2014 IL App (4th) 130055-U

NO. 4-13-0055

FILED
January 8, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. AMMON R. GRAY, Defendant-Appellee.	)	Appeal from Circuit Court of Champaign County No. 12CF498 Honorable Heidi N. Ladd, Judge Presiding

JUSTICE HARRIS delivered the judgment of the court.
Justices Pope and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: Police officers did not exceed the permissible scope of a search pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), and the trial court erred in granting defendant's motion to suppress drug evidence on that basis.

¶ 2 The State charged defendant, Ammon R. Gray, with unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/407(b)(1) (West 2010)). It appeals the trial court's suppression of drug evidence related to that charge. We reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On April 2, 2012, the State charged defendant with unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/407(b)(1) (West 2010)). It alleged that defendant, while within 1,000 feet of a public park, knowingly and unlawfully possessed with

the intent to deliver between 1 and 15 grams of a substance containing cocaine.

¶ 5 On December 14, 2012, defendant filed a motion to quash arrest and suppress the search and seizure that resulted in the charge against him. On January 7, 2013, the trial court conducted a hearing on the motion. Defendant presented the testimony of three Champaign police officers and himself.

¶ 6 Officer Heidi VanAntwerp testified, on March 31, 2012, she was dispatched to a men's homeless shelter based on reports of two men fighting in a parking lot. She received a description of one subject along with information that he was leaving the scene. As VanAntwerp approached the shelter she observed defendant, who fit the description she received, and stopped him. She noticed defendant had facial injuries and stated she could smell alcohol coming from his breath. VanAntwerp also described defendant as being "very animated in his actions" and not wanting to stop and speak with her. She testified defendant was uncooperative and she did not know whether he was a victim of a fight or the aggressor.

¶ 7 During the course of VanAntwerp's interaction with defendant, he "continuously was trying to put his hands in his pockets" and she had to advise him to remove them for her safety. VanAntwerp testified defendant stated he had a pocketknife. She testified that, "[b]ecause of the way [defendant] was acting, [she] did not feel safe knowing that he had a knife with him." The following colloquy occurred between VanAntwerp and the State:

> "Q. And why specifically did [defendant reaching into his pockets] cause you to be concerned for your safety?
>
> A. One, because he was highly intoxicated. Two, because another officer had notified me that she knows the subject to be

> dangerous from past interactions with him, and also because he said [']I have a knife, I have a knife.[']"

VanAntwerp testified that when defendant again attempted to put his hands in his pockets, stating he would get the knife, she gestured to another officer to take control of his arms so that he could be detained and patted down. VanAntwerp stated defendant's hands were placed behind his back and she explained to him that he was going to be searched.

¶ 8 VanAntwerp testified she patted defendant down on his left side, working jointly with Officer Michael Talbott. She did not observe what Talbott was doing on defendant's right side until he removed a bag of suspected drugs from defendant's pocket. At that point, VanAntwerp knew she could finish searching defendant and she discovered another bag of suspected drugs in his left pocket. Police also found at least three cell phones and a set of keys on defendant's person. VanAntwerp testified the search lasted "seconds" before Talbott discovered the initial bag of suspected drugs. Although no knife was found on defendant, a pocketknife was located in the shelter's parking lot. Additionally, VanAntwerp stated the drugs found on defendant field-tested positive for cocaine.

¶ 9 Officer Talbott described defendant as having facial injuries, smelling of alcohol, and being "very belligerent" and "yelling and screaming." Initially, Talbott talked with other individuals at the scene while VanAntwerp spoke with defendant. Eventually VanAntwerp informed him that defendant "kept reaching into his pockets" and "would not stand still." Talbott testified they detained defendant and defendant "stated he had a knife on his person." According to Talbott, defendant stated "he would go in his pocket and take the knife out for us" but the officers told him not to. Talbott testified he and VanAntwerp began to pat defendant down,

looking for the knife. He stated he was concerned for his and VanAntwerp's safety when defendant kept reaching into his pockets and stated he had a knife.

