FOURTH DIVISION
December 29, 2016

No. 1-14-1675

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. 13 CR 1126
	)	
DAVID JEANS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for armed habitual criminal affirmed. Trial court did not err in denying motion to quash arrest and suppress evidence where totality of circumstances showed that officers had reasonable suspicion to stop and frisk defendant, who matched description of narcotics suspect and made furtive movements to conceal his right pants pocket from officers. Counsel was not ineffective for failing to present security camera footage of defendant's arrest where it provided support for notion that officers had reason to suspect that defendant was armed.

¶ 2 While conducting surveillance on a gas station known as a common location for narcotics sales, Chicago police officers received a description of an individual who had recently sold cannabis inside the station. The officers went inside and saw defendant David Jeans, who

matched the description of the suspect.[1] They approached him, frisked him, and found a handgun in his right pants pocket. A security camera inside the gas station captured the encounter. After a jury trial, defendant was convicted of being an armed habitual criminal, as he possessed a firearm after having been convicted of two or more qualifying felonies. 720 ILCS 5/24-1.7(a) (West 2012).

¶ 3 On appeal, defendant claims that the trial court erred in denying his motion to quash arrest and suppress evidence where the officers who stopped and frisked him lacked a reasonable, articulable suspicion to do so. He also argues that his trial counsel provided him with ineffective assistance by failing to introduce the video footage of his arrest to support the suppression motion.

¶ 4 We disagree with both of defendant's arguments. The officers had reasonable suspicion to stop and frisk him where he matched the description of an individual who had recently sold narcotics in a high-crime area and, upon being approached by the officers, made movements in an attempt to conceal the right side of his body from view. And counsel was not ineffective where the video would not have changed the result of the suppression hearing. While the video contradicted the officers in some respects, it also depicted defendant attempting to conceal his pocket and avoid being frisked, supporting the officers' reasonable suspicion.

¶ 5 I. BACKGROUND

¶ 6 The State charged defendant with six offenses relating to his possession of a firearm. The State proceeded with only one count of armed habitual criminal, alleging that defendant, who

[1] While defendant is referred to as "David Jean" in certain places in the record, he has indicated that David Jeans is the correct spelling of his name. We use the correct spelling to refer to him here.

had been previously convicted of armed robbery and unlawful use of a weapon by a felon, knowingly or intentionally possessed a firearm.

¶ 7 A. Pretrial Proceedings

¶ 8 On the first status date following defendant's arraignment, the parties discussed the possibility that there was a security video of defendant's arrest at the gas station. At the following date, defense counsel still had not found the video and requested additional time to investigate.

¶ 9 On April 29, 2013, defense counsel filed a motion to quash arrest and suppress evidence. At the status hearing conducted on the same day, no one mentioned the video. On November 4, 2013, the State informed the court that it had tendered the video to defense counsel, and defense counsel confirmed, "I have the video."

¶ 10 The court held a hearing on defendant's suppression motion on December 18, 2013. Sergeant Eric Olson testified that, on December 23, 2012, he and a team of seven other police officers were conducting surveillance at a GoLo gas station located on the 3700 block of West Roosevelt Road in Chicago. Olson testified that the gas station was the largest "hot spot" for narcotic sales in his district, and that he had made numerous narcotics arrests at that location in the past.

¶ 11 Olson testified that, as he was conducting surveillance, he saw an individual, whom Olson later learned was Angel Aranjo, arrive at the gas station and ask someone standing outside where he could buy narcotics. The person directed Aranjo into the gas station, and Aranjo entered. Thirty second later, Aranjo came out of the gas station and drove away.

¶ 12 Officer Nicholas Garcia, another member of the team, stopped Aranjo and found multiple bags of cannabis. Aranjo told Garcia that a black man wearing blue jeans and a white t-shirt had

sold him the cannabis inside the gas station. Garcia relayed that information to Olson, who went into the station.

¶ 13 Olson testified that several people were inside the station, including defendant, who was wearing blue jeans, a white t-shirt, and a blue "hoodie-type jacket." Olson approached defendant, who was standing near the cash register, and informed defendant that he was a police officer. Olson testified that defendant became "agitated" and "took a *** bladed stance," which meant that defendant "turned his right side away from [Olson]." Olson testified that defendant's assumption of the bladed stance made him suspicious, although he did not specify what he suspected defendant of.

