

No. 1-11-1175

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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 9519   |
|                                      | ) |                  |
| ANTWON MITCHELL,                     | ) | Honorable        |
|                                      | ) | Raymond Myles,   |
| Defendant-Appellant.                 | ) | Judge Presiding. |

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PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.  
Justices Hall and Reyes concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's conviction for possession of a controlled substance is affirmed where the trial court correctly ruled that defendant's oral motion made during trial to quash arrest and suppress evidence was untimely, and counsel's failure to file that motion prior to trial did not constitute ineffective assistance.

¶ 2 Following a bench trial, defendant Antwon Mitchell was convicted of possession of a controlled substance and sentenced to an extended term of four years' imprisonment based upon his extensive criminal history. On appeal, defendant contends that the trial court erred when it ruled that his motion to quash arrest and suppress evidence, made orally during trial, was

untimely. Alternatively, defendant argues that trial counsel rendered ineffective assistance when she failed to file that motion prior to trial. We affirm.

¶ 3 At a status hearing three months prior to trial, defendant informed the court that he wanted to file a motion to quash arrest, but defense counsel would not file the motion. Counsel told the court that she and defendant had discussed the motion and defendant's rationale for that motion "several times." At the next status hearing, defendant told the court that he planned to hire a different attorney because he was not "seeing eye to eye" with defense counsel, but he could not reach his family to get the money. Counsel said her supervisor refused to appoint a different attorney to represent defendant. Defendant then said he would go to trial with his current counsel.

¶ 4 At trial, Chicago police officer William Carlson testified that about 9 p.m. on April 21, 2010, he was on a team of six uniformed police officers in three marked squad cars that responded to a call looking for a specific man who was reportedly selling drugs in the area of 3818 West Augusta Boulevard. Officer Carlson saw defendant, who fit the description of the man, standing on Augusta Boulevard. An unknown man then approached defendant and handed him money in exchange for a small item defendant removed from his right shoe. As Officer Carlson and Officer Rojas approached the men, the unknown man fled the area. The officers then detained defendant, who stated "I got some blows on me. I am a user." Based on his nine years of police experience, Officer Carlson understood that "blows" was a street term for heroin. Officer Rojas recovered several items from defendant's right shoe, and Officer Carlson then handcuffed defendant and placed him in custody.

¶ 5 On cross-examination, Officer Carlson testified that he detained defendant by telling him to place his hands on the police car. Defendant complied and immediately made his statement to the officers. At this point, defense counsel asked the court to consider hearing a motion to

suppress the drugs found in defendant's shoe. Counsel argued that Officer Carlson's testimony that he detained defendant by having him place his hands on the police car indicated defendant was under arrest at that time, but the officer did not have probable cause to arrest defendant.

¶ 6 The State objected, arguing that a motion to suppress could have been filed before trial. The State asserted that there was no discrepancy between Officer Carlson's trial testimony and the information tendered during discovery such that a motion could not have been filed earlier.

¶ 7 Defense counsel responded that in the arrest report and vice case report, Officer Carlson stated that he detained defendant, which counsel interpreted to mean that the officer merely stopped defendant. The reports did not specify that the officer detained defendant by having him place his hands on the police car.

¶ 8 The trial court found that there was no discrepancy between Officer Carlson's trial testimony and the information counsel knew prior to trial, and it denied counsel's request to hear a motion to suppress. Counsel again argued that Officer Carlson never wrote in his report or testified at the preliminary hearing that defendant put his hands on the police car, but instead, merely said he approached defendant and detained him. Counsel noted that defendant made the statement that he had "blows" on him when he was detained. The State argued that the officer's method of detention was immaterial, and that the discovery disclosed that defendant was detained prior to making his statement. The court again found that the information that the officer detained defendant was in the police report, and that Officer Carlson's testimony was not new information. The court again denied counsel's request to hear a motion to suppress.

