2019 IL App (1st) 173010-U
Order filed: April 19, 2019

FIRST DISTRICT
Fifth Division

No. 1-17-3010

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLNOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	2016 CR 10645
ERIC NORALS,	)	
	)	Honorable
	)	Joan O'Brien,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justice Hoffman concurred in the judgment. Justice Hall dissented.

ORDER

¶ 1 *Held*: We reversed the trial court's order granting defendant's motion to reconsider the denial of his motion to quash arrest and suppress evidence and remanded for further proceedings, finding that defendant's stop and frisk was valid under *Terry v. Ohio*, 392 U.S. 1 (1968).

¶ 2 The State appeals the circuit court's order granting defendant's motion to reconsider the denial of his motion to quash arrest and suppress evidence. We reverse and remand.[1]

¶ 3 The State charged defendant with one count of being an armed habitual criminal, two counts of unlawful use or possession of a firearm by a felon, and four counts of aggravated

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

unlawful use of a weapon, after he was found on a public sidewalk on May 6, 2016, while armed with a .45-caliber handgun and the police learned he was a felon.

¶ 4 On November 3, 2016, defendant filed a motion to quash arrest and suppress evidence. Defendant pleaded that Chicago police officers were on routine patrol when they observed him standing in the front yard of his home at 11718 South Eggleston Avenue, talking to members of his family, including his mother. The officers observed a bulge on the right side of his hip, rapidly approached him as he began to walk towards his front door, and ordered him to stop, which he did. The officers conducted a pat-down of defendant that revealed a semi-automatic handgun under his shirt. The officers then placed him in custody without inquiring as to whether he possessed a firearm owners identification (FOID) card. Defendant contended that pursuant to *People v. Aguilar*, 2013 IL 112116, his mere possession of a firearm was not sufficient to justify the stop under *Terry v. Ohio*, 392 U.S. 1 (1968) (a *Terry* stop) or his subsequent arrest.

¶ 5 At the hearing on the motion, Officer Hernandez testified that at about 2 p.m. on May 6, 2016, he and his partner were on patrol in the area of 117th Street and Eggleston Avenue because there had been "a rash of shootings" in that general area over the past month, including two murders. Officer Hernandez had received intelligence reports from other members of the Chicago Police Department stating that the My Blood Brothers (MBB) gang was one of the gangs suspected of being involved in the murders. The police intelligence reports only listed the gang names, and did not name any specific individuals as suspects; defendant's name was not listed in the intelligence reports and Officer Hernandez did not have an arrest warrant for defendant or a warrant to search his residence.

¶ 6 At 117th Street and Eggleston Avenue, Officer Hernandez saw defendant speaking with Durrell Williams on the sidewalk. The officers knew from an intelligence report issued by the

Chicago Police Department after Mr. Williams got out of jail that he was a "high-ranking member of MBB" and that he was currently on parole. They decided to conduct a field interview with Mr. Williams.

¶ 7 Officer Hernandez exited his vehicle and saw two other officers who were at the scene approach Mr. Williams. Meanwhile, Officer Hernandez noticed that defendant began walking towards his home and then double-backed towards his car that was parked in front. Officer Hernandez "observed an outline of a gun on the right side of [defendant's] hip." Defendant was wearing skinny jeans, and the outline of the gun was "just so noticeable." The officer knew it was a gun based on "[e]xperience, *** just something that you pick up within the years of being on the department."

¶ 8 Officer Hernandez told defendant to keep his hands up, which he did. Officer Hernandez then walked toward defendant, touched the right side of his hip, and discovered that defendant was carrying a .45-caliber handgun, about 10 to 12 inches in length. Officer Hernandez yelled out "gun, gun, gun" and put defendant in handcuffs "for officers' safety." Officer Hernandez asked defendant whether he had a FOID card or a license to carry a concealed weapon, and he responded affirmatively. In order to possess a handgun, a person must carry a FOID card issued in his name by the state police. See section 2 of the Firearm Owners Identification Card Act (430 ILCS 65/2 (West 2018)). To receive a license to carry a concealed weapon, a person must have a valid FOID card. See sections 10 and 25 of the Firearm Concealed Carry Act, 430 ILCS 66/10, 25 (West 2018).