¶ 10 Talbott testified he began patting defendant down on defendant's right side near his front pocket and on the outside of his clothes. He testified he was "[f]eeling what [was] in the pockets to see if the knife was there or any weapons." Talbott stated he felt "several objects" in defendant's pocket but "did not know what they were." He described defendant's pants pockets as being "pretty full." Talbott stated he spent a "couple seconds" feeling defendant's pocket and could only estimate that there were "multiple items" in his pocket. Further, he responded to questioning by defense counsel as follows:

> "Q. Were you able to feel the outside outline as to what you thought the items might be?
>
> A. I noticed there was [*sic*] several hard items in there. There was also one soft item in there. But I could not tell exactly what the hard items were.
>
> Q. But you were able to tell they were not a knife; is that right?
>
> A. No.
>
> Q. So you didn't know if it was a knife or not?
>
> A. Correct."

During cross-examination by the State regarding the hard items in defendant's pocket, Talbott further testified as follows:

> "Q. And were you able to tell whether or not those hard

items could be weapons?

A. I could not determine exactly what they were, so no I did not know if they were a weapon or were not a weapon.

Q. Okay. But based on their character of being hard, did you think they could be weapons?

A. Yes, they possibly could.

Q. Did you think, based on their character being hard, one or more could possibly be a knife?

A. Yes.

Q. And after feeling those hard items, one of which could possibly have been a knife, was it at that point that you went into his pocket?

A. Yes."

¶ 11 Talbott testified he then "removed everything that was in [defendant's] pocket to identify and make sure there was no knife there." He could not recall how many items he removed from defendant's pocket but did know defendant "had a lot of stuff in his pockets." Talbott also did not remember what specific items he removed from defendant's pocket except to say that one item was a bag of cocaine and none of the items was a knife.

¶ 12 Officer Kristina Haugen testified she briefly observed defendant with VanAntwerp and Talbott and then went to the shelter to interview a witness. She learned defendant had been the victim in an altercation with another individual. Haugen did not have any interaction with defendant.

¶ 13 Defendant testified he was approached by VanAntwerp and Talbott but informed them he did not want to talk, that he was fine, and that he wanted to leave. He stated he repeatedly told VanAntwerp that he wanted to leave and did not need assistance but she told him he had to stay and finish giving information and receive medical attention. Defendant testified he thought he had to stay and that if he walked off he would get arrested.

¶ 14 Following defendant's presentation of evidence, the State moved for a directed finding in its favor on the basis that defendant failed to meet his burden of showing that he was either unlawfully detained or searched. The trial court found police officers had the right to conduct a brief investigative stop of defendant based on a reasonable suspicion of criminal activity and also the right to conduct a pat-down search for weapons. However, the court was unconvinced that officers had a legitimate basis for emptying everything out of defendant's pockets and denied the State's motion.

¶ 15 The State then recalled VanAntwerp and Talbott. VanAntwerp testified items found in defendant's pants pockets included cash and three cell phones. She stated she removed at least one cell phone, some cash, and a bag of suspected cocaine from defendant's left pocket. Regarding Talbott's search, VanAntwerp stated as follows:

> "[Talbott] ended up reaching into the pocket more than one time. I know this because either myself or the other officer had to hold our hands out for the items to be placed in there because he could not hold all the items in one hand as he continued to bring items out of the pocket."

She agreed that there were two handfuls of miscellaneous items in defendant's right pants pocket.

¶ 16 VanAntwerp testified it did not appear that Talbott attempted to separate hard and soft items before pulling objects from defendant's pocket. She stated the items Talbott removed included two cell phones, cash, suspected drugs, two sets of car keys, and "a few other little items." On cross-examination, VanAntwerp testified it was possible some of the items she described were removed from defendant's coat pocket and she did not know exactly what items were removed from defendant's right pants pocket because she searched his left side.

¶ 17 Talbott testified that after feeling hard objects in defendant's right pants pocket, he ultimately removed all the items from that pocket. He stated that "several items" were in defendant's pocket but did not know for sure how many. Talbott described his search as follows:

> "I had to take everything out so I could get to everything that was in the pocket. Due to the number of items that was [*sic*] in there and the way they were positioned in there, in the pants pockets, it's difficult to get your hand inside of it, so I just removed everything that was in the pocket."

He stated he removed handfuls of items from the pocket regardless of whether they were hard or soft and he estimated he pulled two or three handfuls of items from defendant's pocket.

