2012 IL App (1st) 102437-U

FIRST DIVISION
August 13, 2012

No. 1-10-2437



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 C2 20774 |
| | ) | |
| HENRY FRIER, | ) | Honorable |
| | ) | Larry G. Axelrood, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Judgment entered on defendant's conviction of burglary affirmed over claim that police frisk was unlawful under *Terry*; sentence affirmed; $200 DNA fee vacated; fines and fees order modified.

¶ 2 Following a bench trial, defendant Henry Frier was found guilty of burglary, then sentenced as a Class X offender to 12 years' imprisonment. He was also assessed fines and fees totaling $725. On appeal, defendant contends that the trial court erred in denying his motion to quash arrest and suppress evidence where he was frisked absent a reasonable suspicion that he

was armed and dangerous, and that his 12-year sentence is excessive considering the non-violent nature of the offense. He also challenges certain of the pecuniary penalties imposed by the court.

¶ 3 The record shows, in relevant part, that defendant was charged with one count of burglary after Evanston police stopped him, searched him, and recovered, *inter alia*, a stolen I-pass transponder. Prior to trial, defendant filed a motion to quash arrest and suppress evidence alleging that police had exceeded the bounds of a permissible investigatory stop under *Terry*.

¶ 4 At the suppression hearing, Evanston police officer Rick Worshill testified that about 7:23 a.m. on November 22, 2009, he received a call that a black male wearing a blue and black coat was in front of 2108 Forestview Road and trying car doors. After an updated report issued that the suspect had turned east onto Payne Street, Officer Worshill located to Bennett Avenue and Payne Street to get ahead of him, got out of his vehicle, and positioned himself behind a house where he could look down the street. From there, Officer Worshill observed defendant, wearing a "dark black jacket with blue on it," wipe dew off a car window and try the door, then walk to the car in front and do the same thing. He then saw defendant walk further east and try the door of a SUV. At this point, Officer Worshill returned to his vehicle, pulled up in front of defendant, got out, and conducted a pat-down of defendant.

¶ 5 Officer Worshill testified that he searched defendant for his safety, but when asked what about defendant in particular made him fear for his safety, he testified that "[t]here was nothing particularly about him individually. It's a policy and procedure. I've been stabbed." He also noted that "there is always the possibility of danger, no matter who it is." When asked if it is the policy and procedure of Evanston police to search anyone who is stopped for weapons, he responded, "No. If we have a street stop and it's a possible hazard, it's on us to do the proper procedure so that we don't get hurt."

¶ 6 During his pat-down of defendant, Officer Worshill "didn't know" if he felt a handgun on defendant's person because "[t]here are many ways to conceal handguns inside other objects." However, he did find an object the size of a credit card in defendant's right front pants pocket, an item that was about three and one-half inches square and three-quarters of an inch thick in his other pants pocket, and some change in his pockets. His practice during a search is "to look for edged weapons, keys with sharpened points, and any kind of like container or box that could hold some kind of weapon," and he removed the items "[t]o determine if they were a weapon." However, he discovered they were only an access control card and an I-pass transponder.

¶ 7 Officer Teasley, who walked up as Officer Worshill was searching defendant's pockets, subsequently took defendant into custody for "investigation of a theft" after defendant stated that he had found the items. He then transported defendant to the police station. Officer Worshill spent several hours investigating 27 other vehicles to determine whether they had been broken into, and about 9:15 a.m., he verified that the I-Pass transponder was stolen.

¶ 8 On cross-examination, Officer Worshill stated that the "people" at 2108 Forestview Road called in a report of an individual trying the door handle of their neighbor's car, and gave dispatch their name, address, and phone number. He also stated that he observed defendant look into the cars, that no one else was out on the street on the morning in question, and that he heard Officer Teasley's car coming down the street when he approached defendant.

¶ 9 Officer Worshill stated that during the month prior to the day in question, there had been residential and vehicular burglaries in the area. In his experience, car burglars carry hard or sharp objects on their person, and he noted that the "hard card" that he felt in defendant's pocket could have possibly been a "credit card polished to be an edged weapon," stating, "I felt the bevelled edges, so it felt strange to me. It didn't feel like a regular credit card or a driver's license." He

also noted that he has seen weapons encased in small boxes such as the one that he felt in defendant's pocket.

¶ 10 Officer Worshill further stated that after he left defendant with Officer Teasley, he investigated cars on the street that had dew smeared off their windows and retraced the direction from which defendant had come. He eventually made his way to 2824 Forestview Road, went inside the open garage, and found that the door of the car was ajar, and that the vehicle had been "disturbed" on the inside. At that point, he contacted Clifford Young, the son of the car's owners, Thomas and Barbara Young, who told him that the access card found on defendant was his. His parents later provided the serial number to their I-Pass transponder which matched the number on the one recovered from defendant.

