2016 IL App (1st) 133747-U

FIRST DIVISION
APRIL 18, 2016

No. 1-13-3747

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 12 CR 10175
	)	
TIMOTHY PRUITT,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Where the defendant's trial counsel indicated his acquiescence to incorporate at trial the testimony from the hearing on the defendant's motion to suppress, he was estopped from arguing on appeal that the hearing testimony was not part of the trial evidence. Further, the defendant's motion to suppress evidence stemming from a pat-down search was properly denied, as the search was justified.

¶ 2 The defendant appeals from his conviction on the charge of possession of a controlled substance. He argues that there was insufficient evidence to convict because his arresting officer's testimony at his motion to suppress hearing was not included in the trial evidence. He additionally contends that the court erred in denying his motion to suppress evidence resulting

from the officer's pat-down search. We find his contentions to be without merit and affirm his conviction.

¶ 3 BACKGROUND

¶ 4 During the evening of March 10, 2012, Chicago police executed a drug-related search warrant at a residence at 10605 S. Champlain in Chicago (the residence). The warrant targeted Darryl Jackson, who was subsequently tried with the defendant but who is not a party to this appeal. As a result of that search, Jackson was arrested and charged with possession of a controlled substance with the intent to deliver. During the execution of the warrant, the defendant was seen leaving the rear door of the residence. After being detained and searched by police, he was charged with possession of a controlled substance.

¶ 5 The charges against the defendant and Jackson were tried in the same case, with separate counsel representing each individual. The defendant and Jackson both moved to quash their arrests and suppress evidence. On August 1, 2013, the court conducted a hearing on the defendants' motions to suppress, which was immediately followed by a bench trial with respect to the charges against both individuals.

¶ 6 At the outset of proceedings on August 1, 2013, after verifying that Jackson and the defendant each agreed to a bench trial, the trial court asked the parties' counsel to verify "that the parties would like to do the [hearing on the] motion[s] to quash arrest and suppress evidence before starting the bench trial." The defendant's trial counsel answered: "Yes, Judge. But as we indicated, we would anticipate that much of the testimony that may come out during the motion would probably be the same testimony that would come at trial, so we believe there would probably be some stipulations following."

¶ 7 The court thus commenced a joint hearing on the motions to suppress. First, in support of his motion to suppress, Jackson called Jennye Neal, who testified that she lived at the residence and that Jackson was her boyfriend. She testified that police entered the residence and proceeded to search her and Jackson, but they found no drugs on them. However, she claimed that the police told her they had found marijuana in the basement. When she denied that the marijuana was hers, she claimed, the police told Jackson that it must be his and that he would be going to jail. On cross-examination, Neal also acknowledged that the defendant was also at the residence shortly before the police arrived.

¶ 8 In support of his motion to suppress, the defendant called his arresting officer, Officer Gonzalo Deluna. Officer Deluna testified that he was one of several officers who executed the search warrant at approximately 9:14 p.m. He testified that he and his partner were assigned to the "rear security perimeter" of the residence while other officers prepared to enter the front door, and that he was positioned about 20 yards from the back door of the residence.

¶ 9 Officer Deluna testified that he saw the defendant exit the rear door of the residence, drew his gun on the defendant, and yelled "police." According to Officer Deluna, the defendant "ran down the stairs, looked up, and when he saw us, he stopped and put his hands in the air." Officer Deluna testified that the defendant complied with his instructions to walk towards the officers while keeping his hands up. Officer Deluna then proceeded to "perform[] a protective pat-down search" on the defendant. Officer Deluna testified that the purpose of the search was "for our protection, mostly for weapons."

¶ 10 Officer Deluna did not feel anything during the search that he believed might be a weapon. However, he testified that, as he was doing the search, the defendant stated "I got a rock on me," and then motioned towards his pants. Officer Deluna testified that he was familiar

with the term "rock" as a slang term for crack cocaine. Officer Deluna denied that he had asked the defendant any questions before the defendant made that statement.

¶ 11 Officer Deluna then "finished my protective pat-down to make sure he didn't have any weapons and then I searched where he motioned to where I thought he had the rock that he was referring to." Officer Deluna subsequently recovered from the defendant's right front pants pocket a "plastic baggie which contained a rock substance which was suspect crack cocaine." He testified that the object was later determined to be cocaine.

¶ 12 On cross-examination by the State's attorney, Officer Deluna acknowledged that the search warrant for the residence targeted Jackson, and that the officers were looking for heroin, related paraphernalia and cash from illegal drug sales. Officer Deluna agreed with the State's attorney that executing a drug–related warrant is inherently a "very dangerous" situation, and that the officers had no idea whether the occupants of the residence could have weapons. Officer Deluna agreed that when the defendant exited the building, he had been was running directly toward the officer and also testified that the pat-down search was for the safety of the police.

