2012 IL App (2d) 100887-U
No. 2-10-0887
Order filed March 23, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. NICHOLAS O. CASTRO, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Du Page County. No. 09-CF-3047 Honorable John J. Kinsella, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: (1) The trial court properly denied defendant's motion to quash and suppress, as an officer had reasonable suspicion to stop defendant when he made furtive movements after his associate engaged in some kind of transaction with a known drug-dealer; (2) defendant was entitled to a $20 credit against his $500 drug assessment (a fine for purposes of the credit), to reflect the four days he spent in presentencing custody.

¶ 1 Following a stipulated bench trial in the circuit court of Du Page County, defendant, Nicholas O. Castro, was found guilty of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)) and was sentenced to a two-year term of probation. The trial court also ordered defendant to pay, *inter alia*, an assessment of $500 pursuant to section 411.2(a)(4) of the Illinois

Controlled Substances Act (Act) (720 ILCS 570/411.2(a)(4) (West 2008)). Defendant argues on appeal that the trial court erred in denying his motion to quash his arrest and to suppress physical evidence and incriminating statements that he claims were gathered in violation of his constitutional rights. He alternatively argues that, as a result of the time he spent in custody prior to sentencing, he is entitled to monetary credit toward the assessment imposed pursuant to section 411.2(a)(4) of the Act. We affirm defendant's conviction, but we modify the mittimus to reflect application of a $20 credit toward the assessment.

¶ 2 At the hearing on defendant's motion to quash and suppress, Officer Bieker of the Downers Grove police department (whose first name is not given) testified that on October 10, 2009, he and another officer were conducting surveillance on Matthew Bakosh, a suspected drug dealer, in the parking lot of a tobacco store located at 6303 Woodward Avenue. Bieker testified that he and another officer had "prior contacts with [Bakosh] with cannabis and dealing cannabis." Bakosh and an unidentified female were seated in a tan Buick that was parked in the lot. Bieker was seated in a vehicle that was parked approximately two spaces to the north of the Buick. Bieker observed a gray Mazda pull into a space between his vehicle and Bakosh's. Defendant was seated in the rear driver's-side seat. The driver's surname was Dunkleberger and there were two passengers in the vehicle in addition to defendant. Their surnames were Perez and Madia. Perez, who was seated next to defendant, emerged from the Mazda, approached the driver's-side window of Bakosh's vehicle, and leaned inside that vehicle. Perez had his back to Bieker and Bieker was unable to see what Perez was doing. Perez stepped away from the vehicle and entered the tobacco store. Bakosh's vehicle then pulled out of its parking space and exited the lot onto Woodward Avenue. When Perez walked out of the store, Bieker approached him and asked "what his purpose was with the vehicle that he

just met with." Bieker observed that Dunkleberger and Madia had nervous and surprised looks on their faces. Bieker also observed defendant lean down and reach toward the floorboard. Bieker ordered defendant to put his hands on his head and ordered Dunkleberger and Madia to place their hands on the dashboard. Bieker had Perez sit on the curb and then called for backup.

¶ 3 When a second officer arrived, Bieker had Madia, Dunkleberger, and defendant step out of the vehicle one at a time and he talked to them about "what they were doing." Biecker described defendant as "[v]ery quiet, very nervous" while they were speaking to one another. According to Bieker, Dunkleberger gave him permission to search the Mazda. Bieker searched all four occupants of the Mazda but did not recover any drugs or other contraband from their persons. Bieker then searched the Mazda and recovered three white pills on the floor of the rear driver's-side seat. He found more pills in a blister pack in "the map seat compartment behind the driver's seat." Bieker asked defendant about the pills. Defendant replied that they were Vicodin and that he was taking them for his wisdom teeth. Defendant indicated that he did not have a prescription for Vicodin; his cousin had given him the pills. Bieker testified that this conversation was casual. Defendant was not in handcuffs and had not been told he was under arrest. Bieker did not advise defendant of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), before asking him about the pills.

¶ 4 At the close of defendant's evidence, the State moved for a finding in its favor on the ground that defendant had failed to establish a *prima facie* case. The trial court granted the motion. As noted, the matter proceeded to a stipulated bench trial. This appeal followed.

¶ 5 On appeal from a trial court's ruling on a motion to quash and suppress, the reviewing court "will accord 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." *People v. Close*, 238 Ill. 2d 497, 504 (2010).

