2011 IL App (1st) 101200-U

THIRD DIVISION
November 2, 2011

No. 1-10-1200

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. 09 CR 15101
	)	
JIMMIE WILLIAMS,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

Held: *Terry* frisk by police officer unreasonable where the State failed to prove that officer had a reasonable suspicion that defendant was armed and dangerous.

¶ 1 Following a bench trial, defendant Jimmie Williams was found guilty of two counts of possession of a controlled substance and sentenced to concurrent terms of three years' imprisonment. On appeal, defendant contends that the trial court erred in denying his motion to quash arrest and suppress evidence where the police conducted an allegedly improper frisk pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Defendant also contests various fines and fees, and

requests that his cause be remanded for a hearing to determine the proper amount of pre-sentencing custody credit to which he is entitled. We reverse.

¶ 2 Defendant was charged by indictment with two counts of possession of a controlled substance with intent to deliver after police believed they saw him engage in a narcotics transaction, and subsequently found him in possession of cocaine and heroin. Prior to trial, defendant filed a motion to quash the arrest and suppress evidence alleging that his seizure and arrest were made in violation of the fourth amendment of the United States Constitution.

¶ 3 At the hearing on defendant's motion, Officer Caruso testified that at about 11:50 p.m. on July 10, 2009, he and Officer Kubik were on patrol near 1915 South Drake Avenue in Chicago when he saw defendant in the middle of the street approaching a vehicle. Although it was late in the evening, there was artificial light at the scene. Caruso, who was about 50 feet away, saw defendant engage in a conversation with the driver, and also observed the driver give defendant money. Defendant then reached into his shirt pocket, took out a bag, and retrieved a small item from that bag. As defendant was about to tender the item to the driver, defendant looked in the direction of the police. He put the item back in the bag, returned the bag to his shirt pocket, and walked south as the vehicle drove away. Caruso drove up to defendant and attempted to do a field interview because he suspected that a narcotics transaction occurred. Defendant put his hands on the squad car and Kubik conducted a protective pat-down for weapons, resulting in the recovery of the bag in his front pocket. The items recovered included six baggies containing a white, rock-like substance along with three knotted baggies with the same rock-like substance, and two "tinfoils" with a white powdery substance. Caruso indicated that when he conducts field interviews he always does protective pat-downs for safety reasons.

¶ 4 Officer Kubik, who was a police officer for seven years and conducted hundreds of prior narcotics arrests, testified similarly to Officer Caruso at the hearing. She further testified that

while she was patting down defendant, she felt several hard rock-like substances in the same pocket that he had previously reached into. Kubik did not manipulate the items, but suspected that they were baggies of cocaine due to her experience with narcotics and the way they are packaged. Kubik ultimately recovered the baggies from defendant's pocket, which contained cocaine and heroin.

¶ 5 Following the close of evidence and argument, the trial court denied defendant's motion to quash his arrest and suppress evidence. In doing so, the court found that police believed a narcotics transaction occurred, and there was no violation of defendant's fourth amendment rights. Defendant subsequently filed a motion to reconsider the denial of his motion to suppress, which the court also denied.

¶ 6 After a bench trial, the trial court found defendant guilty of two counts of the lesser included offense of possession of a controlled substance, and sentenced him to two concurrent terms of three years' imprisonment.

¶ 7 On appeal, defendant challenges the court's denial of his motion to quash arrest and suppress evidence. Defendant concedes that the initial stop was lawful, but contends that the subsequent search was not proper where police did not have reasonable suspicion that he was armed and dangerous. Defendant further maintains that police did not have probable cause to believe that he had committed a crime. We note that because the State does not contend that probable cause existed at the time of the search, the sole question regarding this issue turns on whether the search was a valid frisk pursuant to *Terry*.

¶ 8 In reviewing an order denying defendant's motion to quash arrest and suppress evidence, mixed questions of law and fact are presented. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). The factual findings made by the court in connection with such a motion will not be disturbed on appeal unless they are against the manifest weight of the evidence. *Pitman*, 211 Ill. 2d at 512.

The reviewing court, however, may undertake its own assessment of the facts in relation to the issues presented and draw its own conclusions in deciding what relief, if any, should be granted. *Pitman*, 211 Ill. 2d at 512. We review *de novo* the ultimate question of whether the arrest should be quashed and the evidence suppressed. *Pitman*, 211 Ill. 2d at 512.