¶ 9 Chicago police officer Rojas testified that he approached defendant with Officer Carlson, who asked defendant to place his hands on the police car. No officers were touching defendant as he complied with the request. Defendant then stated that he was in possession of narcotics. Officer Carlson asked defendant to remove his shoe, and helped defendant pick up his foot to do

so. Officer Rojas then recovered eight Ziploc bags containing a white powder substance of suspect heroin from defendant's right shoe. Officer Rojas brought the drugs to the police station where they were inventoried in accordance with police procedure. The parties stipulated that a forensic chemist tested the eight items recovered from defendant's shoe and found them positive for 1.4 grams of heroin.

¶ 10 Defendant testified that he was walking on Augusta Boulevard when the police pulled in front of him and told him to put his hands on the car, which he did. An officer asked defendant if he had anything on him. Defendant replied that he had \$164 in his shoe, which the police recovered. The officers searched defendant for 30 minutes, making him remove his shoes, socks, coat and shirt. They also pulled down defendant's pants. The police walked around the area searching the ground with their flashlights, and defendant saw one officer pick up an unknown item. Defendant denied speaking with anyone or exchanging anything with anyone before the police stopped him. He further denied that he possessed drugs or had drugs in his shoe, and denied telling police he had "blows" on him and that he was "just a user."

¶ 11 The State introduced a certified copy of defendant's prior conviction for aggravated battery. The trial court found the testimony of the police officers more credible than defendant. The trial court then found defendant guilty of possession of a controlled substance and sentenced him to an extended term of four years' imprisonment based upon his criminal history.

¶ 12 On appeal, defendant first contends that the trial court erred when it ruled that his motion to quash arrest and suppress evidence, made orally during trial, was untimely. Defendant argues that there was no prior opportunity to file a motion to suppress because defense counsel was not aware of the grounds for the motion until Officer Carlson testified at trial that he detained defendant on the police car. Defendant claims that the court's determination that Officer

Carlson's testimony did not offer any new information that was not known by defense counsel prior to trial was incorrect.

¶ 13 Initially, the State argues that defendant forfeited review of this issue because he did not object after the trial court denied counsel's request to hear the motion. Alternatively, the State argues that the information was not new to defendant, who was present at the scene and testified at trial that he complied with the officer's request to put his hands on the police car. The State further argues that the police reports stated that defendant was detained, and counsel therefore had a basis to file the motion prior to trial.

¶ 14 As a threshold matter, we find that defendant has not forfeited review of this issue. It is well established that, generally, to preserve an issue for appeal, defendant must object during trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, as noted by defendant in his reply brief, under these circumstances it was defendant who sought a hearing on his motion, and the State was the party that objected. Defendant preserved the issue by making an oral motion to the court and raising the issue in his motion for a new trial. Thus, the trial court had sufficient opportunities to consider defendant's arguments during and after trial, preserving the issue for our consideration on appeal. See *People v. Bennett*, 376 Ill. App. 3d 554, 566-67 (2007).

¶ 15 In general, a defendant who claims he was subjected to an unlawful search and seizure must file a motion to suppress before trial if he wants to challenge the evidence as being illegally seized. *People v. Givens*, 237 Ill. 2d 311, 332 (2010). However, the trial court has discretion to allow a motion to suppress made during the trial where certain statutory requirements are satisfied. *Givens*, 237 Ill. 2d at 332; *People v. Flatt*, 82 Ill. 2d 250, 262 (1980). We review the trial court's decision of whether or not to allow a motion to suppress made during trial under the abuse of discretion standard. See *People v. Bier*, 213 Ill. App. 3d 303, 306 (1991); *People v.*

*White*, 134 Ill. App. 3d 262, 290 (1985). An abuse of discretion will be found only where the trial court's decision is so unreasonable, arbitrary, or fanciful that no reasonable person would agree with it. *People v. Kladis*, 2011 IL 110920, ¶ 23.