¶ 14 Olson testified that he began to frisk defendant. According to Olson, defendant was "not combative but *** also not cooperative." Olson said that defendant made "furtive movements, backing up, turning his right side away ***."

¶ 15 Garcia testified that, at that point, he approached defendant to assist Olson in frisking him. Garcia began to pat down defendant's right side and touched something that felt like the barrel of a gun in defendant's pants. Garcia testified that he found a gun in defendant's pocket.

¶ 16 The court asked Garcia if anyone else in the gas station matched the description he had received from Aranjo, and Garcia responded that, as he entered the gas station, "there was a male black attempting to leave that fit the description as well." Garcia testified that he and Olson "conducted a brief interview with him and a very brief pat down and he went on his way."

¶ 17 The trial court denied the motion to quash arrest and suppress evidence, finding that the officers' investigatory stop and frisk was reasonable.

¶ 18 On the first day that the case was set for trial, the State told the court it was not ready and that it had tendered "a video" to defense counsel that day and "allowed [counsel] to view that

video." The State also said it would "put [the video] on a disk for [defense counsel]." Defense counsel told the court that he had seen it.

¶ 19 B. Trial

¶ 20 At defendant's jury trial, Sergeant Olson and Officer Garcia described defendant's arrest similarly to the way they had described it at the suppression hearing, with some additional detail. Olson added that the gas station was a hot spot for "narcotics and/or violence," rather than simply a narcotics hot spot.

¶ 21 Olson estimated that there were five or six customers inside the gas station when he entered. Olson saw someone matching the description of the suspect—a black man wearing a white t-shirt and blue jeans—"almost immediately." Olson told this person he was a police officer and conducted "a brief protective pat-down." Olson said that he did not feel any weapons, and the man told Olson that "he was not involved in any narcotics activity." Olson let the man go on his way, then turned his attention to defendant.

¶ 22 Olson said that defendant was "somewhat uncooperative" when he began to frisk defendant. Olson testified that defendant told Olson that he "could not pat him down," to "[g]et [his] hands off," and that defendant "knew his rights." Olson also said that defendant "kept turning his body" so that he could not reach defendant's right side.

¶ 23 Garcia testified that, after he received the description of the suspect from Aranjo, it took him 30 to 60 seconds to get back to the gas station. He met Olson outside the gas station, relayed the description to Olson, and the two of them went inside. Garcia said that another officer took Aranjo to the police station in his car.

¶ 24 Garcia also described defendant as "uncooperative" because he would not "keep his hands up" or "let [the officers] pat him down." Garcia also said that defendant "wasn't complying with the directions given to him *** [t]o give a frontal view."

¶ 25 On cross-examination, Garcia acknowledged that, when Olson searched the first person in the gas station, Olson went through the man's pockets. Garcia said that "[t]he purpose of conducting a *** pat-down is to find a weapon, but [he and Olson] were there looking for the person selling the drugs." Garcia said that Olson went through the man's pockets "to determine what he felt through the pocket wasn't narcotics packaging."

¶ 26 Tomeka Randle, defendant's girlfriend, testified that she was with defendant on December 23, 2012, when he stopped at the gas station to buy cigarettes. Randle said she never saw defendant speak to anyone at the gas station or carry a firearm that night.

¶ 27 The State published the security video of defendant's arrest while both Olson and Garcia narrated the events of the video. The video does not depict any narcotics transactions inside the station. Defendant enters the gas station with his cell phone and proceeds to make a call near the cash register. Defendant is wearing a blue hooded sweatshirt, a white t-shirt, blue jeans, and a blue baseball cap. A few other customers enter the store and look at items on the shelves or approach the cash register. One of these individuals is a black man with long hair wearing a blue jacket, a white t-shirt, and blue jeans.

¶ 28 At the time Olson and Garcia enter the station, defendant is facing toward the entrance. There are seven people, including defendant, in the station. Olson immediately encounters the other individual who is dressed like defendant. The man raises his hands as Olson puts his hands into the man's jacket and pants pockets. At the same time, defendant turns 90 degrees to his right

to face the store clerk. The front of defendant's body is facing the counter, while the left side of his body is facing Olson.

