in case anybody decided to flee." He then approached the men on foot and asked them what they were doing on the property. Additional officers arrived on the scene, and they separated the two individuals and asked them a few more questions. One of the men was not being truthful about his name. Cardwell noticed an empty cigar wrapper on the ground in front of the other man's feet. Cardwell testified that, based on his observations, he suspected the men were using narcotics. After conducting separate field interviews, the officers determined that the men's stories were not consistent with each other, and they could not provide the names of actual leaseholders or details of the apartments they were visiting. Officer

Cardwell then arrested both men for trespassing. After arresting defendant, Cardwell conducted a pat-down search and found a bag containing several pills in his pocket.

¶ 5 Defendant testified that on the day of his arrest, he was visiting his God-sister, Sharleatha Green, also known as "Sha Sha." Sharleatha lived in the basement apartment at 210 North Eastern Avenue. He stated that Sharleatha had a lease with the building's owner and that he had authority to be there. Around 3 o'clock in the afternoon, defendant was sitting on the steps leading to the basement apartment building waiting "for cable to come on and stuff like that." He and a friend, Dwayne Jones, were standing outside smoking a cigarette when five or six police officer walked up to them and told them not to move. Defendant asked the officers why he was being apprehended, and they said they were arresting him "for a criminal trespass."

¶ 6 Defendant testified that one of the officers knocked on the door to the basement apartment and talked to some people inside. The individuals inside the apartment confirmed that Sharleatha was defendant's God-sister and said that she left the apartment 15 or 20 minutes earlier. Defendant stated that he tried to walk back into the apartment and the officers stopped him. One officer said he saw defendant drop a bag of cannabis. The officers then searched defendant and found a small bag of pills in his pocket. Defendant testified that the pills belonged to Sharleatha and that he was supposed to take them in the house after she left.

¶ 7 Defendant's grandmother, Janice Turner, testified that defendant's God-sister lived in the basement apartment at 210 North Eastern at the time of the incident, but she no longer lived there because she had been murdered. Turner referred to her as "Sha Sha." She did not know her real name.

¶ 8 At the conclusion of the hearing, the trial court stated:

> "Well, it's kind of sketchy as to the agreement with the City. There is a trespass agreement. I don't know what the terms of it are and I don't know who signed it. Although it's common knowledge how the Joliet Housing Authority trespass agreement works, that requires a permit procedure and hours of visitation and so forth. I don't know if that's the case here, but what I do know is there is a trespass agreement and I think that's sufficient for the police to investigate."

The trial court denied the motion to suppress, finding that the trespass agreement gave Cardwell authority to investigate and that defendant's inability to explain his presence on the property lead to a lawful arrest.

¶ 9 At trial, Cardwell testified that the City of Joliet police department had a trespass agreement with the owner of the apartment building at 210 North Eastern Avenue. He explained that a trespass agreement is an agreement in which a property owner permits the police to be on his property to investigate crimes of criminal trespass, loitering, and other ordinance violations, as long as there is a "No-Trespassing" sign clearly posted on the property. He testified that a "No-Trespassing" sign was posted on the front door of the 210 apartments.

¶ 10 Cardwell testified that he called for backup that day because he did not know the men sitting on the steps of the apartment building and, given that multiple crimes had recently occurred in the area, he wanted other officers nearby. He called for officers to meet him on Cass Street, half a block away, and about four officers responded to the call. The responding officers remained in their squad cars and Cardwell approached the front of the apartment on foot. When he walked up, the two men were sitting on the steps leading to the basement apartment. They were facing the wall of the building. Cardwell testified that he startled them, and they both stood up. He then stated, "I kind of positioned myself in like an officer safety position to question

them, be [sic] in front of them." At that point, he called the other officers over. They split the two men up and conducted a quick field interview, separately asking them who they were and what their business was at the apartment. When neither one of them was able to provide any details about the apartment residents, Cardwell arrested them for criminal trespass. He testified that a pat-down search led to the discovery of a bag containing some pills in defendant's front pocket.