However, the trial court's ultimate decision to grant or deny the motion is subject to *de novo* review. *Id.* At the hearing on a motion to quash and suppress, the defendant bears the initial burden of establishing a *prima facie* case that he or she was doing nothing unusual to justify the intrusion of a warrantless search or seizure. *People v. Linley*, 388 Ill. App. 3d 747, 749 (2009). "If the defendant makes the required showing, the burden shifts to the State to present evidence to justify the search or seizure." *Id.*

¶ 6 In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court held that the public interest in effective law enforcement makes it reasonable in some situations for law enforcement officers to temporarily detain and question individuals even though probable cause for an arrest is lacking. *Terry*, 392 U.S. at 27. *Terry* authorizes a police officer to effect a limited investigatory stop where there exists a reasonable suspicion, based upon specific and articulable facts, that the person detained has committed or is about to commit a crime. *People v. Payne*, 393 Ill. App. 3d 175, 180 (2009). When determining whether a reasonable suspicion of criminal activity exists, a court must consider the totality of the circumstances. *Id*. Defendant argues that he was seized, as were Madia and Dunkleberger, when Bieker ordered him to put his hands on his head and ordered Madia and Dunkleberger to place their hands on the Mazda's dashboard. "A person is 'seized' within the meaning of the fourth amendment when, in view of the surrounding circumstances, a reasonable person would believe he was not free to leave and the person submits to the police order." *People v. Holman*, 402 Ill. App. 3d 645, 648 (2010). A reasonable person ordered by a police officer to put his hands on his head or on the dashboard of a vehicle would believe he was not free to leave. Therefore, when defendant, Madia, and Dunkleberger complied with Bieker's order, a seizure occurred. Defendant argues that the seizure vitiated Dunkleberger's consent to the search of the

Mazda and that the pills recovered during that search must therefore be suppressed. Although a passenger in a vehicle ordinarily lacks an expectation of privacy that would permit him or her to challenge a search of the vehicle, as defendant points out, this court has held that a passenger may challenge the unlawful stop of a vehicle, and that any evidence subsequently seized may be suppressed as fruit of the unlawful seizure. *People v. Kunath*, 99 Ill. App. 3d 201, 205 (1981). Defendant further argues that statements he made while being detained are tainted by the illegality of the seizure and must be suppressed. See, *e.g.*, *United States v. Williams*, 615 F.3d 657, 668-70 (6th Cir. 2010). To prevail under these theories, defendant was obligated to establish a *prima facie* case that his detention was unlawful. In our view, defendant failed to meet his burden in this regard.

¶ 7 Bieker was conducting surveillance on Bakosh, an individual with whom Bieker had "prior contacts *** with cannabis and dealing cannabis." Even defendant, in his brief, refers to Bakosh as a "known drug dealer." The vehicle in which defendant was traveling pulled up next to Bakosh's vehicle, and one of defendant's fellow passengers, Perez, approached the driver's side of Bakosh's vehicle and leaned inside. After Perez stepped away from Bakosh's vehicle, it drove off. Although Bieker could not see precisely what transpired when Perez leaned inside Bakosh's vehicle, the circumstances known to Bieker were more than sufficient to arouse a reasonable suspicion that Perez and Bakosh had engaged in a drug transaction. Defendant does not really dispute this conclusion. He argues, however, that nothing links him to the encounter between Perez and Bakosh. It is true that a person's mere propinquity to someone who is independently suspected of criminal activity will not justify a *Terry* stop. See, *e.g.*, *United States v. Goines*, 604 F. Supp. 2d 533, 540 (E.D.N.Y. 2009). The principle applies with significantly less force, however, where there is a known or apparent connection between the individuals in question. Accord *United States v. Jaramillo*, 25 F.3d

1146, 1152 (2d Cir. 1994) ("while it is obviously reasonable to believe that individuals in a private home or vehicle have some connection with one another, it is not reasonable to assume that all of the persons at a public bar have such a connection"). One's companionship with another who is suspected of criminal activity is a factor to be considered in determining whether a *Terry* stop is reasonable. *United States v. Silva*, 957 F.2d 157, 160-61 (5th Cir. 1992).