¶ 29 When Olson finishes rummaging through the other man's pockets, he immediately approaches defendant, who is still on the phone. Olson says something to defendant and defendant turns his head to face Olson while his body still faces the counter. Defendant removes the cell phone from his ear with his right hand and gestures with the phone in his hand. It appears as though defendant is speaking to Olson. Olson says something to defendant and puts his hand on defendant's left hip. Olson and defendant continue to speak back and forth for a few seconds, as defendant drops his right hand, which still has a cell phone in it, to the front of his body and keeps his body facing the counter. Olson and defendant exchange a few more words.

¶ 30 As Olson and defendant talk, Garcia approaches, looks over Olson's left shoulder toward the front of defendant's body, walks behind defendant, and approaches defendant's right side. Defendant shifts slightly away from Olson as Garcia grabs the back of defendant's sweatshirt, leans toward the right side of defendant's pants pocket, and reaches into that area. Defendant then turns his head to face Garcia, keeping the front of his body square with the counter.

¶ 31 Garcia's left hand reaches toward the right pocket of defendant's sweatshirt, but defendant bends over at the waist, obscuring the location of Garcia's hand. Garcia's right hand then reaches toward defendant's lower body, but defendant's body obscures the exact position of Garcia's right hand.

¶ 32 Garcia's hands begin to move more frantically and he looks up to Olson. Defendant raises his right hand, in which he still has his phone, and Olson draws his firearm and points it at defendant.

¶ 33 Garcia pulls a handgun from what appears to be defendant's right pants pocket with his left hand. Defendant drops to his knees, and Olson handcuffs defendant.

¶ 34 The parties stipulated to defendant's prior convictions and to the fact that no fingerprints were found on the firearm recovered from defendant.

¶ 35 The jury found defendant guilty of armed habitual criminal.

¶ 36 C. Posttrial Proceedings

¶ 37 Defense counsel filed a motion for a new trial that claimed that the trial court had erred in denying the suppression motion. Defense counsel argues that the security video showed the officers "reach[ ] into [defendant's] pockets" in the gas station, showing that they did not conduct a "simply pat down"; rather, they conducted "a custodial search for contraband." Defense counsel also argued that the video "refuted" Olson's testimony that defendant adopted a bladed stance. According to counsel, the video showed defendant "not moving at all—complying with every order given by the *** [p]olice."

¶ 38 At the hearing on the motion for new trial, defense counsel stood on his written motion, offering no oral argument in support of it. The court denied the motion, stating, "I don't believe err[or] occurred." The court sentenced defendant to 20 years' incarceration. Defendant filed this appeal.

¶ 39 II. ANALYSIS

¶ 40 On appeal, defendant raises two challenges to his conviction. First, he claims that the trial court erred in denying his motion to quash arrest and suppress evidence where the police officers who apprehended him lacked a reasonable, articulable suspicion to stop and frisk him. Second, he argues that his attorney was ineffective for failing to present the video of his arrest at the

suppression hearing because that video undermined the credibility of the officers and established that they seized him in violation of the fourth amendment.

¶ 41 A. Stop and Frisk

¶ 42 Defendant first argues that the police lacked reasonable suspicion to stop and frisk him in the gas station. The State concedes that defendant was seized when the officers approached him in the station. But the State argues that the officers had reasonable suspicion to stop and frisk him.

¶ 43 We apply a two-part standard of review when addressing a trial court's ruling on a suppression motion. *People v. Grant*, 2013 IL 112734, ¶ 12. We defer to a trial court's factual findings, reversing them only if they are against the manifest weight of the evidence. *Id.* But we review *de novo* the court's ultimate ruling on the motion. *Id.*

¶ 44 The fourth amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. amend. IV. While the fourth amendment generally requires the police to obtain a warrant for a search or seizure to be reasonable (*Katz v. United States*, 389 U.S. 347, 357 (1967)), the United States Supreme Court recognized an exception to the warrant requirement for brief investigatory detentions in *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Under *Terry*, the police may briefly stop a person for temporary questioning if they believe that the person has committed, or is about to commit, a crime. *People v. Flowers*, 179 Ill. 2d 257, 262 (1997); see also 725 ILCS 5/107-14 (West 2012) ("A peace officer, having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense ***."). If the police also believe that the person is armed

and dangerous, they may subject the person to a limited search for weapons, *i.e.*, a frisk. *Flowers*, 179 Ill. 2d at 262.