¶ 11 Evanston police officer William Teasley testified that on November 22, 2009, he also responded to the call regarding the suspect car burglar and located to the area of Bennett Avenue and Payne Street. As he was approaching, he observed defendant looking into the window of a SUV. Defendant then looked in his direction and walked away from the car, and Officer Worshill, who was proceeding up Bennett Avenue, pulled up and conducted a pat-down of him. When Officer Teasley arrived shortly thereafter, Officer Worshill was conducting the pat-down and speaking with defendant, and he handed Officer Teasley a tote bag containing, *inter alia*, an I-Pass transponder. At that time, defendant was detained on reasonable suspicion because "[h]is activity was consistent with that of someone who commits burglaries to autos," and there had recently been "a high rate of auto burglaries in that neighborhood." Later, he was taken into custody for theft of lost or mislaid property after telling the officer that he found two of the items in his possession laying on the street, and did not know where the third one came from. Within an hour, Officer Teasley was informed that the I-Pass transponder was stolen.

¶ 12 In ruling on defendant's motion, the court noted that it was uncontradicted that defendant walked down the street wiping off car windows to look inside and testing the doors. Also, the court noted that "[t]he Officer patted him down, reasonably took a good sized hard object out of [defendant's] pocket that turned out to be an I-Pass." The court then concluded as follows:

> "I don't think that [the officer] should have given [the I-Pass] back. I don't think that [defendant] should have been released. I think that he had reasonable suspicion to continue the investigation at that point."

The court thus denied defendant's motion to quash arrest and suppress evidence.

¶ 13 Defendant subsequently filed a motion to reconsider the denial of the motion to suppress. During argument on that motion, the court asked defense counsel, "Are you sure this was a Terry stop? The Officer was responding to a specific call from a neighbor who identified himself and said a man was pulling door handles in the driveway next to his house." Defense counsel responded, "I think actually this case comes directly under Terry." The State argued, however, that when Officer Worshill observed defendant, who matched the suspect's description, trying door handles and wiping the dew off car windows to peer in, "that is beyond just Terry and at that point, even arguably, there could be some probable cause to arrest the defendant for criminal trespass to vehicle at the very least." Ultimately, the court denied defendant's motion to reconsider.

¶ 14 At defendant's ensuing bench trial, the State presented evidence establishing that the I-Pass transponder recovered from defendant during the *Terry* stop was stolen from a Toyota Corolla belonging to Thomas Young. The State also established that defendant gave a statement in custody admitting "that he was intoxicated and he probably went into some vehicles," and that he took the I-Pass transponder "out of a car." The court ultimately found defendant guilty of

burglary, then sentenced him as a Class X offender to 12 years' imprisonment. This appeal follows.

¶ 15 In reviewing a trial court's ruling on a motion to suppress, we review the court's findings of fact for clear error, with due weight being given to any inferences drawn by the fact finder, and will only reverse when its findings are against the manifest weight of the evidence. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). However, our review of the trial court's ultimate legal ruling on the motion to suppress is *de novo*. *Luedemann*, 222 Ill. 2d at 542.

¶ 16 Initially, we note that the State does not argue here that Officer Worshill, at the time of the search, had probable cause to arrest defendant for attempted burglary or attempted criminal trespass based on his knowledge of the call received and his observation of defendant looking into and then testing the door handles of vehicles on the street. Rather, the State confines its response to the issue raised by defendant, *i.e.*, whether the trial court erred in denying defendant's motion to quash arrest and suppress evidence where the pat-down conducted by Officer Worshill was not authorized under *Terry*. We may nonetheless affirm the trial court's ruling on a motion to suppress on any basis found in the record (*People v. Land*, 2011 IL App (1st) 101048, ¶ 134, citing *People v. Johnson*, 237 Ill. 2d 81, 89 (2010)), and, here, we find that defendant's motion to suppress was properly denied where police had probable cause to conduct a search incident to defendant's arrest.

¶ 17 Probable cause exists where the facts and circumstances known to the arresting officer are sufficient to justify a reasonable person to believe that defendant has committed or is committing a crime. *People v. Jones*, 215 Ill. 2d 261, 273-74 (2005), citing *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). The existence of probable cause depends on the totality of the circumstances at the time of arrest, and that determination is governed by common sense considerations. *People v. Jackson*, 232 Ill. 2d 246, 275 (2009). Probable cause requires less than

evidence which would justify a conviction, and standards such as proof beyond a reasonable doubt or by a preponderance of the evidence have no place in the determination of probable cause. *Jones*, 215 Ill. 2d at 277. As stated by the United States Supreme Court in *Brinegar*:

> " 'These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.' "

*Jones*, 215 Ill. 2d at 277-78, quoting *Brinegar*, 338 U.S. at 176.