¶ 9 A police officer may stop a person for temporary questioning if he reasonably infers from the circumstances that the person is involved in criminal activity. *Terry*, 392 U.S. at 30; 725 ILCS 5/107-14 (West 2008). During a *Terry* stop, an officer may frisk a person for weapons where the officer "reasonably believes that he is dealing with an armed and dangerous individual." *People v. Linley*, 388 Ill. App. 3d 747, 749 (2009) (citing *People v. Davis*, 352 Ill. App. 3d 576, 580 (2004)); 725 ILCS 5/108-1.01 (West 2008) (when a peace officer has stopped a person for temporary questioning and reasonably suspects that he or another is in danger of attack, he may search the person for weapons). However, "[a]uthority to effect a *Terry* stop does not automatically confer authority to frisk an individual." *Linley*, 388 Ill. App. 3d 753. Instead, the officer "must have reason to believe that the detained individual is armed and dangerous," and must be able to point to particular facts that justify the search. *Linley*, 388 Ill. App. 3d 753.

¶ 10 In addressing the question of whether police in this case had reason to believe that defendant was armed and dangerous, we find *People v. Rivera*, 272 Ill. App. 3d 502 (1995), instructive. In *Rivera*, police responded to a radio broadcast describing two drug dealers at a particular address, and observed the defendant and a co-arrestee who matched the descriptions. The officers told the two men to stop and unzip their jackets, and they complied. The officers observed plastic bags protruding from their waistbands which contained cocaine. On appeal, this court found the recovery of narcotics improper holding that "the mere fact that an officer believes drug dealers carry weapons or narcotic arrests involve weapons is insufficient alone to support reasonable suspicion to justify a *Terry* frisk." *Rivera*, 272 Ill. App. 3d at 509. In so

holding, we noted that although police suspected the defendants of participating in drug transactions, there was no indication that they were armed, their hands remained visible, and they made no sudden or unexplainable movements. *Rivera*, 272 Ill. App. 3d at 509.

¶ 11 Here, we find, similarly to *Rivera*, that the mere fact that Officers Caruso and Kubik suspected defendant of participating in a drug transaction was insufficient to support reasonable suspicion to justify a *Terry* frisk. The record shows that there was no evidence to suggest that defendant was armed and dangerous. As police started to approach defendant after they witnessed what they believed to be a drug transaction, defendant put his hands on the hood of the car without being directed to do so. In addition, although it was nearly midnight, the evidence showed that the area had artificial lighting which was sufficient enough to enable the officers to see the alleged drug transaction from 50 feet away. Therefore, there would not have been a concern regarding their ability to see defendant's movements at the scene. Moreover, Caruso testified during the evidentiary hearing that it was his standard procedure to always perform a frisk any time he conducted a field interview, which suggests that Caruso and Kubik were not even relying on the fact that defendant was involved in what they believed to be a drug transaction because they would have frisked him anyway. See *People v. Flowers*, 179 Ill. 2d 257, 264-66 (2001) (upholding the trial court's suppression of evidence where the officer who conducted the pat-down expressly testified that he did not believe defendant had a weapon, but frisked the defendant anyway because it was his routine practice). Accordingly, Caruso and Kubik had no reasonable suspicion that defendant was armed and dangerous, and the *Terry* frisk was unlawful.

¶ 12 In reaching this conclusion, we find *People v. Sorenson*, 196 Ill. 2d 425 (2001), distinguishable from the case at bar. In *Sorenson*, Officer Cordery observed the defendant exit a known drug house and leave in a vehicle a few minutes later. He suspected a drug transaction

had occurred and followed the vehicle. After the driver committed a traffic violation, Cordery pulled him over and approached the vehicle. Cordery feared for his safety because he was on a dark road, three people were inside the car, and, in his experience, persons involved with drugs carry weapons. Cordery searched the defendant because he was the "quickest threat" and recovered cocaine from his unlaced boot which, according to the officer, could have contained a weapon. The trial court denied the defendant's motion to suppress the evidence and defendant was convicted of unlawful possession of a controlled substance. In affirming the conviction, the supreme court noted that when a police officer possesses a reasonable articulable suspicion that occupants of a vehicle were dealing drugs just prior to a stop, the officer's belief that the suspects were armed and dangerous was reasonable because weapons and violence are frequently associated with drug transactions. *Sorenson*, 196 Ill. 2d at 438. The court thus found that the frisk of the defendant was proper. *Sorenson*, 196 Ill. 2d at 439.

¶ 13 Here, unlike *Sorenson*, the scene in question was well lit, defendant was alone when the two police officers approached him, and there was no evidence indicating that defendant was hiding a weapon. Therefore, while *Sorenson* turned on specific facts other than the officer's suspicion that drugs were involved, the State in this case failed to point to any specific, articulable facts that would show how this alleged transaction created a reasonable belief that defendant was armed and dangerous.

¶ 14 For the foregoing reasons, we reverse the judgment of the trial court denying defendant's motion to quash and suppress the evidence of the controlled substances. Without the suppressed evidence, the State cannot prove beyond a reasonable doubt that defendant possessed the narcotics. Accordingly, we reverse defendant's conviction outright (*People v. Blake*, 268 Ill. App. 3d 737, 741 (1995)), and need not address defendant's remaining contentions.

¶ 15 Accordingly, we reverse the judgment of the circuit court.

¶ 16 Reversed.