¶ 13 Following Officer Deluna's testimony, the State moved for directed findings to deny both Jackson's and the defendant's motions to suppress. In argument on the motion, the defendant's counsel claimed that it was a "stretch" to believe that the defendant, without any questioning would "volunteer" the fact that he had cocaine. The trial court granted the State's motion for a directed finding, denying the defendant's motion to suppress. The court reasoned that "it was uncontested that the officer detained him after they saw him running down the back stairs" and that it was "unrebutted" that "he volunteered the fact that he only had a rock on him." The court noted: "He was leaving a building that was being lawfully searched pursuant to a valid search

warrant. I think they *** could legally stop him and detain and search him. And if he volunteered that he had a rock on him, that's certainly enough for probable cause."

¶ 14 Separately, the trial court denied the State's motion for a directed finding with respect to Jackson's motion to suppress. Thus, the hearing continued with respect to Jackson's motion.

¶ 15 The State then called Officer Timothy Balasz, who testified that he was one of the officers executing the search warrant at the residence. Officer Balasz testified that officers recovered $1120 in cash in a bedroom, and in the kitchen found a digital scale and "empty, clear, plastic bags that are commonly used for packaging of narcotics." In the basement, officers found several bags containing cannabis; Officer Balasz testified that Jackson admitted to police that the cannabis was his. He also testified that, after Jackson was taken into custody, plastic bags containing heroin were recovered from Jackson's waistband. The court subsequently denied Jackson's motion to quash his arrest and suppress evidence.

¶ 16 Following the denial of Jackson's motion, the parties agreed to proceed immediately to trial. The following exchange occurred between the parties' counsel and the court, during which counsel for the State and Jackson – but not the defendant's counsel – expressed their intent to incorporate the hearing testimony into the trial :

> "MR. GOLDBERG [Jackson's counsel]: Your Honor, I would be ready for trial. I would be willing to stipulate to the testimony that you have heard from Officer Balasz, and I'm ready to proceed with the rest of the bench [trial.]
>
> THE COURT: Mr. Akers?
>
> MR. AKERS [the defendant's counsel]: We're ready to proceed also, Judge.

THE COURT: And you're ready to proceed too?

MS. BENNETT [State's attorney]: Yes, your Honor. And would I stipulate to the testimony of the witnesses thus far, that that would be their testimony at trial that we are about to have. And I will incorporate that into the trial.

MR. GOLDBERG: Okay.

THE COURT: And so do you have any additional witnesses?

MS BENNETT: I do, your Honor. I would call Officer Alvarado.

THE COURT: And just so the record is clear, both sides are waiving opening for this trial, is that correct?

MS. BENNETT: I would waive opening, Judge.

MR. GOLDBERG: Yes.

MR. AKERS: That's correct, Judge, yes."

¶ 17 Immediately afterward, the trial commenced. The State called Officer Matt Alvarado, who testified that he assisted in executing the search warrant and served as the "evidence officer" to inventory items recovered from the operation. Officer Alvarado stated that at the police station, Officer Deluna tendered to him a "single of crack cocaine." On cross-examination by the defendant's counsel, Officer Alvarado agreed that Officer Deluna had informed him that the crack cocaine was recovered from the defendant.

¶ 18 Following Officer Alvarado, the State called Officer Deluna. Notably, Officer Deluna's brief trial testimony did not repeat the details of his prior hearing testimony regarding his detention and search of the defendant or the defendant's statement to him that he had a "rock." However, Officer Deluna acknowledged that he had previously testified that he "recovered one item of suspect cocaine from the defendant," and testified that this item had remained in his custody until he gave it to Officer Alvarado at the police station.

¶ 19 The State then called Officer Balasz at trial, who testified that the cash recovered from the residence, as well as the heroin recovered from Jackson, remained in his custody and control until they were turned over to Officer Alvarado. Next, the State introduced stipulated testimony that a forensic scientist from the Illinois State Police Crime Lab would state that the item recovered from the defendant tested positive for cocaine, and that tests on the bags recovered from Jackson tested positive for heroin. The State then rested.

¶ 20 At the close of the State's case, Jackson's attorney moved for a directed finding of acquittal with respect to Jackson. The defendant's counsel also made a motion for a directed finding, but did not present any argument in support of that motion, other than to state: "We would rest on the evidence that has been submitted thus far in regards to the motion for a directed finding." The trial court denied both motions. Neither Jackson nor the defendant elected to testify or to present any other evidence before resting.

