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2011 IL App. (3d) 100207-U

Order filed November 8, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT  
A.D., 2011

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 9th Judicial Circuit McDonough County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-10-0207
	)	Circuit No. 08-CF-326
MARK HAY,	)	Honorable
Defendant-Appellant.	)	John Clerkin
	)	Judge, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Justices Schmidt and Lytton concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Where the record is devoid of any evidence contradicting a trial court's factual finding regarding consent to search, we will not disturb said finding. Where an officer has probable cause to detain an individual and search his wallet, this show of authority does not constitute an illegal search and seizure in violation of the fourth amendment.
- ¶ 2 Defendant, Mark Hay, appeals from the trial court's order denying his motion to suppress.

For the reasons that follow, we affirm.

¶ 3 **FACTS**

¶ 4 Defendant was charged by information with one count of unlawful possession of a controlled substance and one count of unlawful possession of drug paraphernalia. The information alleged that the offenses were committed on or about November 14, 2008, and that defendant knowingly possessed less than 15 grams of a substance containing cocaine (Count I) and a rolled up dollar bill used as a "snorting tube" for ingesting and inhaling cocaine into his body (Count II).

¶ 5 Defendant filed a motion to suppress evidence. The motion alleged the following facts: (1) defendant was working as a bartender, along with Michael Quesenberry, at the Last Chance Saloon (the Saloon) when three officers entered the tavern, (2) an officer asked defendant to come out from behind the bar and informed him that Quesenberry had been placed under arrest, (3) the officer then began to search defendant, (4) defendant did not consent to the search, (5) defendant removed a rolled up bill from his own pocket, which the officer confiscated, (6) defendant then attempted to hand his wallet off to someone in the tavern, (7) the officer stopped defendant and confiscated the wallet, and (8) another dollar bill was subsequently located within defendant's wallet, which had cocaine residue on it. Defendant's motion alleged, *inter alia*, that the search of his person and the seizure of the two bills were illegal, and that even if the court concluded that defendant had given voluntary consent to submit to a search, that consent was properly rescinded at the time defendant attempted to hand his wallet off to someone at the tavern.

¶ 6 A hearing was held on defendant's motion to suppress. The hearing consisted of the testimony of a single witness, Macomb police officer Lindsey May. May indicated that he received information, from Quesenberry's former fiancée, about illegal drug sales being

conducted at the Saloon. In particular, the former fiancée, from whom May had received accurate information about other drug crimes in the past, told him that prescription pills were being distributed from behind the bar. May also noted that the Saloon had previously been the site for around 50 separate drug incidents.

¶ 7 May testified that he was on duty on November 14, 2008, when he and two other Macomb officers conducted a tavern check at the Saloon. When May entered the Saloon, both defendant and Quesenberry were working behind the bar. May saw defendant and Quesenberry make a hand-to-hand exchange behind the bar, but could not tell what specifically was passed. Quesenberry then pulled a small "pink pill" out of his pocket, however, he put the pill back in his pocket when he saw May and the other two officers approaching. Quesenberry gave the officers consent to be searched and the officers found a Darvocet pill in his pocket. The officers then walked Quesenberry outside and arrested him.

¶ 8 May went back into the bar and asked defendant if he would be willing to talk to him for a minute. Defendant agreed. May proceeded to ask defendant if he had anything illegal on him and if he would consent to being searched. Specifically, the following colloquy took place:

"Q How did you ask for consent?

A I asked him if he had anything illegal on him and if he cared if I searched him.

Q What was his response?

A No, he didn't have a problem with it.

Q All right, and before you could start to search what happened?

A He started digging in his own pockets.

Q What, if anything did you see?

A Him pulling out items out of his pockets, money, \*\*\*

[and] a rolled-up dollar bill."

¶ 9 Based on his experience, May believed the rolled-up dollar bill was a "snorter bill" (a bill used to snort cocaine). May confiscated the dollar bill and noticed "white dust" on the inside of it. May then asked defendant if there was any cocaine residue on the dollar bill. Upon being asked this question, defendant immediately "turned and tried to start handing his wallet to a female." In doing so, defendant frantically told the female "take my wallet, take my wallet, take my wallet." May interjected "no" and grabbed defendant's arm. He then took defendant's wallet from defendant's hand. Defendant was subsequently handcuffed and taken into custody.

¶ 10 Upon searching defendant's wallet, May found a second dollar bill. This bill was "folded-up." May left the bill in the wallet and did not examine it further until arriving back at the McDonough County jail. May observed that the second dollar bill also had white dust on it. May conducted a field test on the substance and it tested positive for cocaine.

¶ 11 The State moved for a directed finding on defendant's motion to suppress. In granting the State's motion the court found that defendant's fourth amendment rights were not violated because May had probable cause to search defendant. Alternatively, the court held that defendant consented to May's request to search.