¶ 11 On cross-examination, Cardwell stated that he knocked on the basement apartment door where defendant claimed he was visiting, but no one answered. He did not attempt to speak with any residents in the upstairs apartments because defendant did not say that he was visiting anyone upstairs.

¶ 12 Officer Melissa Andrzejewski testified that she was in a field officer training program with Officer Charles Mascolino on the day of defendant's arrest. She and Officer Mascolino provided backup for Officer Cardwell. As they were sitting in their squad car, they observed Cardwell make contact with defendant. After Cardwell handcuffed defendant, he motioned to Andrzejewski and Mascolino. As they approached, Cardwell advised Andrzejewski that defendant was being placed under arrest for criminal trespass. He had already placed defendant in handcuffs and searched him. Cardwell handed Andrzejewski a plastic bag containing a green leafy substance and another bag containing several pills. At the station, Andrzejewski placed the pills in an envelope and sealed it with red evidence tape. She counted seven pills in the bag: six blue ones and one peach one.

¶ 13 Forensic scientist Angela Nealand testified that the six blue tablets weighed a total of 2.1 grams. She performed a spectrometer test on one of the blue pills. The pill tested positive for alprazolam, also known as the prescription drug Xanax.

¶ 14 The jury found defendant guilty of unlawful possession of a controlled substance. Following a sentencing hearing, the trial court ordered defendant to serve six years in prison. The court also assessed fines, fees and costs against defendant, including a $100 street value fine.

¶ 15 ANALYSIS

¶ 16 Defendant contends that his motion to suppress was erroneously denied because he was illegally seized when Officer Cardwell searched his pockets and found a controlled substance.

¶ 17 We apply a bifurcated standard of review when reviewing a trial court's decision denying a defendant's motion to quash arrest and suppress evidence. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). In reviewing questions of fact, we defer to the trial court's factual findings and reverse them only if they are contrary to the manifest weight of evidence. *Id.* The question of whether, based on the facts as found by the trial court, suppression is warranted is a legal question we review *de novo*. *Id.* In our *de novo* review of a ruling on a motion to quash arrest and suppress evidence, we may affirm on any basis supported by the record. *People v. Bianca*, 2017 IL App (2d) 160608, ¶ 16.

¶ 18 Citizens of the United States and this State are protected against unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, §6. For purposes of the constitutional right to be free from unreasonable searches and seizures, it is settled that not every encounter between an officer and a citizen involves a seizure or restraint of liberty that implicates the fourth amendment. *Luedemann*, 222 Ill. 2d at 544. Police-citizen encounters are divided into three tiers: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions, or *Terry* stops, which must be supported by reasonable, articulable suspicion of criminal activity; and (3) consensual encounters that involve no coercion or detention and therefore do not implicate fourth amendment interests. *Id.*

¶ 19 A police officer does not violate the fourth amendment by merely approaching an individual on the street and asking questions. *Florida v. Royer*, 460 U.S. 491, 497 (1983). A consensual encounter between an officer and a citizen does not violate the fourth amendment because it does not involve coercion or a detention. *People v. Almond*, 2015 IL 113817, ¶¶ 52, 56.

¶ 20 A person is seized when, by means of physical force or a show of authority, his freedom of movement is restrained and, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. See *People v. Smith*, 331 Ill. App. 3d 1049, 1053-55 (2002) (officers' initial encounter under trespass agreement fell within community caretaking function but turned into an unlawful fourth amendment seizure when they physically grabbed defendant and placed him under arrest without reasonable suspicion of criminal activity); *People v. Brownlee*, 186 Ill. 2d 501, 517 (1999) (defendants were seized when, following the conclusion of a lawful traffic stop, two officers, positioned on each side of the car, remained silent and did not move from their stations for a two-minute period). A defendant is seized within the meaning of the fourth amendment when he or she is detained and handcuffed during a search and is not free to leave. See *Michigan v. Summers*, 452 U.S. 692, 696 (1981).