¶ 21 In his closing argument, the defendant's counsel explicitly commented on the evidence presented in *both* the hearing on the motion to suppress and at trial. The defendant's counsel emphasized that Jackson, not the defendant, was the target of the search warrant. Defense counsel stated: "We've heard testimony that [the defendant] is supposedly seen running out of the rear of the residence," but emphasized that he was "not seen by any of the officers who were

inside" of the house. The defendant's counsel specifically questioned the credibility of Officer Deluna, referenced his hearing testimony that the defendant had stated that he had a "rock":

> "Officer Deluna just indicates that he sees [the defendant] outside of the residence and it's just coincidental, Judge, that both Mr. Jackson and [the defendant] are extremely cooperative with the police officers and that both of them apparently just offer up that they are in possession of narcotic[s]. [The defendant] says, 'Yes, I have a rock in my pocket.' Even after Officer Deluna has conducted a protective pat-down and has not discovered anything on him, he offers that he has a rock in his pocket which we would submit, Judge, is somewhat incredible."

The defendant's counsel thus argued that "there is reasonable doubt in regard to the possession count that [the defendant] faces."

¶ 22 In response, the State's closing argument also referenced the alleged statement made by the defendant: "It is not unreasonable to believe that the officers, while pointing a gun at the defendant as he runs out of the residence, that he would then offer up, 'Hey, I just got a rock in my pocket.' That is not unreasonable as clearly the officers could have thought he was armed." The defendant's counsel did not object to the State's reference to this evidence.

¶ 23 The trial court proceeded to find the defendant guilty of possession of a controlled substance. On September 6, 2013, the defendant filed a motion for a new trial, which generally averred that the State failed to prove his guilt beyond a reasonable doubt, that he was denied due process of law and equal protection, that he did not receive a fair trial, and that the court erred in

denying his motion for a directed verdict. The motion for new trial made no reference to Officer Deluna's testimony at the hearing on the motion to suppress.

¶ 24 At a hearing on November 12, 2013, the trial court gave the defendant's counsel an opportunity to argue in support of his motion for new trial. However, the defendant's counsel simply stated: "We would rest on the motion. [The] [c]ourt heard the evidence in the case at trial. We would just rest on the written motion." The trial court denied the motion for new trial. On the same date, the trial court sentenced the defendant to one year in the Illinois Department of Corrections. The defendant filed a notice of appeal on the same date, November 12, 2013.

¶ 25 ANALYSIS

¶ 26 We note that we have jurisdiction as the defendant perfected a timely notice of appeal. See Ill. S. Ct. R. 606(a), (b) (eff. Feb. 6, 2013).

¶ 27 The defendant's appeal asserts two arguments to attack his conviction. First, he claims that the evidence was insufficient to convict him of knowing possession of a controlled substance, due to the lack of a stipulation that the trial evidence would incorporate the testimony elicited at the hearing on the motion to suppress. Thus, he asserts that Officer Deluna's hearing testimony – including the defendants' alleged statement that he had a "rock" – was never part of the trial evidence and could not support his conviction for knowing possession of cocaine. The defendant proceeds to argue that the evidence actually elicited at trial was insufficient. Although he acknowledges that there was trial testimony that the cocaine was recovered "from" the defendant, he argues this evidence was insufficient to prove *knowing* possession. See 720 ILLCS 570/402 (West 2012) (making it "unlawful for any person knowingly to possess a controlled or counterfeit substance.") The defendant acknowledges that the State's attorney "expressed a wish

to stipulate to the testimony [Officer] Deluna previously gave" but maintains that his trial counsel "never agreed to stipulate and the court never found that the parties did so."

¶ 28 In its appellate brief, the State disputes the defendant's contention that Officer Deluna's hearing testimony was not incorporated into the State's trial evidence. Further, the State urges that the defendant "forfeited any attempt to challenge the propriety of the stipulation entered into at trial where he did not object at any point during trial, acquiesced in the trial proceedings which were based on that stipulation, and did not challenge the propriety of that stipulation in his motion for new trial."

¶ 29 The State contends that, even if the defendant's counsel did not explicitly "verbalize his agreement to the stipulation," the record demonstrates that the defendant's counsel "conducted the trial with full understanding and agreement that the facts adduced at the hearing *** had been stipulated to for the purpose of trial." The State argues that the defendant's "acquiescence in proceeding by way of stipulation" is also demonstrated by the fact that his counsel's closing argument referenced testimony elicited during the hearing on his motion to suppress. The State argues that the defendant cannot engage in "subterfuge" by now denying that there was a stipulation to incorporate the hearing evidence at trial.

¶ 30 We agree with the State that the conduct of the defendant's trial counsel demonstrated his clear awareness, understanding and acquiescence that the evidence from the hearing on the motion to suppress would be incorporated into the evidence trial. As a result, he is estopped from now asserting the contrary position.