¶ 18 Here, the testimony at defendant's suppression hearing established that on November 22, 2009, the residents of 2108 Forestview Road called in a report of an individual trying the door handle of their neighbor's car. Thereafter, Officer Worshill received a dispatch pursuant to that call which described the suspect as a black male wearing a blue and black coat, and he located to the area and discovered defendant matching the description. He also observed defendant walking down the street wiping the dew off car windows to look inside and testing their doors, consistent

with the suspect from the call. This conduct went beyond merely suspicious behavior, and it was clearly reasonable for a police officer to conclude that he was witnessing criminal conduct. Consequently, Officer Worshill stopped and searched defendant, which led to the recovery of the stolen I-Pass transponder.

¶ 19 Under the totality of the circumstances, we find that Officer Worshill had probable cause to arrest defendant because it was reasonable for him to believe that defendant was trying to enter cars, without authority, with the intent to commit therein a theft, *i.e.*, that he was committing the crime of attempted burglary. 720 ILCS 5/8-4(a), 5/19-1(a) (West 2008); *Jones*, 215 Ill. 2d at 273-74. At a minimum, his conduct showed that he was attempting to commit criminal trespass to vehicles which prohibits knowingly and without authority entering a vehicle. 720 ILCS 5/21-2 (West 2008). We therefore conclude that Officer Worshill's search of defendant prior to that arrest was a valid search incident to arrest (*People v. Miller*, 212 Ill. App. 3d 195, 200 (1991)), and that the trial court did not err in denying defendant's motion to suppress.

¶ 20 Defendant next contends that his 12-year sentence is excessive considering the non-violent nature of the offense. The State responds that defendant has forfeited his sentencing claim by failing to file a motion to reduce sentence. In reply, defendant requests this court to review his sentence for plain error.

¶ 21 We agree with the State that defendant has forfeited his sentencing claim by failing to raise the issue in a written post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Forfeiture aside, defendant's background made him subject to mandatory Class X sentencing with a range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2008). At sentencing, the trial court noted that defendant had committed "a ticky-tack foul, not a hard foul," but that his "background is horrible and cries out for a huge sentence." The court thus informed defendant, "I'm going give [*sic*] you more than what you got last time," and sentenced him to 12 years'

imprisonment. That sentence fell within the limitations prescribed by the legislature, and was not greatly at variance with the purpose and spirit of the Class X sentencing statute, or manifestly disproportionate to the offense committed. *People v. Cabrera*, 116 Ill. 2d 474, 493-94 (1987).

¶ 22 Defendant finally challenges the calculation and assessment of certain of the pecuniary penalties imposed by the court. Although defendant did not raise these claims in the circuit court, a sentence that does not conform to a statutory requirement is void and may be attacked at any time. *People v. Jackson*, 2011 IL 110615, ¶ 10. The propriety of court-ordered fines and fees raises a question of statutory interpretation, which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 23 Defendant first claims that he was improperly assessed a $200 DNA analysis fee because his DNA profile is already in the Illinois State Police database. The State concedes that the fee was improperly assessed and should be vacated. Pursuant to the supreme court's ruling in *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), we agree that the trial court was not authorized to assess defendant the $200 DNA fee where he is currently registered in the DNA database, and therefore vacate that fee.

¶ 24 Defendant next claims that he is entitled to a $5 *per diem* credit for the 292 days he spent in presentence custody for a total $1,460 credit to offset his fines, namely, his $30 Children's Advocacy Center charge. The State concedes that defendant is entitled to the $30 credit. We agree that defendant is entitled to the $5 of *per diem* credit for the time he spent in presentence custody (725 ILCS 5/110-14(a) (West 2010)), and that it apples to offset his $30 Children's Advocacy Center Charge (*People v. Jones*, 397 Ill. App. 3d 651, 664 (2009). Therefore, pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999)), we direct the clerk to modify defendant's fines and fees order to reflect a credit of $30.

¶ 25 Defendant lastly claims that he was improperly assessed a $20 fine under section 10(c)(2) of the Violent Crime Victims Assistance Act (VCVA) (725 ILCS 240/10(c)(2) (West 2008)). The State agrees that fine was improperly assessed, but argues that defendant should have been assessed a $4 fine under section 10(b) of VCVA. In reply, defendant concedes the State's position.

¶ 26 Under section 10(c)(2) of VCVA, when no other fine is imposed, a $20 fine will be assessed against defendant upon conviction of a felony. 725 ILCS 240/10(c)(2) (West 2008). If other fines are imposed, however, defendant will be assessed $4 for each $40, or fraction thereof, of fine imposed. 725 ILCS 240/10(b) (West 2008). Because defendant was assessed a $30 Children's Advocacy Center Fine, we agree that he was subject only to a $4 fine under section 10(b) of VCVA (*Jones*, 397 Ill. App. 3d at 661), and, pursuant to our authority under Rule 615(b), we direct the clerk to modify his fines and fees order to reflect a $4 fine.

¶ 27 For the reasons stated, we vacate defendant's $200 DNA fee, order the clerk to modify defendant's fines and fees order to reflect a $30 credit and $4 VCVA fine, and affirm the judgment in all other respects.

¶ 28 Affirmed in part; vacated in part; fines and fees order modified.