

No. 1-11-2553

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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. 11CR 4462
)	
JERMAINE LITTLE,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 **Held:** Where defendant tossed a bag of bullets while fleeing from police, he was not seized when he abandoned the evidence, and thus, a motion to suppress the evidence would have been futile; therefore, trial counsel's failure to file a motion to quash arrest and suppress evidence did not constitute ineffective assistance of counsel, and defendant's conviction for unlawful use of a weapon by a felon is affirmed.

¶ 2 Following a jury trial, defendant Jermaine Little was convicted of unlawful use of a weapon by a felon for possessing firearm ammunition. The trial court sentenced defendant to four years' imprisonment. On appeal, defendant solely contends his trial counsel rendered

ineffective assistance because counsel failed to file a motion to quash defendant's arrest and suppress evidence where the police officers' seizure of defendant was unlawful. We affirm.

¶ 3 At trial, Chicago police officer Rogelio Ocon testified that about 11:15 a.m. on February 24, 2011, he was on patrol driving an unmarked police car with Officers Conway and Norris near 51st Street and Ashland Avenue. The location had been designated a "hot spot" by the police department due to numerous telephone calls received at the 911 center complaining about narcotics and gang activity. Officer Ocon observed two men pacing back and forth, loitering, for about two minutes. After driving by, the officer made a U-turn, and returned to the location to conduct a field interview. When the police returned, one of the men, defendant, was still loitering, but the other man had left. Officer Ocon asked defendant to come to the police car, and defendant complied. Defendant stood about two feet from the car, and Officer Ocon stood between defendant and the car. Defendant was not asked to place his hands on the car. The officers then asked defendant for identification, and defendant handed Officer Conway his identification card. While Officer Conway checked defendant's name in the computer inside the police car, Officer Ocon approached defendant to conduct a protective pat down. Officer Ocon testified that he was unable to conduct the pat down because before he could start the procedure, defendant ran away from the officers while holding his right side.

¶ 4 Officers Ocon and Norris chased defendant down the street, through an alley and into an open lot. Defendant fell while running, and when he got up, he reached into his right coat pocket, tossed two knotted plastic bags to the ground, and continued running. One of the plastic bags was black and the other was clear. Officer Norris, who was 10 to 15 feet behind defendant, grabbed the plastic bags from the ground, continued chasing defendant and apprehended him. The chase had lasted about two minutes. While walking to the police car, Officer Ocon read defendant his *Miranda* rights from a police book. Defendant then stated to Officer Ocon "them

bullets ain't mines. I'm holding them for my boys." Defendant also said "it's just a few nicks, just trying to make a few dollars." At this point, Officer Ocon did not know what was inside the two plastic bags defendant had dropped. At the police station, Officer Norris gave the plastic bags to Officer Ocon to inventory. One bag contained 22 nine-millimeter bullets, 3 of which were hollow-point bullets. The second bag contained Ziploc bags of cannabis.

¶ 5 Officer Ocon acknowledged that he had stopped defendant for a traffic violation nearly a month earlier, on January 31, 2011. Defendant was arrested for driving on a suspended license and not wearing a seatbelt, and was brought to the police station. While Officer Ocon wrote those tickets, defendant volunteered to turn in some guns from the P Stones street gang. The officer doubted the sincerity of defendant's offer, but defendant insisted, so Officer Ocon gave defendant his cell phone number. Officer Ocon occasionally gives his cell phone number to people in custody because they could possibly be good informants. Defendant called Officer Ocon three times that day and said he had a gun coming he was going to give to the officer. Defendant never turned in a gun. The next time Officer Ocon saw defendant was during the incident in this case. Officer Ocon did not realize that the man loitering on the street was defendant until he was about 10 feet away from him.

¶ 6 Chicago police officer Terrence Norris testified substantially the same as Officer Ocon. Officer Norris saw defendant pacing back and forth on the street, but did not see him violate any laws at that time. As a designated hot spot, the police are told to "check people" who are in that area. Officer Norris expressly denied that the police "detain" people in such areas, but rather, the officers walk up to people and ask them questions. Officer Norris explained that when he saw defendant and the other man, his intention was to stop and talk to them, complete contact cards, and find out why the men were there. Officer Norris denied that Officer Ocon approached defendant, ordered him to come to the police car, yelled at defendant, or put defendant's hands on

the car. Instead, Officer Ocon asked defendant to come to the car in a conversational tone, and defendant complied.