¶ 31 Our court has recognized that "[i]t is fundamental to our adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding. [Citations.] A party is estopped from taking a position

on appeal that is inconsistent with a position the party took in the trial court. [Citations.]" (Internal quotation marks omitted.) *People v. Major-Flisk*, 398 Ill. App. 3d 491 (2010).

¶ 32 Similarly, our supreme court has stated that: "[W]here *** a party acquiesces in proceeding in a given manner, he is not in a position to claim he was prejudiced thereby. [Citations.] Active participation in the direction of proceedings *** goes beyond mere waiver." *People v. Villareal*, 198 Ill. 2d 209, 227 (2001) ("To allow defendant to object, on appeal to the very verdict forms he *requested* at trial, would offend all notions of fair play.").

¶ 33 Viewing the record from the August 1, 2013 proceedings as a whole, we agree with the State that defense counsel's conduct indicated his understanding of and acquiescence to the stipulation that the hearing testimony would also serve as trial testimony.

¶ 34 Our supreme court has explained: "A stipulation is an agreement between parties or their attorneys with respect to an issue before the court [citations] and courts look with favor upon stipulations because they tend to promote disposition of cases, simplification of issues[,] and the saving of expense to litigants [citations]." *People v. Woods*, 214 Ill. 2d 455,468 (2005). "The primary rule in the construction of stipulations is that the court must ascertain and give effect to the intent of the parties." *Id.* at 468-69. We acknowledge that in this case there was no formalized written stipulation, and the defendant's trial counsel did not explicitly state that he stipulated to the inclusion of Officer Deluna's hearing testimony as evidence during the trial. However, we believe that the defendant's words and conduct demonstrated that he shared the other parties' expressed intent to that agreement.

¶ 35 The record reveals numerous instances in which the defendant's counsel did not merely fail to object, but rather affirmatively referenced and relied upon, the parties' understanding of a stipulation to incorporate the hearing testimony at trial. First, we find it noteworthy that, early in

the August 1, 2013 proceedings, the defendant's counsel indicated to the court that he expected "stipulations" resulting from the similarity of the evidence to be elicited in the hearing and at trial. In response to the court's question as to whether the parties wished to proceed with the hearing on the motions before starting the bench trial, the defendant's counsel responded: "Yes, Judge. But as we indicated, *we would anticipate that much of the testimony that may come out during the motion would probably be the same testimony that would come at trial, so we believe there would probably be some stipulations following*." Thus, it was the defendant's counsel who first raised the possibility of a stipulation that the evidence during the hearing on the motions to suppress would be incorporated into the trial that immediately followed. His actions during trial unequivocally confirmed that he tried the case in accordance with his stated intentions regarding the incorporation of stipulated testimony.

¶ 36 Similarly, when the defendant's counsel moved for a directed verdict at the close of the State's case, the defendant's counsel's argument raised no objection with respect to the State's reliance on Officer Deluna's testimony. Rather, his counsel merely stated "We would rest on the evidence that has been submitted thus far."

¶ 37 Most significantly, the defendant's counsel's closing argument clearly indicated his awareness that Officer Deluna's hearing testimony was being relied upon by the State at trial as proof of his client's guilt. Indeed, defense counsel's argument for acquittal relied on his contention that Officer Deluna's hearing testimony regarding the defendant's arrest, including the defendant's purported admission to possessing a "rock," was incredible. Defense counsel's closing argument specifically referenced Officer Deluna's hearing testimony that the defendant was "supposedly seen running out of the rear of the residence," as well as his testimony regarding the pat-down search and the defendant's alleged statement. At no point in his closing

argument did the defendant's counsel suggest that Officer Deluna's hearing testimony could not be considered as trial evidence; to the contrary, defense counsel relied on the purported lack of credibility of that testimony to argue for acquittal.

¶ 38 Furthermore, the State's closing argument also explicitly referenced Officer Deluna's hearing testimony that the defendant had volunteered that he had a "rock" in his pocket. However, the defendant's counsel again did not object to the State's reliance on that testimony. Finally, the defendant also made no such contention in his motion for a new trial.

¶ 39 The defendant's appellate briefs acknowledge his trial counsel's conduct never raised any objection to a stipulation to incorporate the hearing testimony at trial, but maintains that "there was no stipulation to challenge." The defendant acknowledges that "courts must give effect to the intent of the parties when construing a stipulation," but argues that "[t]his presupposes the existence of a stipulation" and that in this case "no stipulation exists for this Court to construe." With respect to the fact that his trial counsel specifically referenced Officer Deluna's hearing testimony in his closing argument, the defendant's reply brief argues that even if his trial counsel held a "mistaken belief" that "evidence from the motion hearing was included at trial," "such a mental state by defense counsel does nothing to satisfy the State's burden of proof."

