

THIRD DIVISION  
September 19, 2012

No. 1-10-2754

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 5097
	)	
RICARDO LEE,	)	The Honorable
	)	John Thomas Doody,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE STEELE delivered the judgment of the court.  
Presiding Justice Salone and Justice Neville concurred in the judgment.

**ORDER**

¶ 1 *HELD:* Where probable cause to arrest existed, the trial court did not err in denying the defendant's motion to suppress evidence discovered during the search incident to arrest.

¶ 2 Following a bench trial, defendant Ricardo Lee was convicted of possession of a controlled substance. Due to his criminal history, he was sentenced to an extended term of four years and six months in prison. On appeal, defendant contends the trial court erred in denying his motion to suppress evidence.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant was arrested in Chicago on February 17, 2010. After the State filed multiple charges relating to a drug offense, defendant filed a motion to suppress evidence. In the motion, defendant argued that the police discovered physical evidence during the course of an illegal search of his person, and that therefore, the evidence should be suppressed.

¶ 5 At the hearing on the motion, defendant called the arresting officer, Chicago police officer Augustine Torres. Officer Torres testified that he had worked as a police officer for five and a half years and had conducted hundreds of narcotics investigations, surveillance operations, and arrests during that time. Based on his training and experience, he was familiar with how narcotics are packaged for sale on the street and how street sales of narcotics occur.

¶ 6 Officer Torres testified that about 1 p.m. on the day in question, he and his partner received information about possible drug transactions being conducted from a car in the parking lot of a fast food restaurant. In response, the officers set up surveillance about 30 feet from the car. Nothing obstructed Officer Torres's view and he used no visual aids. Two people were in the car. In court, Officer Torres identified defendant as the male in the passenger seat.

¶ 7 While conducting surveillance, Officer Torres saw "several" men approach the car at different times. A man would walk up to the car, talk to defendant through the passenger window, and give him money, which Officer Torres recognized by its color. In return, defendant would hand the man a small item, at which point the man would walk away. Officer Torres also saw some men walk up to the driver's side of the car and engage in similar exchanges with the car's driver. Based upon his training and experience, Officer Torres believed that defendant was engaging in narcotics transactions.

¶ 8 After about 20 minutes of surveillance, Officer Torres and his partner decided to drive up

to the car. As they approached, the car pulled away. The officers followed the car for a short distance, curbed it at a red light, and then approached on foot, with Officer Torres on the passenger's side and his partner on the driver's side. Officer Torres asked defendant to get out of the car, which he did. In response to questioning by the State, Officer Torres agreed that he then conducted a "protective pat-down" search. He did not feel any weapons, but he did see a plastic baggie sticking out of defendant's pants. Based on his familiarity with how narcotics are packaged for street sales, including in plastic bags, Officer Torres believed that defendant could be storing drugs in the baggie protruding from his pants. Based on this belief, Officer Torres removed the baggie. Upon inspection, he saw that it contained five capsules of suspected heroin. Officer Torres thereafter placed defendant in custody.

¶ 9 Following argument, the trial court denied defendant's motion to suppress. In doing so, the trial court made the following findings:

"What happened was, the original observations certainly constituted reasonable and articulable suspicion, asking the defendant out of the car, albeit for a protected [*sic*] pat-down. If that was all there was here, then the motion would have to be granted. But an additional fact in this case was the observation by the officer of the bag protruding from the offender. Now, albeit the contents of that bag were not yet known, but looking at the totality of all observations made by the officers, the motion is denied.

I'll make a specific finding that at that point there was probable cause."

¶ 10 Subsequently, defendant filed a motion to reconsider, which the trial court denied. In denying the motion, the trial court stated that it had found Officer Torres's testimony to be credible and would stand on its ruling.

¶ 11 At trial, Officer Torres testified to substantially the same set of facts he related at the hearing on the motion to suppress. He specified that he saw "approximately three" different men engage in hand-to-hand transactions with defendant. Officer Torres also stated that the plastic baggie in question was sticking out from the waistband of defendant's pants.

¶ 12 The parties stipulated as to testimony regarding the chain of custody of the recovered items, as well as a forensic chemist's testimony that the five capsules recovered by Officer Torres weighed 1.1 grams and tested positive for heroin. Defendant did not testify or present any witnesses.

