SIXTH DIVISION
March 15, 2013

No. 1-11-1804

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. 10 CR 12962
	)	
DONTE HAWKINS,	)	Honorable
	)	William T. O'Brien,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for possession of a controlled substance is affirmed as modified, and his mittimus and fee order are amended where (1) the trial court properly denied defendant's motion to quash arrest and suppress evidence because the police did not exceed the permissible scope of a *Terry* search for weapons, (2) the $200 DNA ID System fee is vacated because it was improperly assessed, and (3) the mittimus reflects the incorrect offense of which defendant was convicted.

¶ 2 Following a bench trial, defendant Donte Hawkins was convicted of possession of a controlled substance and sentenced to two years' imprisonment. On appeal, defendant contends

that the trial court erred when it denied his pretrial motion to quash his arrest and suppress evidence because the police officer's manipulation of defendant's waistband exceeded the permissible scope of a *Terry* search for weapons. Defendant also contends, and the State agrees, that he was erroneously assessed a $200 DNA ID System fee, and that his mittimus needs to be amended to reflect the correct offense of which he was convicted. We vacate the DNA fee, correct the mittimus, and affirm defendant's conviction and sentence in all other respects.

¶ 3 Defendant was charged with one count of possession with intent to deliver between 1 and 15 grams of a substance containing heroin. Defendant filed a pretrial motion to quash his arrest and suppress evidence arguing that the police officers' stop, search and arrest of him without a warrant was unreasonable because his conduct would not have caused any reasonable person to infer that he was violating the law.

¶ 4 At the hearing on defendant's motion, Chicago police officer Anthony Varchetto testified that about 11 p.m. on June 7, 2010, he went to 5210 West Wabansia Avenue with a team of several officers in response to an anonymous telephone call that defendant was selling drugs at that location. The caller had given police defendant's name, defendant's home address on Laramie Avenue, and said defendant was selling drugs on Wabansia Avenue around the corner from his house. Officer Varchetto located a picture of defendant in the police database and verified that defendant lived at the same address on Laramie Avenue.

¶ 5 Officer Varchetto established a surveillance point near an alley about 35 to 40 feet from the Wabansia address. About 15 minutes later, a man drove up in a blue Honda vehicle and parked at the location. The man was on his telephone and sat in his car for three or four minutes. Defendant then exited a yard on Laramie Avenue and walked down the alley to the blue Honda with his right hand clenched in a fist the entire time. Defendant leaned into the passenger side front window of the car and conversed with the driver for a minute. Officer Varchetto could not

hear the conversation, and defendant did not hand anything to the driver. Officer Varchetto believed that a narcotics transaction was about to occur, and he radioed the enforcement officers on his team to approach the scene to investigate.

¶ 6 Officers Stinar and DeMarco arrived at the scene, and Officer Stinar exited his vehicle and approached defendant. Defendant immediately placed his clenched right hand down his pants, then quickly removed it. Officer Varchetto did not see what was in defendant's hand or what he put in his pants. Officer Stinar told defendant to show his hands, and defendant raised both of his hands. Defendant's hands were open and nothing was in them at this time. Officer Stinar immediately began patting down defendant, then radioed Officer Varchetto and said that an item had fallen to the ground from defendant's pants leg. Police also detained the man in the Honda, but no drugs were found on him. Officer Varchetto acknowledged that the police did not have a warrant to arrest or search defendant.

¶ 7 Chicago police officer Vincent Stinar testified that Officer Varchetto radioed him, after which Officer Stinar went to the scene and observed defendant standing next to a blue vehicle. Defendant's hands were down at his sides, and his right hand was clenched in a fist. Defendant looked towards the unmarked police vehicle, then placed his right hand inside his waistband. Officer Stinar could not observe what was in defendant's hand or what he placed in his waistband. Officer Stinar exited his police car and approached defendant, who was facing the passenger side of the blue vehicle. The officer told defendant "Police. Let's see your hands," and defendant raised both of his empty hands up to his shoulders. As the officer continued approaching, defendant turned and faced him. Officer Stinar characterized the neighborhood as an area known for high narcotics and gang activity. Officer Stinar testified that he "wasn't sure" whether or not defendant had a weapon, and he then conducted "a protective patdown" of defendant. The officer explained that he felt defendant's waistband area first because that is

where defendant had placed his hand. Officer Stinar pulled on defendant's waistband and pants, started feeling, then saw a white object fall from defendant's left pants leg. Officer Stinar retrieved the object and observed that it was a white, clear plastic bag the size of a golf ball with 15 smaller Ziploc bags inside, each containing a white powdery substance of suspect heroin. Officer Stinar then placed defendant under arrest. The officer acknowledged that he did not observe any bulges or objects protruding from defendant's waistband before the pat-down.