¶ 9 No questions were asked at the hearing regarding whether the officer asked defendant to produce the FOID card or concealed carry license.

¶ 10 Officer Hernandez testified that while still at the scene, he ran defendant's name through various police data bases and discovered that defendant was a convicted felon. As a convicted felon, defendant was ineligible to have a FOID card under section 8 of the Firearm Owners Identification Card Act, 430 ILCS 65/8 (West 2018), and was also ineligible to receive a concealed carry license. 430 ILCS 66/10, 25 (West 2018).

¶ 11 Defendant testified that at about 2 p.m. on May 6, 2016, he was standing in front of his house at 11718 South Eggleston with his friend, Durrell Williams. Defendant had "a black Nike sweater on with black jeans and black gym shoes." Defendant's mother and sister were sitting in his sister's car in the front of the house. Two police cars drove up; one parked in his driveway while the other parked behind his sister's car. The officers "jumped out" and told defendant and Mr. Williams to walk over to them. Defendant and Mr. Williams complied and walked toward the officers, who told them that there had been a shooting in the area. One of the officers searched defendant by patting him over his clothing on his left and right sides, then pulled up his sweater and found the .45-caliber semi-automatic handgun tucked in his right waistband. Defendant's mother and sister yelled at the officers that he "didn't do anything." Defendant's mother was crying, and his sister "was dramatic."

¶ 12 The officers placed defendant in handcuffs and drove him to the police station, where they asked him if he had a FOID card or concealed carry license. The officers never asked him those questions prior to his arrest and transport to the police station. Defendant never told the officers that he had a FOID card or a concealed carry license.

¶ 13 Erica Shannon, defendant's sister, testified that at 2 p.m. on May 6, 2016, she was sitting in her car in front of the residence at 11718 South Eggleston. Her mother and two other family members came out of the house and entered the car with her; meanwhile, defendant was standing

in front of the house, wearing baggy pants and a baggy sweater, and talking with a friend of his. She does not know the identity of the friend.

¶ 14 Two police cars drove up; one parked on the lawn, while the other parked in back of her car. The officers "hopped out" and searched defendant and his friend.

¶ 15 Following all the evidence, the trial court denied defendant's motion to quash arrest and suppress evidence on April 21, 2017. The trial court found from Officer Hernandez's testimony that the officers had sufficient grounds to conduct a *Terry* stop upon seeing defendant with the outline of a gun in his clothing. The trial court further found that the officers properly handcuffed defendant to ensure their safety as well as the safety of defendant's family who was also in the area. Finally, the court found that after the officers conducted a check and determined that defendant was a felon who could not have a FOID card or concealed carry license, they had sufficient probable cause to arrest him.

¶ 16 Defendant filed a motion to reconsider the denial of his suppression motion, which the trial court granted on August 25, 2017. The trial court reconsidered its earlier finding that the visible outline of a gun in defendant's clothing was sufficient to warrant a *Terry* stop, and that the officers acted properly to ensure public safety by handcuffing defendant. The court instead found that under *Aguilar* and its progeny, the officers lacked sufficient reason to conduct a *Terry* stop of defendant, and to handcuff him, based only on defendant's possession of a gun. The court concluded that, given the invalidity of the *Terry* stop, the warrantless arrest was improper and the suppression motion must be granted. The State filed a motion to reconsider, which the trial court denied. The State now appeals.

¶ 17 Initially, we note that defendant has failed to file an appellee's brief in this appeal. On our own motion, we ordered this case taken for consideration on the State's brief alone. We consider

the instant appeal pursuant to the principles of *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (allowing consideration of an appeal based on the appellant's brief only when the record is simple and the errors can be considered without additional briefing).

