

No. 1-14-3780

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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. 13 CR 2514
)	
ROBERT PLEASANT,)	Honorable
)	Neil J. Linehan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant’s conviction for possession of a controlled substance with intent to deliver affirmed where his challenge to the trial court’s denial of his motion to suppress is forfeited because it was not litigated before the trial court.

¶ 2 Following a bench trial, defendant Robert Pleasant was convicted of possession of a controlled substance with intent to deliver between 1 and 15 grams of a substance containing heroin. The trial court sentenced defendant to eight years’ imprisonment as a Class X offender based upon his criminal history.

¶ 3 On appeal, defendant contends that the trial court erred when it denied his motion to quash arrest and suppress evidence because the police seized the heroin during an illegal pat-down search. Defendant argues, for the first time, that the police exceeded the scope of a lawful investigatory stop because the officer searched defendant for weapons without reasonably suspecting that he was armed and dangerous. Defendant also argues for the first time that the police exceeded the scope of the plain feel doctrine when the officer explored a large bulge in the zipper area of defendant's pants and found heroin. Defendant did not raise or litigate these arguments before the trial court. Accordingly, we find that defendant did not preserve his claims for appeal, and we affirm his conviction.

¶ 4 Defendant was charged with one count of possession of a controlled substance with intent to deliver between 1 and 15 grams of a substance containing heroin. Prior to trial, defendant filed a motion to quash his arrest and suppress evidence arguing that the police arrested him without authority of a valid arrest or search warrant. He also asserted that the arresting officers could not have reasonably interpreted his conduct prior to the arrest as constituting probable cause that he had committed or was about to commit a crime. Consequently, defendant asserted that any evidence and statements obtained during and subsequent to his arrest had to be suppressed as they were obtained in violation of his constitutional rights under the fourth and fourteenth amendments. Defendant's motion did not challenge the legality of the officer's protective pat-down for weapons, nor did it allege that the search violated the scope of the plain feel doctrine.

¶ 5 At a hearing on defendant's motion, Cassandra Edmonds testified that about 6:15 p.m. on January 3, 2013, she and defendant were walking in the 7800 block of South Paulina Street after playing the Lotto at a store at 79th and Paulina Streets. When they reached the middle of the

block, Edmonds saw a vehicle coming down the street with no lights on and told defendant she believed detectives were in the vehicle. Defendant and Edmonds reached the corner. The vehicle stopped and two police officers exited the vehicle. One of the officers told Edmonds to put her hands up. That officer then began speaking to defendant and searched defendant by going through his clothes and pockets. Edmonds was standing two to three feet away and heard what the officer said. Defendant did not speak. Edmonds testified that she and defendant were merely walking down the street and that defendant was not doing anything illegal before the officer started searching him. Edmonds never heard the officers state that defendant was the subject of either an arrest or search warrant. Edmonds then saw one of the officers remove an item from defendant's underwear inside his pants, and she assumed it was drugs.

¶ 6 On cross-examination, Edmonds testified that after the officer searched defendant, he checked her identification and asked her if she used drugs or narcotics. She replied "no." The officer also asked her to pull her pockets inside out, asked if she had anything on her, and asked if he needed to call a female officer to search her. Edmonds replied that she did not have anything on her. During her testimony, Edmonds acknowledged that she was friends with defendant and had known him for six or seven years. She testified that she and defendant would go to that same store and buy lottery tickets together once or twice a week, and defendant was holding lottery tickets in his hand when the police approached them. Edmonds estimated that their encounter with the police lasted about 20 minutes and that she was standing on the sidewalk the entire time. Edmonds denied that she handed defendant money while they were on the street, and denied that defendant handed her any items. She further denied that any other women

approached defendant while they were walking down the street, and that defendant handed any items to anyone while they were walking.

¶ 7 After the defense rested, the assistant State's Attorney moved for a directed finding without argument. Defense counsel then argued that the defense met its burden by showing that defendant was not engaged in any illegal activity, and that he was not the subject of an arrest or search warrant. Counsel argued that defendant was "approached by officers and they removed the items from his person." The court denied the State's motion.