¶ 21 Under *Terry*, a police officer may conduct a brief investigatory stop of a person when he reasonably believes that the person has committed, or is about to commit, a crime. *People v. Timmsen*, 2016 IL 118181, ¶ 9. The purpose of a *Terry* stop is for an officer to investigate the circumstances provoking his suspicion using the least intrusive means reasonably available. *People v. Close*, 238 Ill. 2d 497, 512 (2010). The officer must have a reasonable articulable

suspicion that criminal activity is afoot, which requires less than probable cause but more than a mere suspicion or "hunch" of criminal activity. *Timmsen*, 2016 IL 118181, ¶ 9.

¶ 22 Here, the circumstances show that Cardwell approached defendant and Jones asked them a few questions as they were sitting on the steps of the apartment building. Other officers immediately joined Cardwell. They separated defendant and Jones and continued to interview them. Cardwell then placed defendant in handcuffs and arrested him for trespassing. When Cardwell placed defendant in handcuffs, defendant was seized. A reasonable person would not have felt free to leave under those circumstances. See *Summers*, 452 U.S. at 696.

¶ 23 The question then becomes whether the officers had valid justification for seizing defendant at that time. The State argues that the encounter was consensual and Cardwell did not need reasonable suspicion of criminal activity to approach defendant and ask him questions. Nothing prevented Cardwell, as a police officer, from approaching defendant and posing questions to him. See *Florida*, 460 U.S. at 497. However, once defendant was handcuffed, he was seized under the fourth amendment. At that point, Officer Cardwell needed reasonable, articulable suspicion that defendant had committed or was about to commit a crime to lawfully detain him. See *Smith*, 331 Ill. App. 3d at 1055.

¶ 24 We disagree with the State's argument that the trespass agreement between the police department and the building's owner authorized the seizure. Here, it appears that the trespass agreement gave Joliet police officers the authority, under certain circumstances, to perform a community-caretaking service and nothing more. As courts have held, a community-caretaking encounter is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *People v. Avant*, 331 Ill. App. 3d 144, 149 (2001); see also *People v. Thompson*, 337 Ill. App. 3d 849, 865 (2003). A police-citizen encounter

cannot be both a community-caretaking stop and a *Terry* stop at the same time because the rights are distinctly different. *Thompson*, 337 Ill. App. 3d at 865. As such, an interagency agreement cannot be the basis for forming a reasonable articulable suspicion of criminal activity. *Id.*

¶ 25 In *People v. Beverly*, 364 Ill. App. 3d 361 (2006), the court addressed the application of a similar trespass agreement. In that case, officers witnessed two men sitting in a parked car in middle of the day in front of an apartment building in a high crime neighborhood. The officers had not received any complaints about the vehicle or the two men sitting in it. The officers did not recognize the two men, and they did not know whether they were residents of the apartment building. A trespass agreement existed between the city's police department and the apartment building's owner, entitling the police to act as the owner's agent to monitor the property and determine whether people on the property were entitled to be there. The officers pulled up next to the defendant's vehicle and walked up to the car to ask the two men questions pursuant to the trespass agreement. During the encounter, one of the officers saw a baggy on the seat of the car. He asked the defendant to step out of the vehicle. The officer placed defendant in handcuffs and recovered a handgun from his pocket. *Beverly*, 364 Ill. App. 3d at 364-65.

¶ 26 The defendant moved to suppress the handgun prior to trial, and the trial court granted his request. On appeal, the reviewing court held that, although the officers had reason to approach and question the defendant and were authorized to do so under the trespass agreement, the agreement did not justify an intrusion on fourth amendment rights. *Id.* at 373-74 (citing *Thompson*, 337 Ill. App. 3d at 856).

¶ 27 Similarly, here, nothing in the record suggests that the agreement authorized officers to detain or arrest individuals without reasonable and articulable suspicion of criminal activity. The officers testified that they were interested in defendant because he was sitting on the steps of an

apartment building in a high crime area, they did not know him, and the department had a trespass agreement with the owner of the building. Although the officers had reason to approach and question defendant, no one testified the terms of the agreement justified intrusion upon fourth amendment rights. We will not assume the agreement did so without the ability to review the document. Based on Officer Cardwell's testimony, the trespass agreement fell within the officers' community-caretaking function and nothing more. Thus, the officers were authorized to approach defendant, ask about his purpose on the property and request that he leave the premises. However, the trespass agreement cannot be the basis for justifying the seizure that followed.