¶ 8 Defense counsel conceded that the police had reasonable suspicion to stop defendant and that they were "fully justified in approaching, questioning, and investigating" him. Counsel argued, however, that the police did not truly believe defendant was armed with a weapon, and instead, they searched defendant for evidence. Counsel asserted that the police were too aggressive and conducted a search without probable cause.

¶ 9 The trial court recalled the testimony in detail and summarized defendant's argument. The court found that, based on the information the police received before arriving at the scene, coupled with defendant's actions, the police believed defendant was conducting a narcotics transaction. The court noted that the area was known for a high level of gang and narcotics activity. The court then stated:

> "You know, it's common knowledge that sometimes people that deal drugs do have weapons. I don't think it's that far of a reach for the officer here at 11 o'clock at night approaching Mr. Hawkins, after he has thrust his hand into his pants, to conduct a patdown.
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> * * *
>
> *** So, the Court finds that what Officer Stinar did was reasonable. His actions in initiating a patdown were reasonable."

Based on its findings, the trial court denied defendant's motion to quash his arrest and suppress the evidence.

¶ 10 At trial, Officer Varchetto testified substantially similar to his testimony from the hearing on defendant's motion to quash his arrest and suppress evidence. Officer Stinar also testified substantially similar to his previous testimony, adding that he recovered $110 from defendant during a search. The officer acknowledged that he did not inventory that money. The parties stipulated that a forensic chemist tested the 15 items recovered from defendant and found them positive for 2.2 grams of heroin.

¶ 11 The trial court reviewed the evidence and noted that the $110 that was "allegedly" recovered from defendant, which would have indicated an intent to deliver, was not inventoried. Consequently, the court found defendant guilty of the lesser-included offense of possession of a controlled substance. The court subsequently sentenced defendant to a term of two years' imprisonment and imposed various court costs and fees, including a $200 assessment for the DNA ID System fee.

¶ 12 On appeal, defendant first contends that the trial court erred when it denied his pretrial motion to quash his arrest and suppress evidence because Officer Stinar's manipulation of defendant's waistband exceeded the permissible scope of a *Terry* search for weapons. Defendant concedes that the police had reasonable suspicion to stop him and conduct a valid protective pat-down for weapons. He argues, however, that Officer Stinar did not conduct a pat-down, but instead, searched him for narcotics.

¶ 13 The State argues that Officer Stinar's protective frisk was reasonably tailored to discover weapons. The State asserts that it was reasonable for Officer Stinar to begin his search with defendant's waistband because that is where he observed defendant place his hand. In addition,

Officer Stinar limited his search to defendant's waistband and legs, which are areas the police check for weapons because weapons can logically be concealed in those areas.

¶ 14 On review of a motion to suppress, the trial court's factual findings are given great deference and will be reversed only if they are against the manifest weight of the evidence. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). However, a defendant's legal challenge to the denial of his motion to suppress is reviewed *de novo*. *Luedemann*, 222 Ill. 2d at 542.

¶ 15 The fourth amendment of the United States Constitution, which applies to the states through the fourteenth amendment, protects all citizens from unreasonable searches and seizures in their homes, effects and persons. U.S. Const., amend. IV. Generally, to be deemed reasonable under the fourth amendment, police must obtain a warrant supported by probable cause to conduct a search and seizure. *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001). However, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court recognized an exception to the warrant requirement allowing police officers to briefly stop suspicious individuals to make reasonable inquiries to confirm or dispel their suspicions of criminal activity. The *Terry* Court held that a police officer may conduct a pat-down search of a person he is investigating at close range to determine if that person is carrying a weapon where the officer justifiably believes the person is armed and dangerous. *Sorenson*, 196 Ill. 2d at 432. Our supreme court has recognized that the sole justification for a pat-down search under *Terry* is for the protection of police and others in the area, not to discover evidence. *People v. Flowers*, 179 Ill. 2d 257, 263 (1997). A search that exceeds the boundaries necessary for determining if a suspect is armed is unreasonable under *Terry*, and any evidence recovered during such a search will be suppressed. *Sorenson*, 196 Ill. 2d at 432.