¶ 18 On review of the trial court's ruling on a motion to quash arrest and suppress evidence, we will not reverse the court's factual findings unless they are against the manifest weight of the evidence. *In re Maurice J.*, 2018 IL App (1st) 172123, ¶17. We review the trial court's ultimate ruling on whether to grant or deny the motion *de novo*. *Id.*

¶ 19 In his motion to quash arrest and suppress evidence, defendant argued that the officers' search and seizure of him violated his rights under the federal and state constitutions. Under the fourth amendment and the Illinois Constitution of 1970, persons have the right to be free from unreasonable searches and seizures. *In re O.S.*, 2018 IL App (1st) 171765, ¶21; U.S. Const., amend. IV; Ill. Const. 1970, art. I, §6. "The 'essential purpose' of the fourth amendment is to impose a standard of reasonableness upon the exercise of discretion by law enforcement officers to safeguard the privacy and security of individuals against arbitrary invasions." *People v. McDonough*, 239 Ill. 2d 260, 266 (2010). To prevail on a motion to suppress at trial, defendant bears the burden of producing evidence and establishing a *prima facie* case that the search and seizure was unreasonable. *People v. Thomas*, 2019 IL App (1st) 170474, ¶15. Once defendant makes a *prima facie* showing of an illegal search and seizure, the burden shifts to the State to produce evidence justifying the intrusion. *Id.*

¶ 20 For fourth amendment purposes, a person has been seized when his freedom of movement has been restrained by means of physical force or show of authority. *In re O.S.*, 2018 IL App (1st) 171765, ¶22. Relevant factors to consider when determining whether defendant was

seized include: (1) the threatening presence of multiple officers; (2) the officer's display of a weapon; (3) some physical touching of defendant's person; and (4) the use of language or tone of voice indicating that compliance might be compelled. *Id*. ¶23.

¶ 21 However, not every interaction between police officers and private citizens results in a seizure that violates the fourth amendment. *Id*. ¶21. There are three tiers of police-citizen encounters that do not constitute an unreasonable seizure. *People v. Gherna*, 203 Ill. 2d 165, 176 (2003). The first tier involves the arrest of a citizen, which must be supported by probable cause. *Id*. Probable cause exists when the facts and circumstances known by the arresting officer are sufficient to warrant a reasonable person to believe that the suspect has committed an offense. *Id*.

¶ 22 The second tier involves a *Terry* stop. Under *Terry*, an officer may conduct a brief, investigatory stop of a person when the officer reasonably believes that the person has committed, or is about to commit, a crime. *People v. Timmsen*, 2016 IL 118181, ¶9. The officer must have a reasonable, articulable suspicion that criminal activity is afoot, which requires less than probable cause but more than a mere hunch. *Id*. In reviewing the officer's conduct, we consider the totality of the circumstances under an objective standard, considering whether all the facts available to the officer at the time of the seizure would cause a person of reasonable caution to believe that the stop was appropriate. *Id*. To further justify a frisk under *Terry*, the officer must also articulate a reasonable belief that the suspect was armed and dangerous. *People v. Sims*, 2014 IL App (1st) 121306, ¶10.

¶ 23 The third tier of police-citizen encounters involves those encounters that are consensual and, as they involve no coercion or detention, do not implicate the fourth amendment. *Gherna*, 203 Ill. 2d at 177.

¶ 24 In the present case, when granting defendant's motion to reconsider the denial of his motion to quash the arrest and suppress evidence, the trial court found that under *Aguilar* and its progeny, Officer Hernandez did not have sufficient grounds to make a *Terry* stop and frisk of defendant. In *Aguilar*, our supreme court found that the Class 4 form of aggravated unlawful use of a weapon (UUW) under section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code of 1961 then in effect (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008)), which prohibited the possession of an uncased, loaded, and immediately accessible firearm outside the home, is facially unconstitutional because it violates the right to keep and bear arms as guaranteed by the second amendment of the United States Constitution. *Aguilar*, 2013 IL 112116, ¶22. Subsequently, the supreme court clarified that section 24-1.6(a)(1), (a)(3)(A) of the aggravated UUW statute is facially unconstitutional without limitation to any particular form or class of the offense. *People v. Burns*, 2015 IL 117387, ¶25. Post-*Aguilar*, the appellate court has held that the possible observation of a handgun on defendant's person is not in itself sufficient to provide an officer with the reasonable suspicion of criminal activity to justify a *Terry* stop and frisk (see *People v. Thomas*, 2016 IL App (1st) 141040), nor does it provide probable cause for arrest. *People v. Horton*, 2017 IL App (1st) 142019. However, both *Thomas* and *Horton* were subsequently vacated by our supreme court on other grounds (see *People v. Thomas*, No. 121947 (Sept. 27, 2017) and *People v. Horton*, No. 122461 (Nov. 22, 2017)), thereby rendering both judgments void. See *People v. Simmons*, 2016 IL App (1st) 131300, ¶116 (judgments vacated by the supreme court are void and of no effect).