¶ 45 Whether a stop (a type of seizure) is valid is a separate question from whether a frisk (a type of search) is valid. *Id.* at 263. The fact that an officer has reasonable suspicion to stop a person does not necessarily justify a frisk for weapons. *Id.* Thus, we first address whether Olson and Garcia were justified in stopping defendant, then turn to the question of whether their search of defendant's person was reasonable.

¶ 46 1. Stop

¶ 47 When considering whether a *Terry* stop was valid, we must objectively consider whether, based on the facts available to the police officer, the officer could point to specific and articulable facts which, taken along with rational inferences from those facts, reasonably warrant a stop. *People v. Thomas*, 198 Ill. 2d 103, 109 (2001). In other words, "the situation confronting the police officer must be so far from the ordinary that any competent officer would be expected to act quickly." *Id.* at 110. While an officer does not need probable cause to conduct a *Terry* stop, he must also have "more than a mere hunch." *Id.*

¶ 48 Defendant first takes issue with the description of the drug dealer the officers received from Angel Aranjo. Defendant notes that Aranjo gave a generic description of the offender, simply describing the color of the offender's t-shirt and jeans, and failed to mention any other qualities such as the offender's height, build, hairstyle, or complexion. Moreover, defendant notes, Aranjo omitted two articles of defendant's clothing that should have been obvious: his cap and his blue hoodie.

¶ 49 With respect to the description of defendant on which the police officers relied, we must first classify the source of the information. The United States Supreme Court has drawn a

distinction between "a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated," and an anonymous tip, which "seldom demonstrates the informant's basis of knowledge or veracity." (Internal quotation marks omitted.) *Florida v. J.L.*, 529 U.S. 266, 270 (2000). When officers obtain a description from an anonymous tip, the tip must be corroborated by " 'sufficient indicia of reliability to provide a reasonable suspicion to make the investigatory stop.' " *Id.* (quoting *Alabama v. White*, 496 U.S. 325, 327 (1990)). By contrast, "[w]hen a tip comes from an identifiable witness, only a minimum of corroboration or other verification of the reliability of the information is required." *People v. DiPace*, 354 Ill. App. 3d 104, 109 (2004).

¶ 50 In this case, the tip came from Aranjo, who was an identifiable witness. Knowing Aranjo's identity and having him in custody, the police could hold him accountable if he lied about the description of the person who had sold him cannabis. Thus, very little corroboration was necessary to justify a stop based on the tip.

¶ 51 And some corroboration was present. Aranjo said he bought cannabis from an African-American man inside the gas station wearing a white t-shirt and blue jeans, and defendant was an African-American man wearing a white t-shirt and blue jeans inside the gas station. This was sufficient corroboration to justify a brief investigatory detention.

¶ 52 Our conclusion is supported by *People v. Ross*, 317 Ill. App. 3d 26, 30 (2000), where the police received a call from the victim saying that "a black man wearing a blue shirt" had just robbed him. On the way to the victim's home, the police saw the defendant, "who matched the description and was about one-half block from the victim's home" where "there were no other pedestrians in sight." *Id.* The court held that these facts were sufficient to justify a *Terry* stop of the defendant. *Id.*

¶ 53 This case, like *Ross*, involved a description from an identified witness. And like the victim in *Ross*, Aranjo gave the police the suspect's gender, race, and the color of his clothing. Moreover, like *Ross*, defendant was found in the immediate vicinity of the alleged crime with few other individuals present.

¶ 54 Defendant notes that someone else in the gas station did, in fact, match the description, showing the vagueness of the description. But defendant ignores the fact that the universe of possible suspects was very small. Inside the gas station, where only five or six customers other than defendant were present, and where only one other person could have possibly matched the description, it was highly unlikely that the general description would lead the police to pick up the wrong person. See 4 W. LaFave, Search and Seizure § 9.5(h) (5th ed. 2012) ("[T]he description must permit the police to be reasonably selective in determining who to stop for investigation, and whether this may be said to be the case will depend upon how many persons are in the universe of potential suspects."). Given the size of the gas station, Olson was not required to obtain additional information before acting on the description. The fact that a second individual also happened to match Aranjo's description of the suspect does not, alone, show that the description was so vague that Olson was unjustified in relying on it.

