SECOND DIVISION
July 10, 2012

No. 1-10-3652

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 20790
	)	
CARLOS NASH,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: Burglary conviction affirmed over defendant's challenge to order denying motion to quash and suppress where: (1) the trial court's factual findings were not against the manifest weight of the evidence, (2) the officer had reasonable suspicion to initiate a *Terry* stop of defendant, and (3) the burglary proceeds which defendant abandoned when he fled the scene were admissible at trial.

¶ 2 Following a bench trial, defendant Carlos Nash was found guilty of burglary and sentenced to 78 months in prison. On appeal, defendant contends that the trial court erred in denying his motion to quash arrest and suppress evidence because there were no specific and articulable facts to justify a stop and frisk pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968).

¶ 3 Defendant's conviction arose from events that transpired on November 6, 2009. On that night, he had an encounter with University of Chicago Police who detained him and recovered items in his possession that belonged to complainant Bruce Gans. As a result, defendant was charged with one count of residential burglary. Prior to trial, defendant filed a motion to quash his arrest and suppress that evidence, arguing that his warrantless arrest was made without probable cause.

¶ 4 At the suppression hearing, Lieutenant Boddie[1] testified that he has worked for the University of Chicago Police Department for eight years, and for the 23 years prior to that, he worked for the Chicago Police Department. He further testified that on November 6, 2009, he was leading a robbery/burglary mission team in the Hyde Park area where there had been an ongoing burglary problem. The college campus area had experienced many bicycle thefts, and he and his partner were on patrol looking for possible offenders, as well as to deter further activity.

¶ 5 At approximately 1:30 a.m. on the day of the incident, he saw defendant walking down the street pulling a child's bicycle and toting a large duffle bag. Defendant was not doing anything illegal at that time, but appeared suspicious because he was in "[a]n area of high concentration of burglaries," at an early hour of the morning, with a child's bicycle, but no child, and a large duffel bag. Lieutenant Boddie decided to conduct a field interview, and since he and his partner were in plain clothes, he activated the strobe lights on his marked car so that defendant would know they were police and to "keep [them] from getting hurt."

¶ 6 Lieutenant Boddie testified that when he activated his lights, defendant stopped and looked in his direction. He then exited his car and asked defendant to walk toward him. Defendant complied with his order and did not make any furtive gestures. Lieutenant Boddie introduced himself to defendant and explained why they were stopping him. He then conducted a protective pat down search and recovered a pair of bolt wire cutters from defendant's

[1] The lieutenant's name is spelled as both "Bodie" and "Boddie" in the record.

waistband. When he asked defendant to turn so that he could continue his search, defendant became agitated, and Lieutenant Boddie decided to take him into custody. He was unable to do so, however, because defendant escaped and ran away. Lieutenant Boddie put out a flash message over the radio and shortly thereafter, received a call from a resident in the area informing him that defendant was on her neighbor's back porch. He found defendant at that location and placed him under arrest. In this incident, the police recovered a bicycle, duffle bag and a DVD player.

¶ 7 On cross-examination, Lieutenant Boddie testified that he decided to take defendant into custody because "from the time we had spent with him, there was something that was familiar." Expounding on his recognition of defendant, Lieutenant Boddie testified that he recognized defendant from a surveillance video of an unrelated attempted burglary at a building a "stone's throw" from where they encountered defendant. Lieutenant Boddie had seen this video several weeks prior to this incident, then testified as follows:

> "Q: You said that you recognized the Defendant during your interaction with him from the video you had previously viewed, is that correct?
>
> ***
>
> A: Yes. It wasn't bang, I know him. But after I got close to him, I'm trying, you know, just I knew this guy. But I hadn't met him, when it hit me, I guess. You know.
>
> ***
>
> Q: At the time you stopped Mr. Nash, you thought he looked familiar to you, after having contact with him?
>
> A: Yes, Ma'am."