¶ 8 Bieker observed what appeared to be a prearranged drug deal between Perez and Bakosh. Perez traveled to the site of the apparent transaction in a vehicle with defendant and two other individuals, both of whom appeared to be nervous and surprised when Bieker approached Perez. Defendant reached down toward the floorboard of the vehicle in which he was seated, suggesting a possible attempt to conceal contraband. Considering the totality of the circumstances, it was reasonable to suspect that the occupants of the Mazda were involved in a drug transaction that was physically consummated by Perez. In somewhat similar circumstances, a court in a sister state concluded that reasonable suspicion extended to the occupants of a vehicle when one of their number had contact with a drug dealer. In *Hudson v. State*, No. 771, 2011 WL 2651089 (Del. July 6, 2011), the defendant pulled his vehicle, a Buick, into a gas station parking lot, where police were conducting surveillance on a suspected drug dealer. One of the defendant's two passengers entered the suspected drug dealer's vehicle and then returned to the Buick, which then drove off. The *Hudson* court held that there was a reasonable suspicion to seize the occupants of the Buick. See also *Hicks v. State*, 984 A.2d 246, 252 (2009) (*Terry* stop of passenger of vehicle was valid where passenger waited in vehicle for 15 minutes at a pump at a gas station, nobody filled the vehicle, and the driver engaged in what appeared to be a hand-to-hand drug transaction with someone who approached on foot). It is true that in *Hudson* the suspicion that a drug transaction had occurred was

bolstered when the defendant and his passengers drove off from the gas station without having made any purchases. Here, although Perez did enter the tobacco shop after meeting with Bakosh, it was still entirely reasonable to suspect that a drug transaction had taken place.

¶ 9 Defendant cites *People v. Marchel*, 348 Ill. App. 3d 78 (2004), in support of his argument that a reasonable suspicion to detain him was lacking. The *Marchel* court held that the defendant's "furtive" movement of placing his hand near his mouth did not provide police who were patrolling a "drug infested" area with a reasonable suspicion that the defendant was attempting to hide contraband. *Id.* at 80. Defendant stresses the similarity between the "furtive" movement observed in *Marchel* and Bieker's observation of defendant reaching toward the floorboard of the Mazda. However, in *Marchel* the furtive gesture was the sole basis for detaining the defendant. *Id.* Here, in contrast, defendant was detained not merely because he reached toward the floorboard, but because he did so after Bieker confronted a fellow passenger who engaged in what appeared to be drug transaction with a suspected drug dealer. Similarly, defendant's argument that the nervous expressions on Madia's and Dunkleberger's faces did not establish a reasonable suspicion of criminal activity, while not really incorrect, is simply beside the point. Accordingly, defendant failed to make a *prima facie* showing that he was detained unlawfully.

¶ 10 Defendant alternatively argues that, even if his detention was lawful, his statements to Bieker must be suppressed because Bieker did not inform him of his *Miranda* rights. *Miranda* holds that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444. In determining whether a person is "in custody" for purposes of *Miranda* a court must ascertain

whether, in view of the circumstances surrounding the questioning, "a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *People v. Braggs*, 209 Ill. 2d 492, 505-06 (2003). Relevant considerations include "the location, time, length, mood, and mode of the interrogation, the number of police officers present, the presence or absence of the family and friends of the accused, any indicia of formal arrest, and the age, intelligence, and mental makeup of the accused." *Id.*

¶ 11 Temporary detention pursuant to *Terry* is not equivalent to custody for purposes of *Miranda*. See *People v. Jeffers*, 365 Ill. App. 3d 422, 429 (2006) ("the fact that defendant was unable to leave, and thus was subject to a *Terry* seizure, is not dispositive on the issue of whether defendant was 'in custody' for purposes of *Miranda*"); *United States v. Boden*, 854 F.2d 983, 995 (7th Cir. 1988) ("Our holding that the [Bureau of Alcohol, Tobacco, and Firearms] agents' initial encounter with [the defendant] was at most an investigative stop forecloses [the defendant's argument that agents were required to advise him of his *Miranda* rights]"). Indeed, the *Miranda* Court noted that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." *Miranda*, 384 U.S. at 477-78. Whether *Miranda* warnings must be given during an encounter that begins as a *Terry* stop depends on whether " 'at any time between the initial stop and the arrest, [the defendant] was subjected to restraints comparable to those associated with a formal arrest.' " *Jeffers*, 365 Ill. App. 3d at 429 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984)). Here, when defendant admitted that the pills belonged to him, he was not subject to restraints comparable to a formal arrest. Defendant had not been told he was under arrest or accused of any crime. He had not been handcuffed. No weapons had been drawn to effect defendant's detention. The questioning occurred in a public place, not a

coercive environment such as a police station. Defendant had not been asked to accompany the police to another location.