¶ 18 Talbott testified that while he was extracting items from defendant's pocket, defendant was moving around, continuing to yell, and trying to pull away. Further, he stated that, due to defendant's behavior and the number of items in defendant's pocket, "[i]t would have been nearly impossible to determine or pull out just hard items, certain items in the pocket, without missing anything in the pocket or without pulling out something that was a soft item."

¶ 19 Following the testimony and the parties' arguments, the trial court took the matter

under advisement. On January 11, 2013, it issued a final ruling on defendant's motion to suppress. The court reiterated its finding that officers lawfully stopped defendant and justifiably conducted a protective pat-down for weapons. However, it determined Talbott was not justified in removing everything from defendant's right pants pocket.

¶ 20 Specifically, the trial court found the "basis for a protective frisk *** does not *** create a *carte blanche* license to the officer conducting the pat-down to empty the pockets of the individual stopped." The court stated the situation involving defendant had not been out of the officers' control and Talbott could not "justify his belief that there were weapons when he [could not] even describe why he had the belief that what he removed could have been a weapon." It further reasoned as follows:

> "There is no evidence as to the size, the contour, the shape, the configuration anything about those objects that would allow the officer to draw a conclusion that that could have been a knife or a dangerous object so in essence what he did was use that as justification to empty everything in the Defendant's pants pocket, including a soft object he knew could not have been a weapon."

The court concluded "the search and subsequent seizure of the soft [B]aggie was unreasonable in its scope and justification and the evidence must be suppressed." It granted defendant's motion on that basis.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, the State argues the trial court erred in granting defendant's motion

and suppressing the drug evidence. It contends Officer Talbott acted reasonably under the circumstances in emptying defendant's pants pocket as part of a protective search for weapons.

¶ 24 A trial court's order suppressing evidence is reviewed using a two-part standard. *People v. Colyar*, 2013 IL 111835, ¶ 24, 996 N.E.2d 575. Specifically, the court's factual findings are afforded great deference and reversed only if they are against the manifest weight of the evidence, while the court's ultimate legal ruling on whether suppression is warranted is subject to *de novo* review. *Colyar*, 2013 IL 111835, ¶ 24, 996 N.E.2d 575.

¶ 25 "Both the fourth amendment and the Illinois Constitution of 1970 guarantee the right of individuals to be free from unreasonable searches and seizures." *Colyar*, 2013 IL 111835, ¶ 31, 996 N.E.2d 575 (citing U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6). "The search and seizure provisions of the Illinois Constitution are interpreted in limited lockstep with the fourth amendment to the United States Constitution." *People v. Walker*, 2013 IL App (4th) 120118, ¶ 32, 995 N.E.2d 351 (citing *People v. Fitzpatrick*, 2013 IL 113449, ¶ 15, 986 N.E.2d 1163). "Reasonableness under the fourth amendment generally requires a warrant supported by probable cause." *People v. Thomas*, 198 Ill. 2d 103, 108, 759 N.E.2d 899, 902 (2001). However, in *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court recognized a limited exception to the warrant requirement, holding that, under appropriate circumstances, a police officer may briefly detain a person for investigatory purposes. *Thomas*, 198 Ill. 2d at 108-09, 759 N.E.2d at 902.

¶ 26 "Under the *Terry* exception, a police officer may briefly stop a person for temporary questioning if the officer reasonably believes that the person has committed, or is about to commit, a crime." *Thomas*, 198 Ill. 2d at 109, 759 N.E.2d at 902. "*Terry* further held

that 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." *People v. Sorenson*, 196 Ill. 2d 425, 432, 752 N.E.2d 1078, 1084 (2001). See also 725 ILCS 5/108-1.01 (West 2010) ("When 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.").

¶ 27 Here, the trial court determined that police officers lawfully stopped defendant and justifiably conducted a pat-down search for weapons. Neither of these findings is challenged on appeal. The sole question before this court is whether Officer Talbott improperly exceeded the proper scope of the pat-down search by reaching into and emptying defendant's right front pocket.