¶ 25 In addition, *Thomas* and *Horton* are factually distinct from the present case, as Officer Hernandez's testimony at the suppression hearing, which the circuit court found to be credible, revealed that his *Terry* stop and frisk was precipitated upon *more* than just observing a possible

gun on defendant. Rather, the *Terry* stop and frisk was precipitated on *all* the following facts: (1) Officer Hernandez and his partner were patrolling the area of 117th Street and Eggleton Avenue because there had been a "rash of shootings" including two murders in that general area within the previous month; (2) Officer Hernandez had received intelligence reports from the Chicago Police Department stating that the MBB gang was suspected of being involved in the murders; (3) Officer Hernandez saw defendant at 11718 South Eggleston Avenue, speaking with Durrell Williams, a high-ranking member of the MBB, who was currently on parole; (4) after exiting his vehicle, Officer Hernandez saw defendant walk toward the house and then "double back" toward the car parked in front, and (5) Officer Hernandez saw on the right hip of defendant's skinny jeans an outline of an object that he knew, based on his experience as a police officer, to be a gun.

¶ 26 Viewing the totality of the circumstances, which we must when considering the propriety of a *Terry* stop and frisk (*Sims*, 2014 IL App (1st) 121306, ¶9), Officer Hernandez's observation of defendant in a high-crime area speaking with a high ranking member of a gang suspected to be involved in two recent murders, with the outline of a gun on his right hip, provided reasonable, articulable suspicion that criminal activity may be afoot and that defendant may be armed and dangerous. Accordingly, Officer Hernandez's *Terry* stop and frisk of defendant passed constitutional muster.

¶ 27 In support of our holding, we cite a case recently decided by this court, *People v. Thomas*, 2019 IL App (1st) 170474 (which we designate as *Thomas II* so as to avoid confusion with the unrelated case *People v. Thomas*, No. 121947, discussed earlier in this order). In *Thomas II*, the defendant Markeese Thomas was charged with aggravated UUW after police observed him, while in the common area of an unlocked multiunit apartment building, hand off a

gun to another person and then flee upstairs to an apartment unit. *Id*. ¶1. The charges asserted that Mr. Thomas illegally possessed a handgun while not on his land or in his home and without a valid FOID card or concealed carry license. *Id*. ¶3. Mr. Thomas filed a motion to quash his arrest and suppress evidence, which the trial court granted. *Id*. ¶1. The State appealed. *Id*.

¶ 28 In his motion to quash and suppress, and in response to the State's appeal, Mr. Thomas argued that the officers lacked reasonable suspicion or probable cause to believe he was committing a crime because, pursuant to *Aguilar*, possession of a gun is not *per se* illegal and the police failed to ask him whether he had a valid FOID card or concealed carry license prior to arresting him. *Id*. ¶31. The appellate court disagreed with Mr. Thomas, noting that "mere gun possession was not the scenario that presented itself to police." *Id*. ¶36. The appellate court examined the totality of the circumstances, specifically: that the arresting officer had made multiple arrests for narcotics, gangs, and drugs in the neighborhood and was patrolling due to the activities of two rival gangs at the time of the incident; around 7:30 p.m. he observed Mr. Thomas loitering on the sidewalk in front of an apartment building; Mr. Thomas fled into the apartment building upon seeing the officer; the officer entered the apartment building, where he saw Mr. Thomas and another man, Turner, in the common area; the officer saw that Mr. Thomas had a firearm, which he handed to Turner and then fled to a second floor apartment unit and closed the door behind him; Turner threw the handgun on the landing and was detained; the officer recovered the loaded firearm and went to the apartment unit, where a female inside opened the door and the officer arrested Mr. Thomas. *Id*. ¶¶4-7. The appellate court concluded that the totality of these circumstances "suggested criminal activity" (*id*. ¶36) which gave the officers not only a reasonable suspicion to make a *Terry* stop, but probable cause to arrest him. *Id*. ¶¶34-35.