¶ 16 Pursuant to section 114-12(c) of the Illinois Code of Criminal Procedure (725 ILCS 5/114-12(c) (West 2010)), a motion to suppress illegally seized evidence shall be made before trial unless the opportunity to do so did not exist, or the defendant was not aware of the grounds for such motion. When a motion to suppress evidence is made during trial, the trial court determines whether or not that motion is timely. See 725 ILCS 5/114-12(c) (West 2010).

¶ 17 Here, we find no abuse of discretion by the trial court in finding that defendant's motion to suppress was untimely made. The record shows that the trial court listened to the arguments of both parties and determined that there was no discrepancy between Officer Carlson's trial testimony and the information contained in the police reports defense counsel received prior to trial. Defense counsel expressly acknowledged that in the arrest report and vice case report, Officer Carlson stated that he had detained defendant, and defendant then immediately stated that he had "blows" on him and was "a user." The only difference at trial was that Officer Carlson specified that he detained defendant by having him place his hands on the police car. The officer testified at trial that defendant immediately made his statement after being detained, which is consistent with the information in the police reports tendered to counsel during discovery. Both the reports and the officer's testimony show that defendant stated that he had "blows" on him after he was detained. Based on this record, we find that the trial court's determination that there was no discrepancy between the testimony and the police reports, and that Officer Carlson's testimony was not new information, was neither arbitrary nor unreasonable. Accordingly, we find no abuse of discretion by the trial court in finding the motion untimely made.

¶ 18 Alternatively, defendant contends that trial counsel rendered ineffective assistance when she failed to file a motion to quash arrest and suppress evidence prior to trial. Defendant asserts that he was under arrest when Officer Carlson ordered him to place his hands on the police car. Defendant argues that the police did not have probable cause to arrest him at that point because they observed only a single transaction where unknown items were exchanged. Defendant further claims that the single transaction was not sufficient to give the officers reasonable suspicion to stop and detain him, and the officers had no right to conduct a pat down search because they did not fear for their safety.

¶ 19 The State argues that defense counsel made a strategic decision to forgo filing a pre-trial motion to quash arrest and suppress evidence, and such decision cannot be deemed ineffective assistance. The State further argues that filing the motion would have been futile because the police had probable cause to arrest defendant where they received a tip about drug sales that was corroborated by their observation of defendant engaged in a narcotics transaction.

¶ 20 Claims of ineffective assistance of counsel are evaluated under the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Givens*, 237 Ill. 2d at 330-31. To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that counsel's representation was deficient, and as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687; *Givens*, 237 Ill. 2d at 331. If defendant cannot prove that he suffered prejudice, this court need not determine whether counsel's performance was deficient. *Givens*, 237 Ill. 2d at 331. To establish that he was prejudiced by counsel's failure to file a motion to suppress evidence, defendant must show that a reasonable probability exists that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different if the evidence had been suppressed. *Givens*, 237

Ill. 2d at 331. If a motion to suppress would have been futile, then counsel's failure to file that motion does not constitute ineffective assistance. *Givens*, 237 Ill. 2d at 331.

¶ 21 Here, we must first determine if defendant was, in fact, under arrest when Officer Carlson asked him to place his hands on the police car. Encounters between police and citizens have been divided by the courts into three tiers: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions, commonly referred to as "*Terry* stops," which must be supported by a police officer's reasonable, articulable suspicion of criminal activity; and (3) consensual encounters that involve no detention or coercion by the police, and thus, do not implicate fourth amendment interests. *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006). An individual is considered seized under the fourth amendment when an officer " 'by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' " *Luedemann*, 222 Ill. 2d at 550, citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991), quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). "For purposes of the fourth amendment, a seizure is an arrest." *People v. Lopez*, 229 Ill. 2d 322, 346 (2008). The standard for determining whether a person has been arrested is whether, under the circumstances, a reasonable person, innocent of any crime, would conclude that he was not free to leave. *Lopez*, 229 Ill. 2d at 346.