¶ 8 Based on this testimony, defense counsel argued that Lieutenant Boddie did not have

reasonable, articulable suspicion to stop defendant, and asked the trial court to suppress any physical evidence, as well as any statements defendant made as a result of his arrest.

¶ 9 The trial court denied the motion, finding Lieutenant Boddie to be "a credible and compelling witness" and nothing that he did offended the Fourth Amendment. The court further found that Lieutenant Boddie had articulable reasons for suspecting that "something may be afoot" and had made a very neutral, reasonable effort to talk with defendant about his whereabouts. The court also found that probable cause began to develop when the officer recognized defendant from the burglary surveillance video and defendant fled during the frisk.

¶ 10 At trial, Bruce Gans testified that on November 6, 2009, he came to the police station and identified a bag, DVD player and vacuum cleaner as items which he owned and had last seen in his storage unit in the unoccupied basement of his building. Gans had not given defendant permission to enter his storage unit or to possess those items. Gans testified that the door to his building did not always work properly and identified photographs depicting damage to his door.

¶ 11 Lieutenant Boddie provided essentially the same testimony at trial as he did at the suppression hearing. He further testified that when defendant struggled and ran away from him, he left behind the bicycle and the duffel bag. Lieutenant Boddie recovered those items and obtained Gans' address from a sticker on the bicycle. He then went to Gans' home to inform him of the recovered items, and Gans told him the items should be in his basement. When they checked, they discovered that the rear door was open and the items were missing.

¶ 12 Detective James LasCola, of the Chicago Police Department, testified that on November 6, 2009, he showed Gans a bicycle, vacuum cleaner, DVD player and an LL Bean bag, which Gans identified. He then met with defendant in an interview room and advised him of his rights. Defendant acknowledged his understanding of them, then told Detective LasCola that he had entered the building through an unlocked door and went through another unlocked door into the basement. Defendant told him he took a DVD player, LL Bean bag and a bicycle from the

basement, but that he found the vacuum cleaner in the alley and was going to sell the items because he is a drug addict and needed the money to purchase crack.

¶ 13 Defendant testified that on November 6, 2009, he found a bicycle, a Dirt Devil and a VCR in an alley as he was searching for items to fix and sell. When Lieutenant Boddie stopped him, he had an adult bicycle with him, not a child's bicycle. He denied running away from Lieutenant Boddie and hiding from him. He also denied telling Detective LasCola that he had obtained those items from a basement in a building with an unlocked door, but rather, that he found those items in the alley. The parties stipulated that defendant had three prior felony convictions: possession of a stolen motor vehicle in 2007, burglary in 2006 and possession of a controlled substance in 2003.

¶ 14 The trial court found defendant guilty of the lesser included offense of burglary, and, after hearing evidence in aggravation and mitigation, sentenced him to 78 months in prison. On appeal, defendant contends that the trial court erred in denying his motion to quash arrest and suppress evidence and asks this court to reverse his conviction.

¶ 15 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). Factual findings made by the trial court will be upheld unless they are against the manifest weight of the evidence, whereas the trial court's application of the facts to the issues presented and the ultimate question of whether the evidence should be suppressed is subject to *de novo* review. *Pitman*, 211 Ill. 2d at 512.

¶ 16 Defendant contends that the trial court erred in its factual findings on three issues, the first of which is the timing of Lieutenant Boddie's recognition of defendant. Defendant argues that Lieutenant Boddie testified that he did not recognize defendant until he had interacted with him, and not, as the trial court found, as he approached defendant and before conducting the pat

down search. This appears to be a distinction without a difference where Lieutenant Boddie also testified that, when he got close to defendant, and had not yet met him, he recognized defendant from the surveillance video, which was consistent with the court's finding.

¶ 17 Defendant also argues that, contrary to the trial court's finding, Lieutenant Boddie did not testify that he was non-compliant or agitated during the field interview. The trial court stated "[a]t that point Lieutenant Boddie put hands on him. [D]efendant became agitated, didn't want to comply ***." This was an accurate recitation of Lieutenant Boddie's testimony regarding the timing of events, which made clear that defendant became agitated *after* Lieutenant Boddie placed his hands on him to continue the pat down search after recovering bolt wire cutters from defendant's waistband.