¶ 55 Defendant cites *People v. Washington*, 269 Ill. App. 3d 862 (1995), but that case is distinguishable. In *Washington*, "the only evidence introduced to explain the detention of the defendant was the officers' testimony that the defendant 'fit the description of the robbery suspect.' " *Id.* at 866. There was no testimony regarding the suspect's appearance, such as the suspect's gender, race, age, height, weight, or clothing. *Id.* at 867. Without any facts that could allow the trial court to determine if the defendant matched the description of the suspect, the

court could not find that the officers had a reasonable, articulable suspicion to support their stopping the defendant. *Id.*

¶ 56 By contrast, in this case, the record does contain a description of the suspect's race, gender, clothing, and location. Defendant at least partially matched all of those characteristics. In light of the fact that the police obtained the description from an identified witness, we find that there was sufficient corroboration of the description to initiate a *Terry* stop.[2]

¶ 57 2. Frisk

¶ 58 In order to frisk a defendant, a police officer "must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence ***." *Adams v. Williams*, 407 U.S. 143, 146 (1972). When evaluating the existence of reasonable suspicion, we must take into account "the totality of the circumstances—the whole picture." (Internal quotation marks omitted.) *Navarette v. California*, 572 U.S. ___, 134 S. Ct. 1683, 1687 (2014).

¶ 59 Defendant first argues that the frisk was unreasonable because Olson testified that whenever he performs a *Terry* stop, "he normally conduct[s] a protective pat down during the course of that [stop]." Defendant characterizes Olson's testimony as a "frank admission that he frisks everybody he stops."

¶ 60 Our supreme court rejected the notion that an officer's generalized practice of frisking all individuals during an investigatory stop is sufficient reason to invalidate a frisk. In *People v. Moss*, 217 Ill. 2d 511, 515 (2005), a state trooper testified that it was his practice "to perform pat-

[2] Defendant has only challenged the officers' reasonable suspicion to initiate the stop. He has not challenged the duration of the stop.

down searches for officer safety whenever subjects are outside a vehicle at a traffic stop, regardless of whether their behavior arouses any suspicion." While the court noted that the trooper's practice of routine frisks "would be unlikely to withstand the scrutiny of *Terry* in the abstract," the question presented to the court was the objective reasonableness of the frisk, not the officer's subjective motive for performing a frisk: "An officer's subjective feelings may not dictate whether a pat-down search is valid or invalid." *Id.* at 529. Consequently, the court looked to the totality of the circumstances presented to the trooper, not to his generalized frisking policy. *Id.* at 530.

¶ 61 Similarly, in this case, Olson's stated routine practice of frisking anyone he stopped in a high-crime area does not invalidate his frisk of defendant. We do not, by any means, condone the practice of routinely frisking every individual stopped, regardless of the attendant circumstances. See *Flowers*, 179 Ill. 2d at 267 (noting that "[t]he limited exception recognized in *Terry* thus clearly does not permit police officers to engage in a practice of routinely frisking individuals, without concern for whether a particular person poses a danger" and opining that officer's testimony that "he conducts no individualized consideration of whether any particular suspect is armed, but simply applies a general rule that all persons he stops on suspicion of criminal activity should be frisked for 'safety' reasons" is invalid application of *Terry*); *Moss*, 217 Ill. 2d at 529 (officer's "routine practice of patting down every person who is outside a vehicle at a traffic stop would be unlikely to withstand the scrutiny of *Terry* in the abstract.").

¶ 62 But the sergeant's general practice, as well as his subjective motivations, are not the question in this appeal. *Id*. The question is whether, from an *objective* viewpoint, the facts available to the officers would warrant a person of reasonable caution to believe that *this* defendant was armed. *Id*.

¶ 63 Reviewing the totality of the circumstances, we conclude that the officers possessed a reasonable suspicion that defendant was armed, justifying their frisking defendant. Olson and Garcia were investigating narcotics sales in a high-crime area. The officers entered the gas station with information that someone inside had just sold cannabis to Aranjo. Defendant and one other man matched the description of the seller, and Olson determined that the other man did not have any contraband before he moved on to defendant. When Olson approached defendant, he moved his right side away from Olson in an apparent attempt to hide something from the officers and generally acted uncooperatively. While it was equally possible that defendant was trying to hide narcotics or some other type of contraband that was not a weapon, the officers were not required to be certain that defendant was armed before frisking him. They simply needed a reasonable suspicion that defendant was armed. Taking these facts together, the officers were justified in frisking defendant.