¶ 13 Following closing arguments, the trial court convicted defendant of possession of a controlled substance. Defendant filed a motion for a new trial, arguing, among other things, that the trial court erred in denying his motion to suppress evidence. The trial court denied the motion for a new trial. Based on his criminal history, the trial court sentenced defendant to an extended prison term of four years and six months.

¶ 14 On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence.

¶ 15 An appeal from a trial court's ruling on a motion to suppress presents mixed questions of fact and law. *People v. McDonough*, 239 Ill. 2d 260, 265-66 (2010). We accord great deference to the trial court's factual and credibility determinations, and will disturb them only if they are against the manifest weight of the evidence. *McDonough*, 239 Ill. 2d at 266; *People v.*

*Luedemann*, 222 Ill. 2d 530, 542 (2006). However, we review *de novo* the trial court's ultimate determinations with respect to probable cause or reasonable suspicion, as well as the trial court's application of the facts to the law to determine whether suppression is warranted under the facts presented. *McDonough*, 239 Ill. 2d at 266; *People v. Johnson*, 408 Ill. App. 3d 107, 111 (2010). Here, no factual or credibility dispute exists. Accordingly, our review is *de novo*.

¶ 16 Defendant argues that his constitutional and statutory rights were violated because Officer Torres conducted a protective pat-down without having a reasonable or articulable suspicion that defendant was armed and dangerous. He asserts that because Officer Torres did not testify to any facts to support a belief that he was armed and dangerous, the protective frisk was conducted in violation of *Terry v. Ohio*, 392 U.S. 1 (1989), as well as section 108-1.01 of the Code of Criminal Procedure of 1963 (725 ILCS 5/108-1.01 (West 2010)). According to defendant's argument, the evidence discovered during the course of the improper protective pat-down should have been suppressed and, because the State cannot prove possession of a controlled substance without that evidence, his conviction should be reversed.

¶ 17 The State has re-framed the issue on appeal. Instead of characterizing the encounter between defendant and Officer Torres as a *Terry* frisk, the State asserts that Officer Torres had probable cause to arrest defendant at the time of the pat-down, and therefore properly searched defendant incident to the arrest. We are mindful that the State seems to have changed its theory of the case on appeal, as the prosecutor who questioned Officer Torres at the hearing on the motion to suppress repeatedly asked him about the "protective pat-down" that he conducted. However, as noted above, our review of the trial court's decision on a motion to suppress is *de novo*. *McDonough*, 239 Ill. 2d at 266; *Johnson*, 408 Ill. App. 3d at 111. In conducting *de novo*

review, an appellate court makes its own independent assessment of the issues and is free to substitute its own judgment for that of the trial court in order to formulate the legally correct answer. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998). Using a *de novo* standard of a review, we may affirm a trial court's decision on a motion to suppress on any basis established by the record. *People v. Keys*, 375 Ill. App. 3d 459, 461 (2007). Therefore, in this case, there is no impediment to our considering whether the search that Officer Torres performed was proper as a search incident to arrest.

¶ 18 Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the suspect has committed a crime. *People v. Jackson*, 232 Ill. 2d 246, 275 (2009). The existence of probable cause depends upon the totality of the circumstances at the time of the arrest. *People v. Love*, 199 Ill. 2d 269, 279 (2002). The standard for determining whether probable cause exists is probability of criminal activity, not proof beyond a reasonable doubt. *People v. Lee*, 214 Ill. 2d 476, 485 (2005). A police officer's factual knowledge, based on prior law-enforcement experience, is a relevant factor when considering whether probable cause existed at the time of arrest. *People v. Harris*, 352 Ill. App. 3d 63, 67 (2004).

¶ 19 At the time of the arrest in the instant case, Officer Torres had observed three different men walk up to the car defendant was sitting in, talk to defendant through the passenger window, and give him money. Defendant would then hand the men a small item, and the men would walk away. Officer Torres testified that he had worked as a police officer for over five years; had conducted hundreds of narcotics investigations, surveillance operations, and arrests; and was familiar with how narcotics are packaged for sale on the street and how street sales of narcotics

occurred. Based upon his training and experience, Officer Torres believed that defendant was engaging in narcotics transactions.

¶ 20 Given the totality of the circumstances in this case, we find that at the time of arrest, a reasonably cautious person would believe that defendant was committing a crime. Therefore, at the time Officer Torres patted defendant down, he had probable cause to arrest defendant and the challenged pat-down was a lawful search incident to arrest. Accordingly, the trial court did not err in denying defendant's motion to suppress the evidence discovered during the course of the search.

¶ 21 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.