¶ 40 Although the defendant's arguments are creative, we find them unpersuasive. First, as noted by the State, the defendant does not cite any authority suggesting that a stipulation must be embodied in writing or through any formalized language on the record. "The primary rule in the construction of stipulations is that the court must ascertain and give effect to the intent of the parties." *Woods*, 214 Ill. 2d at 468-69. However, the *Woods* decision does not suggest that the terms of the agreement or the "intent of the parties" cannot be inferred from counsel's conduct.

¶ 41 More importantly, we find that the defendant's argument fails in light of the well-settled rule that "[a] party is estopped from taking a position on appeal that is inconsistent with a position the party took in the trial court." *Major-Flisk*, 398 Ill. App. 3d at 500.

¶ 42 As we reject the defendant's contention that Officer Deluna's hearing testimony was not part of the trial evidence, his challenge to the sufficiency of the evidence to support his conviction fails. "Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *People v. Brown*, 2013 IL 114196, ¶ 48.

¶ 43 "In order to convict an individual of unlawful possession of a controlled substance, the State must prove that the defendant had knowledge of the presence of the controlled substance and that he or she also had immediate and exclusive possession or control of the narcotics." *Woods*, 214 Ill. 2d at 466; see also 720 ILCS 570/402 (West 2012). In this case, the evidence included Officer Deluna's unrebutted testimony that: (1) during a pat-down search, the defendant voluntarily stated that he had a "rock" on him and motioned to his pants; (2) "rock" is a slang term for crack cocaine; and (3) the substance recovered from the defendant's pocket tested positive for cocaine. Based on this and the other evidence elicited by the State, the trial court could rationally conclude that the State proved beyond a reasonable doubt that the defendant was in knowing possession of cocaine. Thus, we reject the defendant's primary argument on appeal.

¶ 44 The defendant's second argument on appeal asserts that the trial court erred in denying the defendant's motion to suppress the evidence obtained as a result of Officer Deluna's pat-down search. Although the defendant concedes that Officer Deluna had reason to initially detain him in conjunction with the search warrant, the defendant argues that "he had no probable cause or

reasonable suspicion that Pruitt was armed and dangerous" to additionally justify a pat-down search. In turn, he argues that the court should have suppressed both the defendant's alleged statement during the search that he had a "rock" on him, as well as the cocaine recovered from the defendant, because the "unlawful frisk, precipitating his statement, tainted both the statement and the evidence that Deluna recovered from the search." As set forth below, we find that the pat-down search was lawful, and thus the motion to suppress was properly denied.

¶ 45 Our supreme court had delineated a "two-part standard" for reviewing a decision on a motion to suppress. *People v. Colyar*, 2013 IL 111835, ¶ 24. "We afford great deference to the trial court's factual findings, and will reverse those findings only if they are against the manifest weight of the evidence. [Citation.] We review *de novo*, however, the trial court's ultimate legal ruling on whether suppression is warranted. [Citation.]" *Id.*

¶ 46 "Both the fourth amendment and the Illinois Constitution of 1970 guarantee the right of individuals to be free from unreasonable searches and seizures." *Id.* ¶ 31 (citing U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6). "Reasonableness under the fourth amendment generally requires a warrant supported by probable cause," but "[o]ne exception to the warrant requirement was recognized by the [United States] Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968)." *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001). In this case, the State urges that Officer Deluna's search of the defendant was justified under *Terry.*

¶ 47 In *Terry*, the United States Supreme Court "held that a brief investigatory stop, even in the absence of probable cause, is reasonable and lawful under the fourth amendment when a totality of the circumstances reasonably lead the officer to conclude that criminal activity may be afoot and the subject is armed and dangerous." *Colyar*, 2013 IL 111835, ¶ 32 (citing *Terry*, 392 U.S. at 30). *Terry* instructs that if "nothing in the initial stages of the encounter serves to dispel

[the officer's] reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.'" *Id.* (quoting *Terry*, 392 U.S. at 30-31). Thus, "when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, the officer may conduct a pat-down search to determine whether the person is in fact carrying a weapon." *Sorenson*, 196 Ill. 2d at 432.

¶ 48 Our supreme court has explained that "Although the police officer's level of suspicion need not rise to the level of probable cause, it must be more than an inarticulate hunch. [Citation.] When reviewing the officer's action, we apply an objective standard to decide whether the facts available to the officer at the time of the incident would lead an individual of reasonable caution to believe that the action was appropriate." *Colyar*, 2013 IL 111835, ¶ 40. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Sorenson,* 196 Ill. 2d at 433 (citing *Terry*, 392 U.S. at 27).

¶ 49 "The *Terry* principles have now been codified in our Code of Criminal Procedure of 1963." *Sorenson*, 196 Ill. 2d at 433 (citing 725 ILCS 5/107-14, 108-1.01 (West 1996)). Thus, by statute, "[w]hen 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." 725 ILCS 5/108-1.01. (West 2012).