¶ 29 Similarly, in the present case, mere gun possession was not the scenario that presented itself to Officer Hernandez. Rather, the totality of the circumstances show that he was patrolling the area due to a rash of shootings including two recent murders, he received intelligence reports from the Chicago Police Department indicating the involvement of the MBB gang, he observed defendant talking to a known high-ranking MBB gang leader who had also been identified in an intelligence report, and he observed the outline of a gun on the hip of defendant's skinny jeans. All these circumstances gave Officer Hernandez the reasonable, articulable suspicion of criminal activity necessary to make a *Terry* stop and frisk.

¶ 30 We note that in granting defendant's motion to reconsider the denial of his motion to quash arrest and suppress evidence, the trial court questioned whether Officer Hernandez's handcuffing of defendant immediately after frisking him transformed the *Terry* stop into an illegal arrest. The handcuffing of a defendant does not necessarily transform a T*erry* stop into an illegal arrest, if the circumstances surrounding the stop show that the use of handcuffs was reasonably necessary to effectuate the stop and foster the safety of the officers and/or of the public. *People v. Daniel*, 2013 IL App (1st) 111876, ¶¶39-40. Officer Hernandez testified here that he handcuffed defendant for the safety of the officers where his frisk of defendant revealed that he was carrying a .45-caliber handgun on his person in the high crime area while associating with a high-ranking member of a gang that was suspected in two recent murders; also, at the time of the stop and frisk, multiple members of defendant's family, who were sitting in a nearby car, had become emotional and were yelling at the officer, further raising potential safety concerns. Under all these circumstances, the use of handcuffs was reasonably necessary to effectuate officer safety while the officer performed the computer check of defendant at the scene and did not transform the *Terry* stop into an arrest.

¶ 31 Finally, Officer Hernandez testified that his computer check revealed that defendant was a convicted felon who was ineligible to have a FOID card or concealed carry license (see 430 ILCS 65/2, 66/10, 25 (West 2018)), meaning that his possession of the .45-caliber handgun was illegal. Accordingly, at that point Officer Hernandez had probable cause to arrest defendant and transport him to the police station, which he did. Therefore, defendant's fourth amendment rights were not violated.

¶ 32 For all the foregoing reasons, we reverse the order of the circuit court that granted defendant's motion to reconsider the denial of his motion to quash arrest and suppress evidence. We remand for further proceedings.

¶ 33 Reversed and remanded.

¶ 34 JUSTICE HALL dissenting:

¶ 35 I respectfully disagree with the majority's holding in this case.

¶ 36 In reviewing a trial court's ruling on a motion to suppress, we accept the court's findings of fact unless they are against the manifest weight of the evidence, but review its ultimate ruling as to whether suppression is warranted *de novo*. *People v. Rhinehart*, 2011 IL App (1st) 100683, ¶ 9, citing *People v. Harris*, 228 Ill. 2d 222, 230 (2008).

¶ 37 The fourth amendment applies to all seizures of a person. *People v.* Bailey, 314 Ill. App. 3d 1059, 1063 (2000). For purposes of the fourth amendment, an individual is "seized" when an officer " 'by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' " *Florida v. Bostick*, 501 U.S. 429, 434 (1991), quoting *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968). An individual cannot be seized absent reasonable, objective grounds for doing so. *United States v. Mendenhall*, 446 U.S. 544, 556 (1980); *People v. Gherna*, 203 Ill. 2d 165, 186 (2003). In *Terry v. Ohio*, 392 U.S. 1, 29-31 (1968), the United States Supreme Court held