¶ 7 When the officers exited their vehicle to speak with defendant, Officer Norris went to the area where defendant had been pacing to see if defendant had dropped any contraband there. As Officer Norris walked in that area, he heard Officer Ocon say "he's running." Officer Norris turned around, saw defendant fleeing the area, and chased after him. Like Officer Ocon, Officer Norris saw defendant reach into his right jacket pocket and throw two knotted plastic bags to the ground, then continue running. Within 10 to 15 seconds after defendant dropped the bags, Officer Norris grabbed them from the ground, placed them inside his bullet-proof vest, and continued chasing defendant. Moments later, Officer Norris tackled defendant on the ground and placed him in handcuffs. After defendant was in custody, Officer Norris looked inside the black plastic bag and saw it contained 22 nine-millimeter bullets. He then looked inside the clear plastic bag and saw it contained six bags of suspect cannabis. Officer Norris kept the bags in his custody until he returned to the police station where he gave them to Officer Ocon to inventory.

¶ 8 Defendant testified that when he talked with Officer Ocon on the day of his traffic violation, it was his understanding that the officer wanted defendant to give him a gun. Defendant told the officer that he did not have any guns. Officer Ocon then told defendant that in order to get his car back, he had to give the officer a gun. About 30 minutes after he left the police station, defendant called Officer Ocon's cell phone because the officer told defendant to notify him when he arrived home. Defendant called Officer Ocon once more half an hour later to tell him he did not have any guns. Defendant did not see or speak with Officer Ocon again until their encounter in this case.

¶ 9 Defendant testified that he went to the store on 51st Street to buy cereal and milk for his daughter. He bought those items and left them inside the store, then stood in front of the store

using the phone. When the police drove past, defendant recognized Officer Ocon. The police then made a U-turn and stopped their car in front of defendant. Officers Ocon and Norris exited the police car, and while Officer Norris searched the perimeter of the area, Officer Ocon searched defendant against the police car. The officer touched defendant's upper chest and his legs. Officer Ocon asked defendant what happened to the gun defendant was supposed to give him. The officer then told defendant that he was going to plant a substance such as heroin on him because defendant never gave him a gun. Defendant then ran down the street. Defendant admitted that while he was running, he tossed one bag containing six smaller bags of marijuana. He denied tossing a bag of bullets. After defendant tossed the marijuana, Officer Norris tackled him, handcuffed him, and placed him in the back of the police car. Defendant denied speaking with Officer Ocon and denied that the officer read him his *Miranda* rights. Defendant also denied making any statements about the bullets or marijuana. Defendant acknowledged that he had a prior conviction for delivery of cannabis within 1,000 feet of a school.

¶ 10 Outside the presence of the jury, the parties stipulated that defendant had a prior conviction for unlawful use and possession of a firearm. In front of the jury, the parties stipulated that defendant had a prior conviction for a qualifying offense.

¶ 11 In rebuttal, Officer Ocon denied telling defendant that he was going to plant heroin on him. The officer further testified that defendant initiated the conversation about the guns, and he did not ask defendant to turn in any guns before defendant said he had guns from the gang.

¶ 12 The jury found defendant guilty of unlawful possession of firearm ammunition by a felon. The trial court subsequently sentenced defendant to a term of four years' imprisonment.

¶ 13 On appeal, defendant solely contends his trial counsel rendered ineffective assistance because counsel failed to file a motion to quash defendant's arrest and suppress evidence where the police officers' seizure of defendant was unlawful. Defendant claims the police illegally

seized him when they asked him to approach the police car and asked him for identification without the required reasonable suspicion of criminal activity. Defendant concedes that in *People v. Henderson*, 2013 IL 114040, our supreme court recently found that where a defendant drops contraband after fleeing from police, the defendant's flight interrupts the chain of causation between an alleged illegal seizure of the defendant and the discovery of the contraband. *Henderson*, 2013 IL 114040, ¶ 44. Defendant argues, however, that a full attenuation analysis must be conducted as was done in *Henderson*, and in this case, the State failed to prove the recovery of the bullets was attenuated from the illegal seizure.

¶ 14 The State argues that defendant dropped the bullets after he ran from the police, and therefore, he was not seized at the time he abandoned the evidence. Consequently, there was no violation of the fourth amendment, a motion to suppress would have been futile, and trial counsel's failure to file such motion did not constitute ineffective assistance.

¶ 15 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). *Henderson*, 2013 IL 114040, ¶ 11. 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. *Strickland*, 466 U.S. at 687; *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Specifically, defendant must show that counsel's performance was objectively unreasonable, and that there is a reasonable probability the outcome of the proceeding would have been different if not for counsel's error. *Henderson*, 2013 IL 114040, ¶ 11. If defendant cannot prove 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 trial counsel's failure to file a motion to suppress, defendant must demonstrate that the unargued motion is meritorious, and that a reasonable probability exists that the outcome of the trial would have been different if the

evidence had been suppressed. *Henderson*, 2013 IL 114040, ¶ 15. Counsel's failure to file a motion is not considered ineffective assistance where such motion would have been futile.