¶ 22 In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court recognized a limited exception to the probable cause requirement for seizures. *People v. Maxey*, 2011 IL App (1st) 100011, ¶ 45. *Terry* held that under certain circumstances, police may approach a person to investigate possible criminal behavior even though they do not have probable cause to make an arrest. *People v. Lee*, 214 Ill. 2d 476, 487 (2005), citing *Terry*, 392 U.S. at 22. Police may conduct an investigatory stop when they reasonably infer from the circumstances that the person has committed, or is about to commit, a criminal offense. 725 ILCS 5/107-14 (West 2010); *Lee*, 214 Ill. 2d at 487. To justify an investigatory stop, a police officer must identify specific and

articulable facts which, when taken together with natural inferences, make the intrusion reasonable. *People v. Thomas*, 198 Ill. 2d 103, 109 (2001). These facts do not need to meet probable cause requirements, but they must justify more than a mere hunch. *Thomas*, 198 Ill. 2d at 110.

¶ 23 During a *Terry* stop, the person being detained by police is " 'no more free to leave than if he were placed under a full arrest.' " *Maxey*, 2011 IL App (1st) 100011, ¶ 60, quoting *People v. Ross*, 317 Ill. App. 3d 26, 32 (2000) (quoting additional cases cited therein). Accordingly, the mere fact that a person was restrained by police does not transform an investigatory stop into an arrest. *Maxey*, 2011 IL App (1st) 100011, ¶ 60. "Rather, an arrest is distinguishable from an investigatory stop based on the length of detention and the scope of the investigation following the initial stop." *Maxey*, 2011 IL App (1st) 100011, ¶ 60, citing *Bennett*, 376 Ill. App. 3d at 565, *Ross*, 317 Ill. App. 3d at 30, and *People v. Young*, 306 Ill. App. 3d 350, 354 (1999).

¶ 24 This court has identified numerous factors that can be considered when determining whether or not an arrest has occurred. These factors include: (1) the time, length, place, mode and mood of the encounter between defendant and the police; (2) the number of police officers present; (3) any indication of a formal arrest, including the officer's use of handcuffs or drawing his gun; (4) the officer's intention; (5) defendant's subjective belief or understanding; (6) whether defendant was told he could refuse to accompany the police; (7) whether defendant was transported in a police car; (8) whether police told defendant he was free to leave; (9) whether the police told defendant he was under arrest; and (10) the language used by the police. *People v. Gomez*, 2011 IL App (1st) 092185, ¶ 59.

¶ 25 After considering these factors in light of the facts and circumstances involved in this case, we find that defendant was not under arrest when Officer Carlson asked him to place his hands on the police car. The record shows that, although there was a team of six police officers

looking for defendant, only two officers, Carlson and Rojas, approached defendant and the unknown man, who were standing together on the street. Officer Carlson then asked defendant to place his hands on the police car. The officers were not touching defendant as he complied with the request and immediately stated "I got some blows on me. I am a user." After defendant made this statement, Officer Rojas recovered the heroin from defendant's shoe, and Officer Carlson then arrested defendant by handcuffing him and taking him into custody.