¶ 28 Based on the testimony elicited at the motion to suppress hearing, Cardwell did not have a reasonable and articulable suspicion that defendant had committed criminal trespass. Cardwell saw no signs of a crime occurring and he had not received any complaints about the two men sitting on the steps. Cardwell testified that he detained defendant because his story was inconsistent with Jones' story. Although Cardwell also stated that defendant could not identify the residents of the building, he admitted that he did not talk to any of the residents in the apartment building that afternoon to confirm or deny defendant's authorized presence. Cardwell's testimony establishes nothing more than a mere "hunch" that defendant was trespassing. See *Timmsen*, 2016 IL 118181, ¶ 9.

¶ 29 Defendant testified that he told the officers that he was visiting his God-sister Sharleatha, who lived in the basement apartment. He also testified that the individuals inside the basement apartment spoke with Cardwell and confirmed that he was Sharleatha's God-brother. Fleming's presence on the steps of the apartment building in a high crime area, standing alone, did not provide reasonable suspicion that he was engaged in criminal activity. See *People v. Kipfer*, 356

Ill. App. 3d 132, 138 (2005) (individual's presence in an area where crimes frequently occur, without more, was not enough to support a reasonable, articulable suspicion that the person was committing or had committed a crime). Accordingly, the trial court erred in denying defendant's motion to suppress.

¶ 30 We hold that defendant was improperly seized in violation of the fourth amendment. The trial court's ruling denying defendant's motion to suppress is reversed. The suppression of the Xanax tablets necessitates the reversal of defendant's conviction for possession of a controlled substance. See *People v. Christmas*, 396 Ill. App. 3d 951, 960 (2009) (conviction reversed outright because the State could not prevail on remand without the suppressed evidence). As a result, we need not address the other arguments raised by defendant on appeal.

¶ 31 CONCLUSION

¶ 32 We reverse the trial court's order denying defendant's motion to suppress evidence. We also reverse defendant's conviction for possession of a controlled substance.

¶ 33 Reversed.

¶ 34 JUSTICE SCHMIDT, dissenting:

¶ 35 I respectfully dissent.

¶ 36 The record shows that the arresting officer possessed a reasonable, articulable suspicion that defendant was trespassing when he approached him outside of an apartment complex located in an area wrought with criminal activity and where, just days earlier, people were arrested for possession of weapons and narcotics. The officer did not recognize defendant or his friend and neither appeared to be residents of the complex. See *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing a police officer to conduct a brief, investigatory stop of a person upon a reasonable belief that the person has committed, or is about to commit a crime). When the officer approached the two

men, they were "startled;" one was not truthful about his name, and the other had an empty cigar wrapper at his feet, heightening the officer's suspicion that the men were using narcotics. Neither man provided the names of the residents of the apartment that they were visiting and their stories contradicted one another. No one answered the door at the apartment defendant claimed he was visiting. At this point, the officer possessed probable cause to arrest defendant for trespassing—or to otherwise seize him—under the fourth amendment. See *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)) ("Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."). Accordingly, I would affirm the trial court's denial of defendant's motion to suppress.

¶ 37 Next, I would reject defendant's excessive-sentence claim. Defendant's criminal history made him eligible for an extended-term sentence ranging from three to six years in prison. See 730 ILCS 5/5-4.5-45(a) (West 2014). The trial court carefully considered all of the evidence and all factors in mitigation and aggravation, ultimately finding that his lengthy criminal history—including seven felony convictions—warranted a six-year prison sentence. Based on the record, I would find the trial court did not abuse it discretion in fashioning defendant's sentencing.

¶ 38 Finally, I would vacate the erroneously imposed $100 street-value fine. However, I would decline the State's invitation to remand to the trial court for the imposition of a new street-value fine where the State failed to present any evidence regarding the street value of Xanax in the proceedings below.