¶ 50 In this case, the defendant argues that Officer Deluna lacked reasonable suspicion to believe that the defendant was armed and dangerous so as to justify a pat-down search. Although the defendant was seen leaving a house that was the subject of a search warrant, he

argues that the mere fact "[t]hat the warrant targeted drugs in the house does not give officers an individualized suspicion that each and every occupant is armed and dangerous." The defendant also argues that he could not reasonably be viewed as a threat because "[Officer] Deluna and his partner outnumbered Pruitt two-to-one", the defendant "acted in a non-threatening manner," and he otherwise complied with Officer Deluna's instructions. Although he recognizes that Officer Deluna testified regarding the inherently dangerous nature of executing a drug-related warrant, he argues that such a generalized assumption is insufficient to support a pat-down search.

¶ 51 The defendant relies heavily on the United State Supreme Court's decision in *Ybarra v. Illinois*, 444 U.S. 85 (1979), as well as the 1984 decision of the Third District of our court in *People v. Gross*, 124 Ill. App. 3d 1036 (1984), which indicate that a person's mere proximity to premises that are being searched for drugs does not alone justify a *Terry* search. In *Ybarra*, police obtained a warrant authorizing the search of a tavern and one of its bartenders for evidence relating to the manufacture and distribution of controlled substances. 444 U.S. at 88. When officers arrived at the tavern, they conducted a pat-down search of each of the "9 to 13" customers present in the tavern. *Id.* During a frisk of the defendant, an officer felt "a cigarette pack with objects in it"; the officer later retrieved the cigarette pack, which contained heroin. *Id.* at 88-89. The defendant was later convicted for unlawful possession of a controlled substance. *Id.* at 89.

¶ 52 The United States Supreme Court rejected the contention that the initial search of the defendant was justified as "a reasonable frisk for weapons" pursuant to *Terry*, as "[t]he initial frisk *** was simply not supported by a reasonable belief that [defendant] was armed and presently dangerous." *Id.* at 92-93. The court noted that the officer had no "particular reason to believe that [the defendant] might be inclined to assault them," as he "gave no indication of

possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault" and acted in a non-threatening manner. *Id.* at 93. *Ybarra* held that *Terry* "does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be risked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Id.* at 94.

¶ 53 Under the facts of our Third District's decision in *Gross*, 134 Ill. App. 3d 1036, the defendant was one of four persons present at the residence of another individual, who was the target of a search warrant. *Id.* at 1037. The police frisked everyone present, and also searched the defendant's purse, which was found to contain cocaine. *Id.* The trial court granted the defendant's motion to suppress. *Id.* On appeal, the Third District rejected the State's argument that the search of the purse was lawful under *Terry* since the defendant was found at the "suspected site of drug trafficking and the search to that point" had found drugs in the house. *Id.* at 1039. The State argued that "[g]iven the inherently risk and dangerous business of drug trafficking," the police "had an articulable and individualized suspicion that the defendant may well have been harboring weapons and/or contraband in this easily accessible purse." *Id.* at 1040.

¶ 54 Rejecting this argument, the Third District found that the State's claims were "nothing more than broad generalizations" and that "[t]he fact that drug trafficking is often a risky business does not justify the assumption in all cases that every person present where a drug search is being conducted is inherently dangerous or is harboring weapons and contraband." *Id.* Because the "the record contain[ed] nothing which shows that the police had reason to believe that the defendant *** was armed and dangerous," the Third District affirmed the order granting the motion to suppress. *Id.*

¶ 55 In addition to his reliance on *Ybarra* and *Gross*, the defendant urges that this case is "identical" to the situation presented in our court's more recent decision in *People v. Boswell*, 2014 IL App (1st) 12225, in which we reversed a conviction for possession of a controlled substance after concluding that the defendant's pat-down search was improper. In *Boswell*, the defendant's arresting officer testified that he and his partner were approached by a woman who told them that a man was selling narcotics at a specific intersection. *Id.* ¶ 5. The officers went to the location, a "known area of narcotics sales," and saw the defendant, who fit the description provided by the woman. *Id.* ¶ 6. The arresting officer "saw defendant clasp hands with a man" and "believed that a hand-to-hand narcotics transaction had taken place." *Id.* The officer and his partner approached the man, who "did not attempt to walk or run away." *Id.* ¶ 7.

¶ 56 The arresting officer in *Boswell* proceeded to perform a pat-down search for "officer safety," during which the defendant admitted that he had heroin on his person. *Id.* Notably, the officer testified at the motion to suppress hearing that " 'drugs and guns go together' " and that "it was a reasonable inference that people dealing drugs on street corners may also be in possession of weapons." *Id.* ¶ 6. The trial court denied the motion to suppress, finding the pat-down search justified. *Id.* 8.