¶ 18 Finally, defendant argues that Lieutenant Boddie did not try to talk to him about his whereabouts, nor did he testify that he asked defendant any questions whatsoever. However, Lieutenant Boddie testified that he stopped defendant to conduct a field interview, introduced himself to defendant and explained why they had stopped him. Defendant, however, fled, thus cutting short Lieutenant Boddie's efforts to speak with defendant after he explained why they had stopped him. Thus, we cannot say that the trial court erred in finding that Lieutenant Boddie attempted to speak with defendant about his whereabouts. *Pitman*, 211 Ill. 2d at 512.

¶ 19 Defendant also challenges the legal findings made by the trial court. Although he does not contest that probable cause to arrest developed as the initial stop progressed, he claims that the stop and subsequent pat down search violated his constitutional rights.

¶ 20 The fourth amendment to the United States constitution guarantees the right to be free from unreasonable searches and seizures. U.S. Const., amend. IV; *People v. Gherna*, 203 Ill. 2d 165, 176 (2003). Although reasonableness under that amendment generally requires a warrant supported by probable cause, under the *Terry* exception, a police officer may briefly stop a

person for questioning if the officer reasonably believes that the person has committed or is about to commit a crime. *People v. Flowers*, 179 Ill. 2d 257, 262 (1997), citing *Terry*, 392 U.S. at 22. To justify a *Terry* stop, the officer must point to specific, articulable facts which make the intrusion reasonable when considered with rational inferences. *People v. Shafer*, 372 Ill. App. 3d 1044, 1048 (2007). In determining the reasonableness of a *Terry* stop, the totality of the circumstances are considered, taking the whole picture into account. *People v. Baskins-Spears*, 337 Ill. App. 3d 490, 499 (2003).

¶ 21 Here, the evidence, taken as a whole, indicates that Lieutenant Boddie and his partner had reasonable suspicion to initiate a *Terry* stop of defendant. Lieutenant Boddie, a law enforcement professional with 31 years of experience, was on a burglary/robbery mission team when he observed defendant walking down the street at 1:30 a.m., while carrying a large duffel bag and pushing a child's bicycle. In addition, the officers were in an area with a high concentration of burglaries, including bicycle thefts. Officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances before them warrant further investigation (*Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)) and in light of his experience, the facts before him, and the common sense inferences and considerations to be drawn from them, the composite of these circumstances were sufficient to raise a reasonable suspicion of criminal activity to warrant an investigative stop. *People v. Ledesma*, 206 Ill. 2d 571, 583 (2003), *overruled on other grounds by Pitman*, 211 Ill. 2d at 513. Although each of defendant's actions could be individually innocent, the degree of suspicion that attached to the acts as a whole warranted further investigation (*Terry*, 392 U.S. at 22; *U.S. v. Sokolow*, 490 U.S. 1, 9-10 (1989)) and Lieutenant Boddie and his partner were entitled to temporarily detain defendant for questioning in order to dispel their reasonable suspicions of criminal activity.

¶ 22 In reaching this conclusion, we have considered *People v. Croft*, 346 Ill. App. 3d 669 (2004), cited by defendant in support for his argument that to allow his activity to justify an

investigative detention would subject a large number of presumably innocent travelers to random seizures, and find it distinguishable from the case at bar. In *Croft*, defendant was observed at 11:15 p.m. wearing dark pants and no shirt and walking his bicycle up a hill. 346 Ill. App. 3d at 671. On review, the court acknowledged that reasonable suspicion may emerge from seemingly innocent, noncriminal conduct, but found that facts such as in that case, were insufficient to support an investigatory detention where they describe a large category of presumably innocent travelers. *Croft*, 346 Ill. App. 3d at 675. *Croft* is factually distinguishable from this case, where defendant was seen at 1:30 a.m., pushing a child's bicycle without a child, and carrying a large duffel bag in an area rife with burglaries and where the arresting officers were on patrol for this type of activity. These facts were sufficient to raise a reasonable suspicion warranting a *Terry* stop.