that a police officer "may, within the parameters of the fourth amendment, conduct a brief, investigatory stop of a citizen when the officer has a reasonable, articulable, suspicion of criminal activity." A *Terry*, analysis involves a dual inquiry: (1) whether the officer's action was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances that justified the interference in the first place. *People v. Parra*, 352 Ill. App. 3d 584, 587 (2004), citing *People v. Gonzalez*, 204 Ill. 2d 220, 228 (2003). While reasonable suspicion is a less demanding standard than probable cause, the fourth amendment requires at least a minimal level of objective justification for making the stop. *Rhinehart*, 2011 IL App (1st) 100683, ¶ 11; citing *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

¶ 38 Here, the articulated reason for the stop was Officer Hernandez' sighting of Durrell Williams, who was standing on the sidewalk talking to defendant, while defendant stood in his front yard. Officer Hernandez testified at the hearing on defendant's suppression motion that he was patrolling the neighborhood investigating shootings that had occurred in the last month in the area. Williams, who was familiar to Officer Hernandez, was a recent parolee and a high-ranking member of one of the gangs that was alleged to be responsible for the shootings. Defendant was not named in the investigation, nor was he previously known to Officer Hernandez. The articulated reason for the stop was to conduct a field interview of Williams. According to defendant's and his sister's testimony, there were two police cars at the scene, one which pulled onto the front lawn near where Williams and defendant were talking, and one which pulled behind his sister's vehicle in the driveway.

¶ 39 Once the officers exited the vehicle to talk to Williams, defendant walked towards the house before he exited the yard and walked towards his sister's car, which contained his mother and other family members. When he reached the sidewalk, Officer Hernandez told him to stop

and put his hands up before patting him down and recovering the gun. Officer Hernandez stated that he saw the outline of what appeared to be a gun when defendant began walking away and that he thought it was a gun based on his "experience, him scanning the area, just something that you pick up within the years of being on the department." Both defendant and his sister testified that defendant wore a baggy sweater and baggy jeans, while Officer Hernandez testified that defendant wore skinny jeans.

¶ 40 I believe this to be an invalid *Terry* stop. As admitted by Officer Hernandez, defendant was not the subject of the stop; defendant had nothing to do with the articulated purpose of the stop. Talking to a gang member is not a crime. Once the police moved toward Williams to conduct their field interview, the purpose of the stop was fulfilled. Moreover, at the time of the initial stop to interview Williams, defendant was on his own land and it was only after the police arrived that defendant left the yard and walked towards his family members who were in the car parked in the driveway. Officer Hernandez testified that he saw what he believed to be a gun in defendant's waistband upon first exiting the vehicle and again when defendant walked from the yard towards his sister's car. I would find that this, standing alone, did not give the police reasonable suspicion of any criminal activity by defendant; as our supreme court noted in *People v. Aguilar*, 2013 IL 112116, *People v. Burns*, 2015 IL 117387 and *People v. Mosley*, 2015 IL 115872, it is not unlawful for a person to carry a firearm in their vehicles, outside the home or on a public way. Additionally, those cases concluded that the subsections of the aggravated unlawful use of a weapon statute that prohibited persons from carrying uncased firearms in vehicles, outside of the home, or on a public way violated the second amendment right to bear arms on its face. See *Aguilar*, 2013 IL 112116, ¶ 22; *Burns*, 2015 IL 117387, ¶ 25; *Mosley*, 2015 IL 115872, ¶ 61. Once defendant was ordered to stop and put his hands up, he was seized within

the meaning of the fourth amendment without reasonable justification, and subsequently subjected to an illegal search. As such, I would find that this was an invalid *Terry* stop as it is not unlawful to carry a gun without more.

¶ 41 Moreover, the fact that a person is in a high crime area is insufficient to support a reasonable suspicion that a person is committing a crime, although it is a relevant factor. *Wardlow*, 528 U.S. at 124; *People v. Smith*, 331 Ill. App.3d 1049, 1054 (2002).

¶ 42 I would affirm the decision of the trial court and grant defendant's motion to suppress.