SECOND DIVISION
MARCH 31, 2011

1-09-1589

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.
	)	
v.	)	No. 08 CR 12987
	)	
SAMUEL DENEAL,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Connors concurred in the judgment.

ORDER

Held: The trial court properly denied defendant's motion to suppress because defendant was not seized within the meaning of the fourth amendment when he admitted to possessing drugs on his person. The trial court properly charged defendant with the $200 DNA analysis fee and $25 court services fee, but improperly charged him with the $5 court system fee. The parties agree that defendant should have been assessed the mandatory $50 court system fee associated with a felony conviction. The judgment of the trial court was affirmed, and the mittimus corrected.

Following a bench trial, defendant Samuel Deneal was found guilty of possession of a controlled substance and sentenced to two and a half years of imprisonment. On appeal, defendant contends that the trial court erred in denying his motion to suppress because the officers lacked a reasonable, articulable suspicion that defendant was engaging in criminal activity necessary to support a *Terry* stop and the search of his person. Defendant also challenges the imposition of

certain fines and fees. We affirm the judgment of the circuit court of Cook County.

Defendant was arrested, then charged with the above-stated offense after he admitted to officers that he possessed drugs. Prior to trial, defendant filed a motion to quash his arrest and suppress evidence of the seized drugs (motion to suppress).

The evidence presented at defendant's pretrial hearing and trial revealed that Chicago police officers Ventura (Officer Ventura) and Zamora (Officer Zamora) were patrolling the high-crime Lockwood neighborhood in plainclothes and an unmarked police vehicle when they saw defendant loitering at the corner. They stopped their vehicle and approached defendant on foot to conduct a "field interview" in relation to narcotics. Officer Zamora testified that he simply wanted to talk to defendant. Defendant, however, appeared "very nervous." Officer Ventura asked defendant if he could do a "patdown" for officer safety and inquired whether defendant had anything that could be of harm. According to Officer Zamora's testimony, however, Officer Ventura "asked [defendant] if he had anything on his -- anything that would hurt him 'cause I [Officer Zamora] was going to conduct a patdown for safety." Defense counsel clarified that it was Officer Ventura who asked defendant if he had "anything on [him]." In response to the officer's question, defendant stated that he had drugs in his shirt pocket. Officer Zamora reached into defendant's pocket and recovered what was later established to be PCP. Officer Zamora testified that defendant was in no way detained prior to his admission.

The trial court denied the motion to suppress. In doing so, the trial court noted that the officers had no reasonable suspicion to search defendant merely because he was loitering on the corner in a high crime area. The trial court stated, "loitering is not an offense." However, the trial court observed that as the officers approached, defendant became nervous and "whatever the cause of the nervousness, whatever the cause of the approach, the officers indicated they intended to conduct a protective patdown upon saying *** am I going to hurt myself with anything I touch in there[?] Do you have anything I should know about[?]" The trial court found that it was defendant

who "gave up the drugs" when "asked about what he had." Accordingly, the trial court concluded that "as the event evolved," the officers acted reasonably and "[t]here was nothing improper." Defendant now challenges that ruling on appeal.

In reviewing a motion to suppress, we defer to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). A reviewing court, however, remains free to undertake its own assessment of the facts in relation to the issues and may draw its own conclusions when deciding what relief should be granted. *Luedemann*, 222 Ill. 2d at 542. Accordingly, we review *de novo* the trial court's ultimate legal ruling as to whether suppression is warranted. *Luedemann*, 222 Ill. 2d at 542. In our review, we consider both the evidence submitted at the suppression hearing and at trial. See *People v. Ball*, 322 Ill. App. 3d 521, 532 (2001).

Defendant contends that the trial court erred in denying his motion suppress because the officers lacked a reasonable, articulable suspicion that defendant was engaging in criminal activity necessary to support a *Terry* stop and the search of his person.

The State responds that there was no *Terry* stop in this case. The State argues that the interaction between defendant and the police constituted a consensual encounter, rather than a fourth amendment seizure.

The fourth amendment of the United States Constitution and Article I, section 6, of the Illinois Constitution provide that people have the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const., amend IV; Ill. Const. 1970, art. I, §6. Logically, the fourth amendment requires that all seizures of the person be founded upon an objective justification, even if they involve a brief detention short of traditional arrest. *United States v. Mendenhall*, 446 U.S. 544, 551 (1980); *Luedemann*, 222 Ill. 2d at 544. Accordingly, if defendant was seized when the officers approached and questioned him, the officers had to reasonably suspect him of criminal activity for their conduct to be constitutional. See *Mendenhall*, 446 U.S. at 551-52;

Luedemann, 222 Ill. 2d at 544; *People v. Marshall*, 1-08-1242, slip op. at 11 (Dec. 21, 2010).