¶ 23 Defendant also argues that the pat down search was unlawful. After temporarily stopping an individual, an officer may conduct a brief pat down search for weapons if the officer reasonably believes that the individual may be armed and presently dangerous. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993); *Terry*, 392 U.S. at 24; *People v. Sorenson*; 196 Ill. 2d 425, 432 (2001). The officer must be able to point to particular facts that justify the search (*People v. Linley*, 388 Ill. App. 3d 747, 753 (2009) and the applicable test is objective, although the officer's subjective feelings is a factor to be considered (*People v. Galvin*, 127 Ill. 2d 153, 167-68 (1989)).

¶ 24 Here, the record is devoid of any particularized facts supporting a belief that defendant was armed. Although Lieutenant Boddie recognized defendant from the video, there is no presumption that every time a burglary suspect is stopped he is armed and dangerous. *Galvin*, 127 Ill. 2d at 173. Lieutenant Boddie, who was not alone at the time, testified that defendant initially complied with his orders, and made no furtive or evasive gestures, factors which have weighed against a reasonable belief that a suspect is armed and dangerous. *Flowers*, 179 Ill. 2d at 265-66. He provided no reason for instituting the pat down search which produced the wire

cutters, and provided no testimony regarding a subjective belief that defendant was armed and dangerous. Based on the totality of the circumstances, there were no particularized facts that would cause a reasonably prudent man to believe that he or others were in danger (See *Flowers*, 179 Ill. 2d 257 at 264-66) to support the pat down search.

¶ 25 Notwithstanding this deficiency, we find no basis for reversing the denial of defendant's motion to quash arrest and suppress evidence where the items which constituted the burglary offense and his inculpatory statement were not discovered during the pat down search, but after defendant fled and abandoned the items, and was properly arrested.

¶ 26 In *People v. Keys*, 375 Ill. App. 3d 459, 461 (2007), defendant, initially complied with the officer's request that he raise his hands above his head, then subsequently broke free and ran away, discarding drugs in the process. On appeal, the reviewing court affirmed the trial court's denial of the defendant's motion to suppress evidence, reasoning that defendant abandoned the drugs after ending the initial, arguably unlawful, seizure when he ran away from the officers. *Keys*, 375 Ill. App. 3d at 464.

¶ 27 Defendant maintains that *Keys* was wrongly decided and urges us to follow case law from other jurisdictions. In *People v. Henderson*, 2012 IL App (1st) 101494, *pet. for leave to appeal granted*, No. 114040, however, this court recently found *Keys* factually similar and instructive. In *Henderson*, defendant was seized, then broke away and ran from the officers, dropping a gun in the process, before he was seized a second time. 2012 IL App (1st) 101491, ¶¶ 3-4, 9. This court affirmed the trial court's denial of defendant's motion to suppress, reasoning that defendant was not seized within the meaning of the fourth amendment at the time the gun fell to the ground. *Henderson*, 2012 IL App (1st) 101491, ¶¶ 27, 30.

¶ 28 Similarly, in this case, defendant was seized, but then broke free and ran away before he was seized a second time. At the point at which defendant fled, he was no longer "seized" for purposes of the fourth amendment, or submitting to Lieutenant Boddie's show of authority

(*Henderson*, 2012 IL App (1st) 101491, ¶ 27), and abandoned the purloined items, making them admissible at trial (*Keys*, 375 Ill. App. 3d at 464; *People v. Novakowski*, 368 Ill. App. 3d 637, 641 (2006)). Furthermore, because probable cause existed at the time defendant was finally arrested, a fact defendant does not contest, the statements he made to Detective LasCola subsequent to that arrest were also admissible. *People v. Hopkins*, 235 Ill. 2d 453, 477-78 (2009).

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.