¶ 57 Our appellate court disagreed, finding that "neither [arresting] officer articulated particular facts to support a belief that defendant was armed or to give rise to a justifiable fear for their safety or the safety of others." *Id.* ¶ 23. Our court stated that "*Terry* requires more than a general belief that drug dealers may carry weapons before a pat-down may be conducted" and that "the mere fact that an officer believes drug dealers carry weapons or narcotics arrests involve weapons is insufficient alone to support reasonable suspicion to justify a *Terry* frisk." *Id.*

¶ 58 Our court in *Boswell* rejected the State's reliance on *People v. DeLuna*, 334 Ill. App. 3d 1 (2002), which found a pat-down search was valid where the defendant knocked on the door of an apartment that was the subject of a drug-related search warrant, after retrieving a package from his vehicle and concealing it in his waistband. *Boswell*, 2014 IL App (1st) 122275, ¶ 24 (quoting *DeLuna*, 334 Ill. App. 3d at 4). We found that *Boswell* presented a "very different scenario" and explained that, whereas "the defendant in *DeLuna* arrived at the very location where officers had probable cause to believe drugs would be found and in possession of a package that *** appeared to contain drugs," the *Boswell* defendant "was merely standing on a public street and neither officer observed him in possession of any quantity of drugs." *Id.* ¶ 25. Further, in *Boswell*, there was "no evidence that (1) defendant engaged in any furtive movement, (2) the officers observed any bulges in defendant's clothing, or (3) defendant attempted to walk or run away," and "the officers were on a public street during daylight hours." *Id.* ¶ 25. Thus, our court in *Boswell* found the evidence "does not support any articulable suspicion that a protective pat-down was necessary." *Id.*

¶ 59 We do not find that *Boswell* controls in this case. *Boswell* holds that there must be "particular facts to support a belief that defendant is armed" and there must be "more than a general belief that drug dealers may carry weapons before a pat-down may be conducted." *Id.* ¶ 23. However, contrary to the defendant's contention that *Boswell's* facts are "identical," there are key differences between *Boswell* and this case. Most significantly, whereas the *Boswell* defendant was merely standing in a public street, the defendant in this case was seen hurriedly leaving in a manner that could be described as fleeing from the premises that were already subject to a valid search warrant. We find that this case more closely resembles *DeLuna*, which declined to find improper a pat-down search of a defendant who "knocked on the door of the

very apartment being searched for drugs" pursuant to a warrant. *DeLuna*, 334 Ill. App 3d at 11-12. Moreover, unlike *Boswell*, where our court noted the lack of evidence that the "defendant attempted to walk or run away," 2014 IL App (1st) 122275, the arresting officer in this case testified that the defendant "ran down the stairs" to leave the rear door of the residence, suggesting that the defendant was attempting to avoid the officers executing the search warrant.

¶ 60 Thus, notwithstanding the defendant's reliance on *Ybarra*, *Gross*, and *Boswell*, we concur with the State that the decision of our supreme court in *People v. Sorenson*, 196 Ill. 2d 424 (2001), is more applicable to the facts at hand. Notably, *Sorenson* indicates that the inherently dangerous nature of the illegal drug trade *may* support a protective search pursuant to *Terry*. We find that under the facts of this case, *Sorenson* is persuasive and weighs against the defendant's argument.

¶ 61 In *Sorenson*, a police officer testified that on the evening of the search in question, he was conducting surveillance of a "known drug house," and that he had been told by numerous sources that its occupants were dealing drugs. *Id.* at 427. A vehicle with three persons, including the defendant, parked at the house; the officer then observed the defendant briefly enter the house and return to the vehicle before it drove away. *Id.* at 427-28. Suspecting a drug transaction had occurred the police officer followed the vehicle and then stopped it after it made a turn without signaling. *Id.* at 428.

¶ 62 The officer testified that he felt threatened when he stopped the vehicle because it was a "dark road," there were three persons in the vehicle, and "in his experience, persons involved in drugs are known to carry weapons." *Id.* The officer first searched the driver and then frisked the defendant. *Id.* During the search, the officer asked the defendant to remove his boots, which were unlaced, as "[i]n his experience, any time boot laces are untied there is a very strong

possibly that weapons may be located inside." *Id.* at 429. When the defendant complied, the officer noticed a white substance in one of the boots that later tested positive for cocaine. *Id.* The defendant was charged with unlawful possession of a controlled substance.