¶ 12 Defendant waived his right to a jury trial. The State summarized the facts that were heard at the suppression hearing and the parties stipulated that the white dust found on the dollar bills tested positive for cocaine. Defendant was found guilty of both charges.

¶ 13

## ANALYSIS

¶ 14 The sole issue before this court is whether the trial court erred in denying defendant's motion to suppress. Defendant argues that he did not consent to May's request to search.

Defendant also contends that May did not have probable cause to search his person or wallet.

¶ 15 Our review of the record gives us no reason to disturb the trial court's factual finding that defendant consented to May's request to search. However, even assuming defendant had not consented, we find defendant's own actions of emptying his pockets did not constitute a search. Moreover, defendant was not seized at this time and, therefore, the provisions of the fourth amendment were not implicated. Instead, defendant was not seized, and his wallet searched, until May asserted his authority by grabbing defendant's arm and taking him into custody. At this point, May had probable cause to search defendant's wallet<sup>1</sup> and thus defendant's fourth amendment rights were not violated.

¶ 16 Reviewing a trial court's ruling on a motion to suppress involves mixed questions of fact and law. *People v. Gherna*, 203 Ill. 2d 165, 175 (2003). On review, we give 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. *Gherna*, 203 Ill. 2d at 175. However, we review the trial court's legal determination of whether suppression is warranted under those facts *de novo*. *Gherna*, 203 Ill. 2d at 175.

¶ 17 At the outset, we note that there is nothing in the record to contradict the trial court's factual finding that defendant consented to May's request to search. May, the sole witness at the

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<sup>1</sup> The second dollar bill containing cocaine was found in defendant's wallet, not on his person.

hearing, testified that defendant stated he had "[n]o[] \*\*\* problem with [being searched]." The trial court was in the best position to weigh May's credibility. Thus, we will not disturb the trial court's finding regarding consent. See *People v. Rincon*, 387 Ill. App. 3d 708, 724 (2008).

¶ 18 "[O]ne who consents to a search of his property waives his constitutional rights to complain that the search and seizure were unlawful." *People v. Armstrong*, 41 Ill. 2d 390, 396 (1968). We could affirm on this basis alone. However, we will review defendant's substantive arguments.

¶ 19 It is well settled that a seizure does not occur simply because a law enforcement officer approaches an individual and puts questions to that person if he or she is willing to listen. *United States v. Drayton*, 536 U.S. 194, 200 (2002); *Ghera*, 203 Ill. 2d at 178. In *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991), the Supreme Court explained that the police may do more than merely ask questions without turning the encounter into a seizure:

"We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual [citations]; ask to examine the individual's identification [citations]; and request consent to search \*\*\* [citations]--as long as the police do not convey a message that compliance with their requests is required."

¶ 20 Here, defendant was not seized at the time May asked defendant if he had anything illegal on him and if he cared if May searched him. May asked to talk to defendant and defendant agreed. More specifically, the record does not reveal any conduct of May that would lead a reasonable innocent person under identical circumstances to believe that he or she was not

" 'free to decline the officers' requests or otherwise terminate the encounter.' " *Gherna*, 203 Ill. 2d at 178, quoting *Bostick*, 501 U.S. at 436. Furthermore, we do not believe defendant's own actions of "digging in his \*\*\* pockets" constitutes a search within the meaning of the fourth amendment. It was defendant's actions alone that revealed the "snorter bill", not any action by May.

¶ 21 We do believe, however, that defendant was seized at the time May grabbed defendant's arm in an attempt to stop him from handing his wallet off to a nearby patron; handcuffed him and took him in to custody. However, because May had probable cause at this time to detain defendant and search his wallet, this show of authority did not constitute an illegal search and seizure in violation of the fourth amendment.

¶ 22 "A seizure, for fourth amendment purposes, is synonymous with an arrest." *People v. Melock*, 149 Ill. 2d 423, 436 (1992). Absent probable cause or a warrant based thereon, an arrest is violative of the fourth amendment protections. See *Dunaway v. New York*, 442 U.S. 200, 216 (1979). "Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Wear*, 229 Ill. 2d 545, 564 (2008).

¶ 23 The following facts, in the instant case, establish probable cause: (1) May received information about illegal drug sales being conducted at the Saloon, (2) May witnessed defendant and Quesenberry make a hand-to-hand exchange under the bar, (3) a Darvocet pill was found in Quesenberry's possession, (4) defendant pulled what appeared to be a "snorter bill" with white dust inside of it out of his pants' pocket, and (5) defendant frantically attempted to hand his wallet to a nearby patron when May asked defendant if there was any cocaine residue on the

"snorter bill." The totality of the circumstances establishes a lawful seizure of defendant and search of his wallet.

¶ 24 For the foregoing reasons, we affirm the trial court's judgment denying defendant's motion to suppress.

¶ 25 Affirmed.