Givens, 237 Ill. 2d at 331. Determining whether or not 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).

¶ 16 The fourth amendment of the United States Constitution, which applies to the states through the fourteenth amendment, protects all citizens from unreasonable searches and seizures in their homes, effects and persons. U.S. Const., amend. IV. 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). An officer does not violate the fourth amendment by merely approaching a person in public and asking questions if that person is willing to listen. *Luedemann*, 222 Ill. 2d at 549, citing *United States v. Drayton*, 536 U.S. 194, 200 (2002). Even without reasonable suspicion, the police have the right to approach citizens and ask potentially incriminating questions (*Luedemann*, 222 Ill. 2d at 549, citing *Bostick*, 501 U.S. at 439), and may also " 'ask to examine the individual's identification' " (*Luedemann*, 222 Ill. 2d at 551, quoting *Bostick*, 501 U.S. at 434-35).

¶ 17 However, an encounter between police and a citizen becomes a nonconsensual seizure, or a *Terry* stop, where a reasonable innocent person would not feel free to walk away and leave under the circumstances. *Luedemann*, 222 Ill. 2d at 550-51, citing *Bostick*, 501 U.S. at 435, 438. To determine if an encounter constituted a seizure, the court must objectively evaluate the police conduct in question rather than the subjective perception of the citizen. *Luedemann*, 222 Ill. 2d at 551. This court has previously found that where a police officer takes a citizen's identification card and returns to his squad car to run a warrant check on the computer, a seizure occurred as a reasonable person would not have felt free to leave his identification behind and go about his business. *People v. Mitchell*, 355 Ill. App. 3d 1030, 1034 (2005). Moreover, in *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court held that a police officer may conduct a protective pat-down search for weapons only where the officer stops the individual based on reasonable suspicion of criminal activity, and justifiably believes the person is armed and dangerous. *Terry*, 392 U.S. 30-31.

¶ 18 Here, after considering the totality of the circumstances, we find that the police unlawfully seized defendant when they stopped him on the street. Officer Ocon testified that he saw defendant and another man pacing back and forth for about two minutes, a relatively short period of time. That activity was the sole basis for stopping defendant. The officer did not identify any other specific facts that aroused his suspicion of criminal activity. In fact, Officer Norris testified that he did not see defendant violate any laws, and his intention was to merely stop the men, ask them why they were there, and complete contact cards. In the time it took the police to turn around their vehicle, the other man had left the area and defendant was standing there alone. Officer Ocon asked defendant to come to the police car, and defendant complied. The officer then asked defendant for identification, and defendant handed Officer Conway his identification card. The police are permitted to approach citizens to ask questions and request

identification. *Luedemann*, 222 Ill. 2d at 551. Up to this point, the encounter between the police and defendant was consensual and defendant's fourth amendment rights were not implicated.

¶ 19 However, Officer Conway then took defendant's identification card inside the police car to check defendant's name in the computer while Officer Ocon continued talking with defendant. As found in *Mitchell*, a reasonable person would not feel free to leave his identification and walk away from the police. Moreover, while Officer Conway checked the computer, Officer Ocon approached defendant to conduct a protective pat down. A pat down may be conducted only where the police officer has seized the citizen during a lawful *Terry* stop based on reasonable suspicion of criminal activity and a justified belief the person is armed and dangerous. *Terry*, 392 U.S. 30-31. Consequently, based on the totality of the circumstances, we find that what began as a consensual encounter became a seizure. Although the police had the authority to approach defendant, ask him why he was there, and ask for identification, they did not have the required reasonable suspicion of criminal activity to conduct a *Terry* stop or a protective pat down. Accordingly, the seizure of defendant was unlawful.

¶ 20 Nonetheless, we find under our supreme court's recent decision in *Henderson*, that although the initial encounter between the police and defendant in this case constituted an unlawful seizure, defendant's flight negated any impropriety in it, and the bullets were not recovered as a result of that seizure. In *Henderson*, the police stopped a car in which the defendant was a passenger based on an anonymous tip that the car possibly contained a gun. *Henderson*, 2013 IL 114040, ¶¶ 3-4. The defendant complied with the police officer's order to exit the car, then fled from police. *Henderson*, 2013 IL 114040, ¶ 4. A gun fell to the ground from the defendant's waistband as he ran. *Henderson*, 2013 IL 114040, ¶ 4. The supreme court found that the vehicle stop was an illegal seizure of the defendant; therefore, it had to determine if the recovery of the gun resulted from the illegal seizure. *Henderson*, 2013 IL 114040, ¶ 31. In

so doing, the court found that it must consider " 'whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality.' " *Henderson*, 2013 IL 114040, ¶ 33, quoting *United States v. Crews*, 445 U.S. 463, 471 (1980).