¶ 63 The trial court denied the defendant's motion to suppress, finding the search was valid as the officer's testimony demonstrated his "reasonable belief that the search was necessary to protect himself from harm." *Id.* at 430. The appellate court affirmed the defendant's subsequent conviction. *Id.*

¶ 64 In the supreme court, the defendant argued that the officer "lacked a reasonable belief that the defendant posed a danger necessary to justify a pat-down search under *Terry*." *Id.* at 431. In its analysis, the supreme court noted that: "we will accord great deference to the trial courts' factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence; however, we will review *de novo* the ultimate question of the defendant's legal challenge to the denial of his motion to suppress." *Id.* at 431.

¶ 65 Our supreme court proceeded to find that the search was justified. Significant for purposes of this case, the supreme court rejected the defendant's argument "that the officer was not so much concerned with his safety as he was in searching for illegal drugs." *Id.* at 434. The supreme court concluded that this notion was belied by the officer's testimony that he "was primarily concerned with the possibility that the defendant possessed a weapon." *Id.* (noting "[t]he fact that the officer may have also believed that the defendant possessed illegal drugs did not negate the officer's concern for his safety").

¶ 66 Similarly, the supreme court also rejected the defendant's arguments—similar to those raised in this appeal—that the search was based on "general suppositions," and that there was "not a sufficient nexus between illegal drug activity and a reasonable belief that a suspect is

armed and dangerous." *Id.* The supreme court noted that the officer testified that he felt threatened under the circumstances, including "that he was alone facing three persons in a vehicle who had come from a known drug house, and that, in his experience, persons involved with illegal drugs are known to carry weapons." *Id.* at 437. Our supreme court further noted that "it has been held that when a police officer possesses a reasonable articulable suspicion that automobile occupants were dealing drugs just prior to the stop, the officer's belief that the suspects were armed and dangerous was reasonable because weapons and violence are frequently associated with drug transactions." *Id.* at 438 (citing *United States v. Brown*, 913 F.2d 570, 572 (8th Cir. 1990)).

¶ 67 Notably, the *Sorenson* defendant, like the defendant in this case, also relied on *Ybarra*. However, our supreme court found that *Ybarra* was "distinguishable." *Id.* at 438. Our supreme court reasoned: "*Ybarra* does not control the present case because here [the officer's] suspicions were specifically directed at the defendant. Moreover, the officer was alone on a dark roadside, conducting a valid investigative stop involving a vehicle with several occupants. Thus, *Ybarra* is not factually similar to the present case." *Id.* at 439.

¶ 68 The *Sorenson* court concluded: "the question is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety was in danger. Under the totality of the circumstances presented here, we find that [the officer] was warranted in his belief that his safety was in danger. Accordingly, we find that the frisk of the defendant was proper in this case." *Id.*

¶ 69 We arrive at the same conclusion in this case. Based on Officer Deluna's testimony, the trial court could conclude that he had a reasonable belief that his safety was in danger, justifying his protective pat-down search of the defendant. In denying the defendant's motion to suppress,

the trial court explicitly credited the "uncontested" testimony from Officer Deluna that the defendant "was leaving a building that was being lawfully searched pursuant to a valid search warrant" and was seen "running down the back stairs." Pursuant to *Sorenson*, the trial court could also rely on Officer Deluna's testimony that, based on his experience, executing search warrants is inherently dangerous, especially when illegal drugs are concerned. See *id.* at 433 ("In determining whether the officer acted reasonably *** due weight must be given to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.") Moreover, Officer Deluna specifically testified, and the trial court evidently believed, that he was conducting a search for "weapons" out of concern for his and his fellow officers' safety. As in *Sorenson*, whether Officer Deluna "may have also believed that the defendant possessed illegal drugs did not negate the officer's concern for his safety." *Id.* at 434.

¶ 70 We note that the trial court's credibility determinations with respect to Officer Deluna's testimony are entitled to "great deference," and its factual findings will be reversed "only if they are against the manifest weight of the evidence." *Colyar*, 2013 IL 111835, ¶ 24. Notwithstanding the argument by defense counsel that officer Deluna's testimony was "somewhat incredible," the trial court believed it to be true. Especially as his testimony was not contradicted by any evidence, we cannot say that the trial court's decision to credit Officer Deluna's testimony regarding the basis for his search was against the manifest weight of the evidence.

¶ 71 In turn, we find no error in the trial court's denial of the defendant's motion to suppress. Given Officer Deluna's unrebutted testimony, we have no reason to doubt that "a reasonably prudent man in the circumstances would be warranted in the belief his safety was in danger," justifying his protective pat-down search of the defendant during which the cocaine was

discovered. *Sorenson*, 196 Ill. 2d at 439. As we find that the pat-down search was proper, we reject the defendant's arguments that his statement to Officer Deluna regarding the "rock," or the evidence that cocaine was recovered from his pocket, should have been suppressed as evidence resulting from an illegal search.

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

¶ 73 Affirmed.