¶ 64 Defendant argues that his presence in a high-crime area, and the fact that he matched the description of a drug dealer, did not justify a frisk for weapons, because neither of these facts suggested that he was armed. It is true that, in isolation, neither of these factors will support a frisk. See, *e.g.*, *People v. Boswell*, 2014 IL App (1st) 122275, ¶ 23 ("*Terry* requires more than a general belief that drug dealers may carry weapons before a pat-down may be conducted."); *People v. Surles*, 2011 IL App (1st) 100068, ¶ 39 (rejecting argument that "defendant's presence in a high-crime area is a legally sufficient basis for performing a *Terry* stop and frisk" (internal quotation marks omitted)). But these were not the only facts facing Olson and Garcia. They also observed defendant move his right side away from Olson. Defendant's attempt to shield his right side from view, taken with the location and the fact that the officers had reason to suspect that defendant had been involved in dealing drugs, was sufficient reason to frisk defendant.

¶ 65 Defendant cites *Flowers*, 179 Ill. 2d at 265, in support of his argument that the frisk was not justified, but in *Flowers*, "there was no evidence that [the] defendant attempted to avoid [the police officer] when he approached or engaged in any other evasive or suspicious behavior." In this case, the officers both testified that defendant stood in a way that concealed part of his body from Olson and moved his right side away from Olson.

¶ 66 Similarly, the other cases that defendant relies on, *Surles*, 2011 IL App (1st) 100068, and *Boswell*, 2014 IL App (1st) 122275, are distinguishable. In *Surles*, the only information available to the officers at the time that they frisked the defendant was that the vehicle in which the defendant was a passenger failed to stop at a stop sign, and that the driver could not produce a driver's license. *Surles*, 2011 IL App (1st) 100068, ¶ 36. And in *Boswell*, the only justification offered for the frisk was that the officers saw the defendant engage in a hand-to-hand transaction, and the officers expressed a "general belief that drug dealers may carry weapons." *Boswell*, 2014 IL App (1st) 122275, ¶ 23. In this case, by contrast, the officers were investigating narcotics sales in a high-crime area, defendant matched the description of a drug dealer, and, most importantly, defendant displayed suspicious behavior and attempted to conceal half of his body when approached by the police. Unlike *Surles* and *Boswell*, the officers were not investigating a minor traffic infraction and did not rely on a generalized belief that defendant might be armed because he sold drugs. Instead, they relied on the situation before them, including defendant's suspicious conduct.

¶ 67 Defendant notes that neither Olson nor Garcia testified that they actually believed defendant was armed. While Olson and Garcia's subjective perception of a threat has some relevance (*Flowers*, 179 Ill. 2d at 264), the most important question is whether, viewed objectively, they had reason to suspect that defendant was armed. *Moss*, 217 Ill. 2d at 529. The

fact that neither Olson nor Garcia said that they actually believed defendant was armed does not change the fact that they were presented with facts that would lead a reasonable officer to suspect that defendant could have been armed. The motion to quash was properly denied.[3]

¶ 68 B. Ineffective Assistance of Counsel

¶ 69 Defendant also contends that his attorney provided him with ineffective assistance in failing to introduce the video of his arrest at the suppression hearing or to request the court to reconsider its denial of the suppression motion after receiving the video in discovery. According to defendant, the video "strongly rebutted" Sergeant Olson's testimony at the suppression hearing and would have shown that the officers violated defendant's fourth amendment rights during the *Terry* stop.

¶ 70 The Illinois and United States Constitutions protect a criminal defendant's right to the effective assistance of counsel. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). When reviewing a claim of ineffective assistance of counsel, we ask two questions: (1) whether counsel's performance fell below an objective standard of reasonableness; and (2) if counsel's performance was deficient, whether there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Albanese*, 104 Ill. 2d at 525. We apply *de novo* review. *People v. Hale*, 2013 IL 113140, ¶ 15.

[3] We should note here that defendant has not argued that we should consider the store video in reviewing the court's ruling on his suppression motion, and thus we have confined our discussion to the testimony presented at the hearing. In any event, as we will discuss in the next part of our analysis, consideration of the video would not change our view of the trial court's ruling on the motion to quash.