¶ 21 The *Henderson* court identified three factors relevant to an attenuation analysis, including the temporal proximity of the illegal police conduct and discovery of the evidence, the presence of any intervening circumstances, and the purpose and flagrancy of the police misconduct. *Henderson*, 2013 IL 114040, ¶ 33. The court expressly noted that the Supreme Court rejected a "but for" test under which evidence would be deemed inadmissible merely because it would not have been discovered "but for" the illegal actions of the police. *Henderson*, 2013 IL 114040, ¶ 34. Consequently, evidence that is recovered through a chain of causation that began with an unlawful seizure is not *per se* inadmissible. *Henderson*, 2013 IL 114040, ¶ 34. The court considered the attenuation factors, and because the amount of time between the vehicle stop and recovery of the gun was unknown, it assumed the temporal proximity factor favored the defendant. *Henderson*, 2013 IL 114040, ¶ 36. Regardless, under the second factor, the court found the defendant's flight from police ended the seizure, and thus, anything that occurred thereafter was, by its very nature, no longer tied to the initial stop. *Henderson*, 2013 IL 114040, ¶ 37. The defendant's flight interrupted the causal connection between the unlawful seizure, which was not flagrant misconduct, and recovery of the gun. *Henderson*, 2013 IL 114040, ¶ 50. The court concluded that a motion to suppress the gun would not have been granted, and thus, trial counsel was not ineffective for failing to file the motion. *Henderson*, 2013 IL 114040, ¶ 51.

¶ 22 Similar to *Henderson*, here, we find defendant's flight from the police interrupted the causal connection between the illegal seizure and recovery of the bullets. When defendant fled from the police, his seizure ended. Consequently, everything that occurred thereafter was no

longer tied to the initial unlawful stop. As defendant ran through the open lot, he tossed the bag of bullets to the ground, thereby abandoning the evidence. Defendant was not being seized when Officer Norris recovered the bullets 10 to 15 seconds after defendant dropped them. Therefore, a motion to suppress the bullets would not have been successful.

¶ 23 Defendant contends that even if his flight is an intervening factor, we must still consider the remaining two attenuation factors, which he claims weigh in his favor. Regarding temporal proximity, Officer Ocon testified that the time between the initial stop of defendant and recovery of the bag of bullets was about two minutes. During this time, Officers Ocon and Norris chased defendant down a street, through an alley, and into an open lot where the evidence was recovered from the ground. We acknowledge that two minutes is not a lengthy amount of time, but under the circumstances in this case, we find it was a sufficient amount of time to separate the recovery of the evidence from the unlawful seizure.

¶ 24 We also reject defendant's assertion that the third factor, flagrancy of the police misconduct, weighs in his favor. Defendant claims the police in this case were overbearing and harassing because they seized him with no basis and solely on his presence in an area deemed a "hot spot" for criminal activity. Although we agree the seizure was improper, there is no evidence in the record to support defendant's claim that the officer's misconduct was flagrant. Police misconduct is considered flagrant when it is intentional or purposeful, or when it is carried out in a manner that causes surprise, confusion and fear. *Henderson*, 2013 IL 114040, ¶ 49. Here, the record shows the police saw defendant loitering on the street in a designated "hot spot," and stopped to ask him for identification and question him about what he was doing there. As discussed above, the police have the authority to take such action. The officers crossed the line into a *Terry* stop when Officer Conway returned to the police car to check defendant's identification in the computer, and Office Ocon attempted to conduct a protective pat down.

However, there is no indication the officers acted intentionally, or attempted to surprise or instill fear in defendant. Based on this record, we find the officers' conduct was not flagrant.

¶ 25 Finally, we reject defendant's argument that his flight and abandonment of the evidence was directly caused by the illegal seizure. The defendant in *Henderson* presented this same argument. *Henderson*, 2013 IL 114040, ¶ 45. The *Henderson* court found that the defendant was essentially arguing that "but for" the illegal stop, he would not have fled and the gun would not have been discovered. *Henderson*, 2013 IL 114040, ¶ 45. As noted in *Henderson*, the United States Supreme Court has rejected a "but for" or *per se* rule which would render evidence inadmissible at trial simply because it was discovered through a series of events that began with an unlawful seizure. *Henderson*, 2013 IL 114040, ¶ 45.

¶ 26 We conclude that defendant's flight from the police interrupted the causal connection between the unlawful seizure, which was not flagrant misconduct, and the discovery of the bag of bullets. Accordingly, the bullets were not inadmissible fruit of the poisonous tree. We find that a motion to suppress the bullets would not have been granted, and therefore, trial counsel's failure to file such motion did not constitute ineffective assistance.

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

¶ 28 Affirmed.