However, it is well-established that not all personal intercourse between the police and citizens involves a fourth amendment "seizure." *Mendenhall*, 446 U.S. at 552; *Luedemann*, 222 Ill. 2d at 544. For example, a seizure does not occur simply because a law enforcement officer approaches a citizen and presents him with questions if that person is willing to listen. *Luedemann*, 222 Ill. 2d at 551. Rather, a seizure takes place when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *Mendenhall*, 446 U.S. at 552; *Luedemann*, 222 Ill. 2d at 550.

Here, two plainclothes police officers stopped their unmarked vehicle, then approached defendant on foot. Officer Ventura essentially asked defendant if he had any weapons and requested a patdown. We do not believe this language compelled compliance from defendant. See *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *People v. Castigilia*, 394 Ill. App. 3d 355, 360 (2009). In addition, there is no evidence that Officer Ventura made the request using an authoritative tone, physically touched defendant before making the request, or displayed weapons. In the absence of these factors, we cannot say there was a seizure; defendant remained free to decline the patdown request, or to terminate the encounter and leave. See *Luedemann*, 222 Ill. 2d at 550, 553-54. While there were two police officers, a factor worth considering, we note, again, that they were in plainclothes. That fact diminishes the threat of their presence. See *Castigilia*, 394 Ill. App. 3d at 358. In short, the total evidence does not show that the officers, through means of physical force or show of authority, restrained defendant's liberty.

There was no seizure within the meaning of the fourth amendment and thus no *Terry* stop until after defendant admitted possessing drugs. At that point, the police clearly had probable cause to search defendant's person and, on finding the PCP, to arrest him. *People v. Anderson*, 395 Ill. App. 3d 241, 249 (2009). Therefore, the trial court rightly denied defendant's motion to suppress.

In reaching this conclusion, we reject defendant's reliance on *People v. Ocampo*, 377 Ill.

App. 3d 150, 160-61 (2007), and *People v. Jackson*, 389 Ill. App. 3d 283, 288 (2009). In *Ocampo*, a police officer pulled his car behind a gas station in front of the defendant, exited the car, showed the defendant his badge, and told the defendant that he "needed to talk." The officer was soon joined by three others, and the encounter resulted in the discovery of drugs. In *Jackson*, a uniformed police officer approached the defendant and ordered him to remove his hands from his pockets. The officer repeated the order three or four times, and when the defendant finally complied, a weapon fell out of his pocket. In both cases, the court held that the evidence was sufficient to establish that an unconstitutional seizure had occurred.

This case is distinguishable. Officer Ventura simply asked defendant if he had anything that could harm the officers, then requested a patdown. *Cf. People v. Wells*, 403 Ill. App. 3d 849, 855 (2010) (no consensual encounter where officers approached defendant and immediately restrained him). This was not an order, as in *Jackson*, and there was no indication that defendant was required to comply with the request, as in *Ocampo*. Unlike *Ocampo*, the officers appear to have waited for defendant's consent before proceeding.

Our conclusion is consistent with the deferential standard of review required when examining the trial court's historical findings of fact. Here, the trial court's findings of fact, although not explicit, indicate that the encounter between defendant and the police was consensual. The trial court noted that although the officers did not have reasonable suspicion to search defendant merely for loitering, there was no reason why the officers could not question defendant. The trial court observed that "the officers indicated they intended to conduct a protective patdown upon saying *** am I going to hurt myself with anything I touch in there[?] Do you have anything I should know about[?]" The trial court then found that it was defendant who "gave up the drugs" when "asked about what he had," and the officers acted reasonably. The trial court thus found that the officers requested the patdown, but did not order it.

We note that it is possible to interpret Officer Zamora's testimony regarding the request as

conflicting with Officer Ventura's. Officer Zamora, for example, testified that Officer Ventura "asked [defendant] if he had anything on his -- anything that would hurt him 'cause I [Officer Zamora] was going to conduct a patdown for safety." Defendant would have us interpret the latter part of the sentence as signifying that the police intended to patdown defendant regardless of his response, thereby restraining defendant's liberty. However, we do not believe that was the intended import of the statement or that Officer Ventura actually communicated this to defendant. Given the totality of the evidence, Officer Zamora appears to have been explaining that he was the officer designated to conduct the potential patdown. His pretrial hearing testimony and trial evidence clarify that it was Officer Ventura who presented defendant with the questions, and nothing in Officer Ventura's testimony indicates that a patdown was ordered. Thus, viewing the record as a whole, while also giving due deference to the trial court's findings of fact, we cannot say the trial court's findings were against the manifest weight of the evidence.

Defendant next challenges the imposition of certain monetary penalties, including the $200 DNA analysis fee. He argues that the relevant statute, subsection 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2008)), contemplates the collection of but one DNA sample and but one fee. He argues the fee is inapplicable because he already submitted DNA on a prior conviction.

The State responds, initially, that defendant forfeited review of this issue by failing to raise it before the trial court. Defendant counters that the ordered fee is void because the trial court lacked the statutory authority to levy it, and a void order may be challenged at any time.