¶ 71 In this case, defendant's ineffectiveness argument hinges on the impact of the video on the suppression question. If the video would not have supported his fourth-amendment argument, then counsel did not perform unreasonably in declining to present it. See, *e.g.*, *People v. Mitchell*, 189 Ill. 2d 312, 356 (2000) (counsel not ineffective for failing to present evidence at sentencing hearing where evidence was "not inherently mitigating"). And if the video would not have changed the outcome of the suppression hearing, then defendant suffered no prejudice. See *People v. Henderson*, 2013 IL 114040, ¶ 15 (where ineffectiveness argument predicated on failure to file motion to suppress, defendant must show that suppression motion would have succeeded and that suppression would have changed outcome of trial). Thus, we must assess the effect of the video on the suppression hearing.

¶ 72 Defendant argues that the video would have proven that the officers exceeded the permissible bounds of a *Terry* frisk because "it is apparent from the video that both Garcia and Olson [put] their hands into [defendant's] pockets." Defendant is correct that, if the video showed the officers reaching into defendant's pockets, it would prove that they exceeded the scope of a *Terry* frisk. See *Sibron v. New York*, 392 U.S. 40, 65 (1968) (officer exceeded scope of frisk when he "thrust his hand into [defendant's] pocket" before conducting pat-down of outer clothing).

¶ 73 But having carefully reviewed the video numerous times, we cannot determine that either officer immediately reached into defendant's pockets. In the video, defendant's body is positioned between the camera and Sergeant Olson. There is no clear indication that Olson immediately reaches into the pockets of defendant's pants or sweatshirt. Similarly, when Officer Garcia circles defendant and begins to search his right side, defendant leans over, obscuring the location of Garcia's hands. There is no clear shot of Garcia immediately reaching into

defendant's pockets. While Garcia did, ultimately, reach into defendant's pocket to retrieve the handgun, it is impossible to tell whether he did so after he had touched the handgun through defendant's clothing. Indeed, if anything, the video appears to refute defendant's position, showing that Garcia first patted down defendant before reaching into defendant's pocket—but, at best, the video is inconclusive. Thus, we cannot agree that the video conclusively establishes that the officers exceeded the permissible scope of the frisk.

¶ 74 Defendant also notes that the video undercuts the officers' testimony regarding defendant's adoption of a "bladed stance" and furtive movements. Defendant notes that, throughout the video, he does not turn away from the officers; he remains facing the cash register.

¶ 75 It is true that the video does not show defendant turning away from Olson at the moment that Olson approached him. Instead, defendant turned toward the cashier's counter when the officers first entered the gas station—initially detaining another individual—and defendant remained facing the counter from that moment onward, including throughout his entire interaction with the police. Defendant is correct that the video does not show defendant taking a "bladed" stance. But the video does show that defendant was acting in a manner suggesting that he was trying to shield his right side from the officers' view. When Sergeant Olson first approached defendant from defendant's left, defendant turned his head to face the sergeant but kept the rest of his body facing forward toward the counter (indeed, nearly pressed up against the counter), a somewhat awkward pose for someone to take while speaking with a police officer or, frankly, anyone else. And defendant did shift to his right, away from Sergeant Olson, while they spoke. Overall, the unnatural position of defendant's body while he spoke with Olson would

suggest to a reasonable person that he was attempting to keep his right pocket from being seen or touched.

¶ 76 Defendant also initially raised his right hand, then dropped it near his right pocket. When Garcia approached defendant's right side, defendant bent at the waist, making it more difficult for Garcia to access his pocket. Thus, while the video does not depict defendant drastically turning away from Olson, it still shows that defendant attempted to conceal the contents of his right pocket from the police. As we discussed above, defendant's attempt to hide his right pocket from the officers was sufficient reasonable suspicion to support a frisk. Thus, while the video does undermine the officers' testimony to a limited extent, it also offers sufficient evidence to justify the frisk that is depicted.

¶ 77 Because the video does not establish that the officers violated defendant's fourth amendment rights, we cannot say that counsel was unreasonable in declining to present it at the suppression hearing. We also reject defendant's argument that the absence of the video prejudiced him. While some of the footage contradicted the officers' description of the incident, it also showed that they had reason to suspect that defendant was armed. Because the video would not have changed the outcome of the suppression hearing, defendant cannot establish that his counsel was ineffective in failing to present it at that hearing.

¶ 78 III. CONCLUSION

¶ 79 For the reasons stated, we affirm defendant's conviction.

¶ 80 Affirmed.