¶ 26 Our research reveals that it is not uncommon or unusual for a police officer to ask an individual to place his hands on a car during an investigatory stop. In *People v. Jackson*, 2012 IL App (1st) 103300, Chicago police officer Gary Anderson testified that he observed the defendant walking at a rapid pace and paying close attention to the police car. The officer stopped the defendant to conduct a field interview, and asked him to place his hands on the police car. Officer Anderson specifically explained that his purpose for doing so was for "[o]fficer safety." *Jackson*, 2012 IL App (1st) 103300, ¶ 5. The defendant began acting erratically, flailing his arms, and he was then handcuffed, though still not under arrest. During a "protective pat down" Officer Anderson recovered a loaded handgun from the defendant's backpack, and at that point, the defendant was arrested. *Jackson*, 2012 IL App (1st) 103300, ¶¶ 5-6. Several other cases describe circumstances where the police asked the defendants to place their hands on cars during investigatory stops, and the defendants were then subjected to pat downs, after which they were arrested. See, e.g., *People v. Sorenson*, 196 Ill. 2d 425, 428-29 (2001); *People v. Holman*, 402 Ill. App. 3d 645, 647 (2010); *In re S.V.*, 326 Ill. App. 3d 678, 682 (2001); *People v. Morales*, 221 Ill. App. 3d 13, 15-16 (1991); *People v. Santoro*, 192 Ill. App. 3d 895, 896-97 (1989); *People v. Dyer*, 141 Ill. App. 3d 326, 328-29 (1986); *People v. Jones*, 102 Ill. App. 3d 246, 247-48 (1981). These cases show that it has long been a common practice for police to ask people to place their hands on a car during a *Terry* stop for police protection.

¶ 27 In this case, the record shows that defendant immediately made his inculpatory statement that he had "blows" on him as he complied with Officer Carlson's request to place his hands on the police car. This statement gave the police probable cause to arrest defendant.

¶ 28 Defendant alternatively claims that the police officers' observation of the single drug transaction was not sufficient to give them reasonable suspicion to stop and detain him. We disagree. As stated above, a police officer is justified in making an investigative stop when he can identify specific and articulable facts which allow him to reasonably infer that defendant has committed a crime. 725 ILCS 5/107-14 (West 2010); *Lee*, 214 Ill. 2d at 487; *Thomas*, 198 Ill. 2d at 109. Police may stop a person to investigate possible criminal behavior based on an informant's tip where the information received has some indicia of reliability and establishes the necessary quantum of suspicion. *Lee*, 214 Ill. 2d at 487. Where police obtain corroboration of the information, it establishes the informant's veracity and supports the inference that the informant obtained his information reliably. *People v. Williams*, 147 Ill. 2d 173, 210 (1991).

¶ 29 Here, the record shows that the police were responding to a call that a specific man was reportedly selling drugs in the area of 3818 West Augusta Boulevard. When the police arrived at that particular location, Officer Carlson saw defendant, who fit the description of the man, standing on the street. The police then observed an unknown man approach defendant and hand him money in exchange for a small item defendant removed from his right shoe. This observation gave the police corroboration of the information they received from the call reporting drug sales in that area, rendering that information more reliable. Thus, Officer Carlson's observation of the suspected narcotics transaction, coupled with the factual corroboration of the information received in the call to police and interpreted by commonsense considerations, gave the officer reasonable suspicion that defendant had committed a crime which warranted further investigation, justifying the stop of defendant. See *Lee*, 214 Ill. 2d at 487.

¶ 30 Furthermore, we reject defendant's additional argument that the officers had no right to conduct a pat down search because they did not fear for their safety. As explained above, as soon as defendant was stopped, he immediately made his inculpatory statement which gave the police probable cause to arrest him. Consequently, the police did not conduct a protective pat down of defendant, but instead, performed a search incident to his arrest.

¶ 31 Based on these findings, we conclude that a pre-trial motion to suppress would have been futile because the police had probable cause to arrest defendant when they recovered the heroin from his shoe. In fact, it appears from the record that counsel made this exact determination prior to trial when she initially interpreted Officer Carlson's detention of defendant as a *Terry* stop. The record shows that three months before trial, defendant informed the court that he wanted to file a motion to quash his arrest, but counsel refused to file the motion. Counsel then informed the court that she and defendant had discussed the motion "several times." It is well settled that the determination of whether to file a motion to suppress is a matter of trial strategy, and thus, counsel's decision is given great deference and is generally immune from claims of ineffective assistance. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). Accordingly, trial counsel's failure to file a motion to suppress did not constitute ineffective assistance.

¶ 32 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.