2017 IL App (1st) 150746-U
Order filed: April 14, 2017

SIXTH DIVISION

No. 1-15-0746

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. 14 CR 2309
	)	
DEVON WHITE	)	Honorable
	)	Carol Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's denial of defendant's motion to suppress evidence was not erroneous; the evidence was sufficient to convict him of burglary; mittimus corrected.

¶ 2 Following a stipulated bench trial, defendant-appellant, Devon White, was found guilty of one count of burglary in violation of section 19-1(a) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/19-1(a) (West 2013)), and two counts of theft in violation of sections 16-1(a)(1) and (a)(4) of the Criminal Code (720 ILCS 5/16-1(a)(1) (West 2013)), and 720 ILCS 5/16-1(a)(4) (West 2013)). Defendant was sentenced to seven years' imprisonment on the burglary conviction (count 1, which alleged that he entered a motor vehicle owned by Bianca Merritt with the intent to commit theft therein), and three years' imprisonment for two counts of theft merged into one count (count 2, which alleged that, while he had a prior burglary

conviction, defendant obtained or exerted unauthorized control over items owned by Ms. Merritt, with a value not exceeding $500). Defendant's sentences were to be served concurrently, with 390 days' credit given for time served, and he was assessed fees and fines totaling $399.

¶ 3 On appeal, defendant argues that his motion to suppress was erroneously denied; the trial evidence was insufficient to convict him of burglary; and his mittimus should be corrected to reflect one count of theft, rather than two. We affirm, but direct the clerk of the circuit court to correct the mittimus.

¶ 4 On August 8, 2014, prior to trial, defendant filed a motion to suppress evidence on the grounds that he was illegally searched after a stop by police which was made without probable cause or an articulable suspicion that he had committed an offense and, therefore, the items found in the course of this illegal search should be suppressed. On September 30, 2014, at a hearing on the motion to suppress, Chicago police officers, Andrzej Tyralski and James Vittori, testified and their testimony established the following.

¶ 5 On January 13, 2014, at about 2:20 a.m., Officers Tyralski and Vittori were on patrol in a marked police vehicle when they received a radio dispatch relaying a 9-1-1 telephone call made by Hattie Carter. Ms. Carter reported that she had observed a black man wearing a red cap with a baseball emblem and a gray sweatshirt or jacket, burglarizing a white Chevrolet Monte Carlo parked at 7343 S. Morgan Street in Chicago. The man was inside the vehicle and had "damaged" it.

¶ 6 The officers proceeded to the Morgan Street address. Less than one block from that location, and within "a minute, minute and a half of the 911 call," they observed a man, wearing a gray jacket or sweatshirt, and a red hat with a baseball emblem on it, walking alone on the street. Officer Tyralski was "almost positive he was the only person on that block," as it "was the

middle of the night." The officers identified defendant in court as the man they had seen on the night of the incident who matched the description in the 9-1-1 telephone call. Neither officer had seen defendant prior to that day. The officers asked defendant to "come over" to their squad car as "an investigative stop" to "ask him a couple of questions." Defendant complied with the officers' request. The officers agreed that defendant was not visibly committing a crime, nor carrying a weapon, nor behaving suspiciously when they stopped him.

¶ 7 The officers then handcuffed defendant and performed a "protective pat-down." Officer Tyralski explained the pat-down was performed with an open hand over the outer layers of defendant's clothing "for *** safety, because it is [E]nglewood, middle of the night" and to "secure" the scene. During the pat-down, Officer Vittori felt several hard items in defendant's right-side jacket pocket and was not certain whether one of those objects was a weapon. Officer Vittori questioned defendant about the items in his pocket, but defendant refused to answer.

¶ 8 When the officer removed the items from defendant's pocket and found a Magellan GPS device, a cell phone, and a bottle of perfume, defendant was placed into the squad car. The officers then drove defendant to the Morgan Street address where the officers observed a parked white vehicle. There, the officers spoke with Ms. Merritt. Ms. Merritt positively identified as belonging to her the white vehicle which had been "broken into," and the items which defendant had in his possession. She told the police that, the last time she saw her vehicle, its windows were not broken and the items were inside the vehicle. Ms. Merritt had not given defendant permission to take the items from her car.

¶ 9 After hearing the officers' testimony and the arguments, the court denied defendant's motion to suppress. In doing so, the court found that the officers' actions were reasonable in light of the circumstances: the 9-1-1 telephone call of an in-progress vehicle break-in; the

matching descriptions; and the proximity of time and location. The court also found that, in stopping defendant for a "field interview, [the officers] were entitled to a protective pat-down," which produced a Magellan GPS, a cell phone, and perfume. The officers transported defendant to the nearby scene of the incident. The officers then spoke with the owner of the burglarized vehicle, who identified as belonging to her the items recovered from defendant. The court concluded that the officers acted reasonably upon "an articulable suspicion."