We agree with the State. This court has repeatedly held that imposition of the fee is authorized in a case such as the present. See *People v. Adair*, 1-09-2840, slip op at 19-20 (Dec. 10, 2010); *People v. Bomar*, Nos. 3-08-0985 & 3-08-0986, slip op. at 15-16 (Oct. 15, 2010); *People v. Hubbard*, 404 Ill. App. 3d 100, 103 (2010); *People v. Grayer,* 403 Ill. App. 3d 797, 802 (2010); *People v. Marshall*, 402 Ill. App. 3d 1080, 1083 (2010), *appeal allowed*, No. 110765 (Sept. 29,

2010); *but see People v. Rigsby*, 1-09-1461, slip op. at 5 (Dec. 3, 2010), and cases cited therein (holding that only one DNA analysis and one fee is necessary per qualifying offender). These decisions reasoned that while section 5-4-3 does not expressly require a fee for every felony conviction, it also does not preclude multiple DNA fees following a conviction in separate cases. We found that taking a defendant's DNA upon conviction of a qualifying offense provided fresh samples, subject to new methods of collecting, analyzing, and categorizing DNA and, further, that the fees may be used to cover a variety of additional costs incurred by the State crime lab. Unless and until our supreme court rules otherwise, we will continue to abide by these well-reasoned decisions. The order therefore is not void, and defendant has forfeited review of his claim. See *Marshall*, 402 Ill. App. 3d at 1082.

Defendant next challenges the imposition of the $25 court services fee against him (see 55 ILCS 5/5-1103 (West 2008)). Defendant contends that the fee applies only to certain enumerated offenses, which exclude his drug conviction.

The State responds that under the plain language of the statute, the fee applies to all criminal convictions. We agree with the State.

Section 5-1103 of the Counties Code (Code) (55 ILCS 5/5-1103 (West 2008)) provides that a county board may impose a court services fee to defray court security expenses incurred by the sheriff. In civil cases, each party must pay the fee when filing the first pleading, paper or appearance. In criminal cases, the statute provides that the fee:

> "shall be assessed against the defendant upon a plea of guilty, stipulation of facts or findings of guilty, resulting in a judgment of conviction, or order of supervision, or sentence of probation without entry of judgment pursuant to Section 10 of the Cannabis Control Act, Section 410 of the Illinois Controlled Substances Act, Section 70 of the Methamphetamine Control and Community Protection Act,

> Section 12-4.3 of the Criminal Code of 1961, Section 10-102 of the Illinois Alcoholism and Other Drug Dependency Act, Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act, or Section 10 of the Steroid Control Act." 55 ILCS 5/5-1103 (West 2008).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature, which is best determined from the language of the statute itself, read as a whole and given its plain and ordinary meaning. *People v. Santiago*, 236 Ill. 2d 417, 428 (2010).

The plain language of section 5-1103 demonstrates that the legislature intended to apply the fee to all criminal convictions and limit its application only with respect to certain cases where a defendant receives probation without entry of judgment. See *People v. Adair*, No. 1-09-2849, slip op. at 21 (Dec. 10, 2010). The legislature's placement of the comma after "supervision" clearly was intended to offset the phrase "probation without entry of judgment." We find that the phrase beginning "pursuant to," therefore modifies only the phrase, "probation without entry of judgment."

Defendant nevertheless seizes upon the one exception, a citation to aggravated battery of a child (720 ILCS 5/12-4.3 (West 2008)), and notes that the offense does not result in a sentence of probation without entry of judgment, but a classified conviction. Based on that, he reasons that the fee applies only to the enumerated criminal offenses. We disagree. It is clear that the legislature has not updated section 5-1103 to comport with the current version of the aggravated battery statute. That statute previously provided for a special penalty provision, a possible term of probation without entry of a judgment of guilt when the aggravated battery was committed by a person engaged in the actual care of the victim child or institutionalized severely or profoundly mentally retarded person. See 720 ILCS 5/12-4.3(b) (West 1994); Pub. Act 89-313, eff. Jan. 1, 1996 (deleting subsection (b)).

Regardless, it would make little sense for the legislature to limit application of the fee to only certain enumerated criminal offenses, yet not do so in civil cases. Defendant's argument therefore

has no merit, and we conclude the fee was properly assessed here.

Finally, defendant contends, and the State correctly concedes, that the $5 court system fee for individuals who violate the Illinois Vehicle Code or a similar local provision (55 ILCS 5/5-1101(a) (West 2008)), was improperly assessed because it does not relate to defendant's drug conviction. However, the State argues, and defendant concedes, that he is subject to a $50 mandatory court services fee associated with his felony conviction (55 ILCS 5/5-1101(c) (West 2008)). We agree with the result reached by the parties. We therefore vacate the $5 fee and impose the $50 fee. We order the clerk of the circuit court to correct the mittimus to reflect a total owed of $1,005.

We affirm the judgment of the circuit court of Cook County in all other respects.

Affirmed; mittimus corrected.