¶ 28 "The purpose of a pat-down search is to protect the officer and others in the vicinity, not to gather evidence." *People v. Moss*, 217 Ill. 2d 511, 533, 842 N.E.2d 699, 713 (2005). "The scope of the search must be limited to actions which are reasonably likely to discover weapons that could be used to harm the officer." *Moss*, 217 Ill. 2d at 533, 842 N.E.2d at 713. "The determination of whether an officer acted reasonably is based on an objective standard which takes into account the specific reasonable inferences the officer is entitled to draw from the facts in light of his experience." *People v. Christensen*, 198 Ill. App. 3d 168, 172, 555 N.E.2d 746, 748 (1990). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). For example, an officer's

continued exploration of an individual's pocket *after having concluded that it contains no weapon* is inappropriate and unrelated to the type of protective search authorized in *Terry*. *Dickerson*, 508 U.S. at 378.

¶ 29 Here, during his interaction with police, defendant informed Officers VanAntwerp and Talbott that he had a knife and attempted to reach into his pockets to retrieve it. Officers restrained defendant and performed a pat-down of his outer clothing. Talbott testified he felt several hard objects and a soft object in defendant's right front pants pocket. He could not determine exactly what the objects were but denied that he was able to tell defendant's pocket did not contain a knife. Talbott stated he "did not know if [the hard objects] were a weapon or were not a weapon." Further, his testimony showed that, based on the objects' character of being hard, they could possibly be a knife. As a result, Talbott reached into defendant's right front pocket and removed its contents. Further, he testified that, due to defendant's behavior and the number of items in defendant's pocket, "[i]t would have been nearly impossible to determine or pull out just hard items *** without missing anything in the pocket or without pulling out something that was a soft item."

¶ 30 Under these circumstances, the trial court determined Talbott had no justifiable basis for reaching into defendant's pocket and removing its contents. It found Talbott could not justify his belief that there were weapons in defendant's pocket and pointed to the lack of evidence regarding the size, contour, or shape of the objects in defendant's pocket. We disagree and find, based on defendant's comments, defendant's actions, and Talbott's finding of "several hard objects" during a pat-down search, the search of defendant's right front pocket did not exceed the bounds of a lawful *Terry* search.

¶ 31 First, defendant's assertion that he had a knife and his attempt to reach into his pockets to retrieve it provided a reasonable basis for Talbott to believe a weapon would be discovered in one of defendant's pockets. Second, rather than immediately reaching into defendant's pockets, officers initially conducted a pat-down search of his outer clothing. During that search, Talbott felt several hard objects in defendant's right front pocket that he believed could possibly be a knife. Although the trial court found Talbott's description of feeling "several hard objects" was insufficient to justify any further search, we disagree.

¶ 32 In *Moss*, 217 Ill. 2d at 515, 842 N.E.2d at 703, an officer conducted a pat-down search of the defendant and "felt two hard objects in the front of [the] defendant's pants." He testified the objects "were approximately the size of a nine-volt battery" and that he was aware of weapons that were the same size. *Moss*, 217 Ill. 2d at 515, 842 N.E.2d at 703. The officer "testified that he maintained contact with the hard object, trying to determine what it was." *Moss*, 217 Ill. 2d at 515, 842 N.E.2d at 703. The officer repeatedly asked the defendant what was in his pants and, upon receiving no response, he ordered the defendant to turn around and open the front of his pants. *Moss*, 217 Ill. 2d at 515-16, 842 N.E.2d at 703. Ultimately, the defendant removed a bag of a white, solid substance that field-tested positive for cocaine. *Moss*, 217 Ill. 2d at 516, 842 N.E.2d at 703.

¶ 33 The supreme court noted the officer's testimony "that he could not identify the hard object he felt in [the] defendant's pants, but was aware of weapons that [were] a similar size." *Moss*, 217 Ill. 2d at 534, 842 N.E.2d at 713. In light of such testimony, the supreme court held "the search of [the] defendant did not exceed the proper scope under *Terry* when [the officer] continued his contact with [the] defendant's pants as he attempted to determine whether

the object he felt was a weapon." *Moss*, 217 Ill. 2d at 534, 842 N.E.2d at 713. Further, the court found the facts before it distinguishable from cases where a police officer "continued to manipulate the defendant's pocket even after he determined it did not contain a weapon." *Moss*, 217 Ill. 2d at 534, 842 N.E.2d at 713 (citing *Dickerson*, 508 U.S. at 378).