¶ 10 On October 29, 2014, defendant filed a motion to reconsider the denial of his motion to suppress arguing that, at the time of the incident, the officers were not justified in their performance of a *Terry* frisk. In November 2014, following arguments, the court denied defendant's motion to reconsider finding that "the police had probable cause to stop the defendant" so that "the stop and search in this case was appropriate."

¶ 11 At defendant's February 2015 bench trial, the State requested to "adopt" the testimony of Officers Tyralski and Vittori from the motion to suppress hearing and the defense did not object. Further, the parties stipulated that Ms. Merritt would testify that: she met said officers on the night in question; she identified her vehicle for them; her car had no broken windows prior to the break-in; she had informed the officers that the items recovered from defendant—the Magellan GPS, cell phone, and perfume—belonged to her, and that those items had last been seen inside her vehicle; and she did not know defendant nor did she give him permission to enter her vehicle or remove items from it. The parties also stipulated to defendant's prior burglary conviction in circuit court case No. 11 CR 16515. The court denied defendant's motion for a directed finding. Defendant chose to not testify and presented no evidence.

¶ 12 The court found defendant guilty as charged. Defendant filed a posttrial motion arguing that the evidence was insufficient and the trial court erred when it denied his motion to suppress.

The court denied the posttrial motion. After a sentencing hearing, the court sentenced defendant to seven years' imprisonment as a class X offender for burglary (count 1), and a concurrent three year term of imprisonment for theft (count 2), after merging count 3 into count 2. Defendant now appeals.

¶ 13 On appeal, defendant first argues that the circuit court erred by denying his motion to suppress, where the officers exceeded the scope of the *Terry* stop by performing a pat-down search of him. Defendant does not challenge the basis for the *Terry* stop.

¶ 14 When ruling on a motion to suppress involving factual determinations or credibility assessments, the court's findings will not be disturbed on review unless they are against the manifest weight of the evidence. *People v. Almond*, 2015 IL 113817, ¶ 55. However, we review *de novo* the trial court's ultimate legal ruling to grant or deny the motion. *Id*.

¶ 15 The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Reasonableness under the fourth amendment generally requires a warrant supported by probable cause. *People v. Flowers*, 179 Ill. 2d 257, 262 (1997). A *Terry* stop is a recognized exception to the probable cause requirement of the fourth amendment, and allows for an officer to detain defendant when the officer has a reasonable, articulable suspicion that a crime has been or is about to be committed. *People v. Surles*, 2011 IL App (1st) 100068, ¶ 33 (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). The *Terry* principles have now been codified in the Illinois Code of Criminal Procedure of 1963. See 725 ILCS 5/107-14, 108-1.01 (West 2016).

¶ 16 During a lawful *Terry* stop, the officer may perform a protective pat-down search when he has a reasonable, articulable suspicion that he or another is in danger of attack because

defendant is armed and dangerous. *Surles*, 2011 IL App (1st) 100068, ¶ 35. Such a search is not to discover evidence, but must be limited to a search for weapons. *Id*. Handcuffing is proper during an investigatory stop when it is a necessary restraint to effectuate the stop and foster the safety of the officers. *People v. Johnson*, 408 Ill. App. 3d 107, 113 (2010). The officer's subjective belief regarding the safety of the situation is a factor that may be considered when determining whether a protective pat-down search was valid under *Terry*. *Flowers*, 179 Ill. 2d at 264. In determining the validity of a pat-down search under *Terry*, the totality of the circumstances known to the officer at the time of the search must be considered. *People v. Gonzalez*, 184 Ill. 2d 402, 422 (1998).

¶ 17 The lateness of the hour, and defendant's presence in a "high crime" area, are factors to consider in determining whether, under the totality of the circumstances, the *Terry* "reasonable, articulable suspicion" standard has been met (see *People v. Kipfer*, 356 Ill. App. 3d 132, 138 (2005); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *People v. Jackson*, 2012 IL App (1st) 103300, ¶ 51; *People v. Smithers*, 83 Ill. 2d 430, 438 (1980); and *People v. Goodum*, 356 Ill. App. 3d 1081, 1085 (2005)).

¶ 18 In the present case, the totality of the circumstances supports the reasonableness of the officer's decision to perform a safety pat-down. Specifically, a 9-1-1 call was made at about 2:20 a.m. which stated that a black man wearing a red cap with a baseball emblem and a gray sweatshirt or jacket had been observed inside a white automobile at 7343 South Morgan Street and that he had "damaged" the automobile; within a minute to a minute and a half of receiving the 9-1-1 call, the officers observed defendant who matched the race and clothing description of the offender, walking less than one block away from the location of the where white car had been broken into; and Officer Tyralski testified that they performed a pat-down search of defendant

"for our safety, because it is Englewood, middle of the night." The officer testified that Englewood "is a high crime area." Officer Vittori testified that defendant was handcuffed just prior to the search "for officer safety."