¶ 16 In determining whether a pat-down search is reasonable, an officer does not need to be absolutely certain that the person is armed; instead, the question is whether, under the

circumstances, a reasonably prudent person would believe that his safety or that of others was in danger. *Sorenson*, 196 Ill. 2d at 433. In each case, consideration must be given to the specific reasonable inferences that the officer is entitled to draw from the facts in light of his experience. *Sorenson*, 196 Ill. 2d at 433. Our supreme court has noted that where a police officer has a reasonable suspicion that a person is dealing drugs, the officer's belief that the person is armed and dangerous is reasonable because weapons and violence are frequently associated with narcotics transactions. *Sorenson*, 196 Ill. 2d at 438.

¶ 17 The scope of a *Terry* search is not limited to a pat-down of a person's outer clothing. *Sorenson*, 196 Ill. 2d at 439. A search, however, "must be confined to 'an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.' " *Sorenson*, 196 Ill. 2d at 440, quoting *Terry*, 392 U.S. at 29. The limitations of a search in any particular case depends upon the factual circumstances of that case. *Sorenson*, 196 Ill. 2d at 440, citing *Terry*, 392 U.S. at 29.

¶ 18 Here, we find that Officer Stinar's pat-down search of defendant was reasonable and did not exceed the scope of a *Terry* search. As noted above, defendant concedes that Officer Stinar had reasonable suspicion to conduct a protective pat-down for weapons, but claims the officer exceeded the limit of his search by pulling on defendant's waistband. We disagree. Officer Stinar expressly testified that he conducted "a protective patdown" of defendant because he did not know whether defendant had a weapon. The officer explained that he began his pat-down with defendant's waistband because that was where defendant had placed his hand. Neither Officer Stinar nor Officer Varchetto could see what defendant had in his clenched fist. Even if they suspected he had narcotics in his hand, and that he tried to conceal the narcotics in his pants, it was still reasonable for Officer Stinar to feel defendant's waistband and legs for weapons. It is common for armed offenders to conceal their guns and other weapons in their waistbands where

they are readily accessible. See, *e.g.*, *People v. Holland*, 356 Ill. App 3d 150, 152, 156-57 (2005) (police officer recalled 10 prior incidents where people concealed weapons in their waistbands, which, when considered with other factors in the case, including the defendant's act of quickly moving his hands to the front of his waistband, gave the officer reasonable, articulable suspicion that the defendant was carrying a gun).

¶ 19 In addition, we find no issue with the fact that Officer Stinar "pulled" on defendant's waistband. This was the action Officer Stinar took when he first grabbed defendant to begin the pat-down. There is no indication that Officer Stinar shook, twisted or otherwise manipulated defendant's waistband. Nor did the officer put his hand inside defendant's waistband, as defendant had done, in an attempt to recover the suspected drugs. Based on the facts and circumstances in this case, we find that Officer Stinar acted in accordance with the holding in *Terry* and confined his search to an intrusion that was reasonably designed to discover weapons. Therefore, the trial court's denial of defendant's motion to quash his arrest and suppress evidence was proper.

¶ 20 Defendant next contends, and the State agrees, that the $200 DNA ID System fee under section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2010)) was erroneously assessed to him because he was previously assessed the fee and submitted a DNA sample in May 2004 as the result of a prior conviction. See *People v. Marshall*, 242 Ill. 2d 285 (2001). We therefore vacate the $200 DNA fee from the Fines, Fees and Costs order.

¶ 21 Finally, the parties agree that defendant's mittimus should be amended to reflect the correct offense of which he was convicted. The mittimus incorrectly indicates that defendant's conviction was for manufacturing or delivering between 1 and 15 grams of heroin (720 ILCS 570/401(c)(1) (West 2010)), which is a Class 1 felony. Pursuant to our authority (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)), we direct

the clerk of the circuit court to correct the mittimus to reflect defendant's conviction of the lesser-included offense of possession of a controlled substance under section 402(c) of the Illinois Controlled Substances Act (720 ILCS 570/402(c) (West 2010)), which is a Class 4 felony.

¶ 22 For these reasons, we vacate the $200 DNA ID System fee from the Fines, Fees and Costs order, direct the clerk of the circuit court to amend the mittimus as instructed above, and affirm defendant's conviction and sentence in all other respects.

¶ 23 Affirmed as modified; mittimus corrected.