¶ 34 Here, although Talbott did not expressly testify regarding the size of the hard objects he felt during the pat-down search, he did testify he believed they could possibly be a knife. Talbott's findings during the pat-down search, particularly when coupled with evidence that defendant asserted he had a pocketknife, provided a sufficient basis for Talbott to believe it was reasonably likely that defendant's pocket contained a weapon. Additionally, as in *Moss*, this case is also distinguishable from situations where police officers continued to search a defendant after determining a weapon was not present. In this case, Talbott never made such a determination and, instead, testified he was unable to rule out the possibility that defendant's pocket contained a weapon.

¶ 35 To support its position on appeal, the State cites several federal court cases. In *United States v. Majors*, 328 F.3d 791, 793-94 (5th Cir. 2003), an officer conducted a pat-down search for weapons and "felt a large bulge" in the defendant's left pocket. The officer was unable to identify the bulge and "pulled up the outside of [the defendant's] pocket to see what was inside." *Majors*, 328 F.3d at 794. The Fifth Circuit Court of Appeals noted the officer "did not rule out the possibility that the bulge in [the defendant's] pocket was a weapon" and found "his continued search *** justified under *Terry* for the protection of himself and *** other officers." *Majors*, 328 F.3d at 795.

¶ 36 In *United States v. Street*, 614 F.3d 228, 231 (6th Cir. 2010), an officer observed

the defendant " 'stick his hand in his pocket and grab something.' " The officer, concerned the defendant was reaching for a weapon, grabbed the defendant's arm and asked the defendant " 'if he had anything in his pocket.' " *Street*, 614 F.3d at 231. The defendant responded that he had a pistol and the officer reached into the defendant's pocket and retrieved a revolver. *Street*, 614 F.3d at 231. The Sixth Circuit Court of Appeals held the defendant's "admission to the police that he was carrying a gun confirmed the officers' 'reasonable suspicion' (indeed probable cause to believe) that he was armed, [citation], permitting [the officer] to reach into [the defendant's] pocket and confirm it contained a weapon." *Street*, 614 F.3d at 234.

¶ 37 Finally, in *United States v. Campbell*, 178 F.3d 345, 347 (5th Cir. 1999), an officer frisked the defendant and felt "a large bulge" in the defendant's right front pants pocket that he feared was " 'some type of weapon.' " The officer "then reached into the pocket, pulled its contents out, and laid them on the ground." *Campbell*, 178 F.3d at 347. The Fifth Circuit Court of Appeals determined that because the officer "had not ruled out the possibility that the large bulge was a weapon, *** his removal of the pocket's contents was not beyond the scope of a permissible *Terry* frisk." *Campbell*, 178 F.3d at 349.

¶ 38 Although lower federal court decisions are not binding on Illinois courts, they may be considered persuasive authority. *Wilson v. County of Cook*, 2012 IL 112026, ¶ 30, 968 N.E.2d 641. We find *Majors*, *Street*, and *Campbell* are persuasive and relevant to the issue presented here. Additionally, we note defendant failed to specifically address these cases in his brief. Moreover, the case upon which defendant primarily relies, *People v. Pratcher*, 332 Ill. App. 3d 1063, 774 N.E.2d 482 (2002), is distinguishable from the facts of this case. There, evidence suggested an officer continued his search of the defendant's pocket to determine the

nature of the object he felt *after* he concluded that there were no weapons in the pocket. *Pratcher*, 332 Ill. App. 3d at 1069, 774 N.E.2d at 487. As discussed, in this case, Talbott was unable to rule out the presence of a weapon in defendant's pocket and continued his search on that basis.

¶ 39 Under the circumstances presented here, Officer Talbott did not exceed the permissible scope of a *Terry* search. As a result, the trial court erred in granting defendant's motion to suppress the drug evidence. We reverse the trial court's decision and remand for further proceedings consistent with this order.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings. As part of our judgment we grant the State its statutory assessment of $50 against defendant as costs of this appeal.

¶ 42 Reversed and remanded.