¶ 19 Given that: defendant matched the description of a man who had physically damaged a vehicle; he was observed less than one block away from the vehicle about one minute after the offender had broken into the vehicle and damaged it; and defendant was located in a high crime area in the middle of the night and the officers testified to their belief that a pat-down search and handcuffing was necessary for safety purposes, we find that the search (and concomitant handcuffing) was warranted under *Terry*.

¶ 20 Defendant does not dispute that the officers had a reasonable, articulable suspicion to effectuate a *Terry* stop upon him, but he argues that the officers had no such justification to perform a pat-down search. Specifically, defendant contends that, the fact he was walking in a high-crime area in the middle of the night was not sufficient, in and of itself, to indicate a reasonable, articulable suspicion that the officers were in danger because defendant was armed and dangerous. However, as discussed above, the officers observed defendant, walking in a high-crime area at night, within a minute to minute and a half *after* receiving a 9-1-1 call, which reported that a man, matching defendant's description, had been observed damaging a vehicle a half-block away. It is the totality of all these circumstances that supported the officers' decision to handcuff defendant and then to conduct a pat-down search of him. The search complied with *Terry* and, therefore, we affirm the trial court's order denying the motion to suppress. Defendant also argues that the evidence was insufficient to convict him of burglary beyond a reasonable doubt.

¶ 21 On a claim of insufficiency of the evidence, we must determine whether, taking the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *In re Q.P.*, 2015 IL 118569, ¶ 24. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and it is better equipped than this court to do so as it heard the evidence. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry the defendant, nor substitute our judgment for that of the trier of fact on the weight of the evidence or credibility of witnesses. *Q.P.*, 2015 IL 118569, ¶ 24. We accept all reasonable inferences from the record in favor of the State. *Id.*

¶ 22 The trier of fact need not be satisfied, beyond a reasonable doubt, as to each link in the chain of circumstances; instead, it is sufficient if, all the evidence taken together, satisfies the trier of fact, beyond a reasonable doubt, of the defendant's guilt. *Jonathon C.B.*, 2011 IL 107750, ¶ 60. The trier of fact is not required to disregard inferences that flow normally from the evidence, nor required to seek all possible explanations consistent with innocence and elevate them to reasonable doubt, nor find a witness was not credible merely because the defendant says so. *Id*.

¶ 23 A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Q.P.*, 2015 IL 118569, ¶ 24.

¶ 24 A finder of fact may infer from a defendant's recent and exclusive possession of items stolen in a burglary, without reasonable explanation, that he obtained possession of the items by burglary. *State v. Funches*, 212 Ill. 2d 334, 343 (2004). "The recency element in the common law inference affords an accepted basis for an inference of guilt on the part of the possessor. If

the possession is not recent, the elapse of time affords a continuing opportunity for the stolen goods to pass through other hands, thereby decreasing the value of the inference." *Id*. at 344. An inference does not violate due process when: (1) there is a rational connection between the basic fact and the presumed fact; (2) the presumed fact is more likely than not to flow from the basic fact; and (3) the inference is supported by corroborating evidence of guilt. *Id*. at 342-43. "If there is no corroborating evidence, the leap from the basic fact to the presumed element must still be proved beyond a reasonable doubt." *Id*. at 343. The party challenging an inference must demonstrate its invalidity as applied in light of all the trial evidence. *Id*.

¶ 25 The evidence showed that defendant was found in possession of items that had been stolen from inside a vehicle that had been broken into, less than one block from where the vehicle was parked and within a few minutes of the 9-1-1 call reporting the break-in. Ms. Merritt's stipulated testimony firmly established that her vehicle had a recently-broken window, and that the Magellan GPS, cell phone, and perfume found in defendant's possession by the officers had previously been inside her vehicle. Defendant's argument, to the contrary notwithstanding, this evidence alone is sufficient to support a conviction for burglary. Defendant's possession of Ms. Merritt's property from her burglarized vehicle was clearly recent and exclusive: the items were found in defendant's pocket within a short time after dispatch relayed the 9-1-1 call.

¶ 26 Here, taking the evidence in the light most favorable to the State, as we must, we cannot find that no rational trier of fact would agree with the trial court that defendant was guilty of burglary.

¶ 27 We are not required to elevate to reasonable doubt as to burglary the slim possibility that Ms. Merritt's car was burglarized by someone, other than defendant, who conveyed the stolen

items to defendant within a few minutes of the burglary, and less than one block from the burglary scene. Because we have found sufficient evidence to convict defendant, independent of the content of the 9-1-1 call, we need not address whether that content was improper hearsay evidence.

¶ 28 Lastly, the parties correctly agree that the mittimus must be corrected. Though the trial court merged the theft convictions by merging count 3 into count 2, the mittimus reflects two theft convictions. The mittimus should not reflect a conviction under count 3.

¶ 29 Pursuant to our authority under Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct the mittimus to reflect one theft conviction instead of two, under count 2. We, otherwise, affirm the judgment of the circuit court.

¶ 30 Affirmed, mittimus corrected.