¶ 12 Defendant's reliance on *People v. Rivera*, 304 Ill. App. 3d 124 (1999), is misplaced. *Rivera* arose from an encounter on the premises of the Morris Municipal Airport between the defendant, who drove there in a Chevrolet van, and six or seven police officers who arrived in four or five squad cars. The van was stopped based on a tip that it would be carrying cocaine. The defendant stepped out of the van and it was searched with his consent. A grocery bag was found under the seat. One of the officers asked the defendant if there was cocaine in the bag and the defendant said that there was. The officer then asked the defendant if the cocaine belonged to him. The defendant responded that the cocaine belonged to his passenger. There was conflicting evidence as to when the defendant was placed in handcuffs. The defendant testified that he was handcuffed as soon as he stepped out of the van. A police officer testified that the defendant was handcuffed after denying that the cocaine belonged to him. Holding that the questioning at the scene was custodial interrogation, the *Rivera* court reasoned as follows:

> "In this case, it is undisputed that no fewer than six police officers and four squad cars were on the scene and assisting in the investigative stop when [a police officer] asked defendant if there was cocaine in the [grocery] bag. Defendant's van was blocked front and rear. It was clear before [the officer] posed his question that defendant was going nowhere without a police escort. After feeling what he suspected was a brick of cocaine in the bag, [the officer] asked defendant a short, direct question that demanded an immediate response: 'Is this cocaine?'

> Under these circumstances, the fact that no weapons were drawn and the officers did not raise their voices did not render the heavily police-dominated environment noncustodial. The officers' general, on-the-scene investigatory purpose had ended when the bag of suspected cocaine was removed from the van. At that point, the officers' reasonable suspicion of criminal activity had developed into probable cause to believe that defendant was involved in a cocaine delivery, and defendant immediately became the prime focus of the investigation. Thus, even accepting the officers' testimony that defendant was not handcuffed until after the question was answered, defendant was entitled to *Miranda* warnings. ***." *Id.* at 128-29.

¶ 13 Clearly, the substantial police presence was a significant factor in the *Rivera* court's decision. Here, in contrast, there were only two officers on the scene. Defendant argues that he became the focus of the investigation when Bieker discovered pills in the car, just as the defendant in *Rivera* became the focus of the investigation when the police found what was believed to be cocaine in his van. Here, however, there was no evidence that Bieker recognized the pills to be a controlled substance before defendant indicated that the pills were Vicodin. In any event, although a court that is attempting to determine whether a defendant was subjected to custodial interrogation may properly consider whether the defendant believed he or she was the focus of the investigation (see *Stansbury v. California*, 511 U.S. 318, 325 (1994)), this is but one factor and is not dispositive in itself (*People v. Vasquez*, 393 Ill. App. 3d 185, 190-91 (2009) (observing that the United States Supreme Court has "rejected the notion that *Miranda* warnings are necessary when someone has become the focus of an investigation" (citing *Beckwith v. United States*, 425 U.S. 341 (1976)))).

¶ 14 Accordingly, defendant failed to make a *prima facie* case that evidence was gathered in violation of his constitutional rights, and the judgment must be affirmed. We agree with defendant, however, that he is entitled to monetary credit toward the assessment under section 411.2(a)(4) of the Act.

¶ 15 Section 110-14(a) of the Code of Criminal Procedure of 1963 provides:

> "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine." 725 ILCS 5/110-14(a) (West 2010).

¶ 16 A defendant may apply for the credit for the first time on appeal. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008). It is undisputed that defendant spent four days in custody prior to sentencing and has therefore accumulated a credit of $20. The credit is applicable to assessments under section 411.2(a) of the Act (*People v. Jones*, 223 Ill. 2d 569, 592 (2006)), and the State concedes that defendant is entitled to the credit he claims.

¶ 17 For the foregoing reasons, the mittimus is modified to reflect a credit of $20 toward the assessment under the Act. In all other respects, the judgment of the circuit court of Du Page County is affirmed.

¶ 18 Affirmed as modified.