¶ 8 The State called Chicago police officer Cory Walker who testified that he had been an officer for 18 years. About 6:15 p.m. on January 3, 2013, he and his partner, Officer Flaherty, were dressed in civilian clothes and driving an unmarked police vehicle in the area of 79th Street and Ashland Avenue. A citizen then informed them that a heavy-set black man wearing a black jacket and blue jeans was selling narcotics on the 7800 block of Paulina Street. The officers drove to that location and conducted surveillance. Officer Walker described the area as a high narcotics traffic area, and he previously observed narcotics activity and made arrests there.

¶ 9 Officer Walker observed defendant, who fit the citizen's description, standing alone on the corner of 78th and Paulina Streets. Defendant was standing about 100 feet away from the officers, and there was good artificial lighting in that location. About one minute later, a woman approached defendant, engaged in a brief conversation with him, then handed him money. Defendant placed the money inside his pocket and handed the woman a small item which he retrieved from the front zipper area of his pants. The woman then walked away from the location heading southbound. Officer Walker believed that he had observed a narcotics transaction. The officers left their surveillance point and returned to their vehicle which was parked in an alley

about 20 feet behind them. Officer Walker never saw defendant walking down the street with a woman. He also denied that he and Officer Flaherty were driving their vehicle at the time of the suspected narcotics transaction.

¶ 10 After returning to their vehicle, Officer Walker drove to the corner of 78th and Paulina Streets where defendant was still standing alone on the corner. The woman was no longer in the area. Officer Walker denied that they stopped the woman for an interview, asked her for identification, spoke with her, or ever saw her again.

¶ 11 Officer Walker then approached defendant and conducted a protective pat-down for weapons. During the pat-down, Officer Walker observed and felt a large bulge in the front zipper area of defendant's pants which, based on his years of experience, he believed to be narcotics. The bulge was in the same location where he had observed defendant reach down to before handing the small item to the woman.

¶ 12 On cross-examination, Officer Walker acknowledged that the description given by the citizen did not include details about the suspect's height, complexion, hair, a more specific weight, or more specific details about his jacket. The distance from where they spoke with the citizen to defendant's location was about four blocks, and it took the officers three to five minutes to drive to defendant's location. Officer Walker testified that he conducted a street stop of defendant and interviewed him at that time. Counsel asked the officer "[a]t some point did you fear for your safety?" The officer replied "[y]es, sir." Officer Walker acknowledged that based on that fear, he decided to conduct a pat-down, at which time he did not feel a weapon, but felt a bulge that he believed to be narcotics. Officer Walker explained that there was a cut in the zipper flap of defendant's pants and that the bulge was "shoved down in there, in the zipper area."

Officer Walker again denied that he saw defendant walking with a woman, and acknowledged that he never stopped the woman involved in the transaction to determine exactly what she had received. Officer Walker also acknowledged that while driving from Ashland Avenue to Paulina Street he observed other people out on the street, but no one else was wearing a black jacket and blue jeans, and no one was standing near defendant.

¶ 13 Chicago police officer Flaherty testified substantially similar to Officer Walker. Officer Flaherty also observed defendant standing alone on the corner of 78th and Paulina Streets. After a few minutes, a woman approached defendant, engaged in a brief conversation with him, and handed him money. Defendant placed the money in his pocket, retrieved a small object from the front zipper region of his pants, and handed that object to the woman. She then walked away heading south on Paulina Street. The officers left their surveillance point, returned to their vehicle, drove around the block, and approached defendant who was again standing alone on the corner. Officer Flaherty acknowledged that neither he nor Officer Walker ever stopped the woman, asked her for identification, or spoke with her.

¶ 14 On cross-examination, Officer Flaherty testified that he and Officer Walker went to 78th and Paulina Streets because a citizen informed them that a man was selling narcotics at that location “right now.” The citizen described the suspect as a short, heavy-set black man wearing a black jacket and blue jeans. Officer Flaherty acknowledged that the citizen did not describe the suspect’s hair, or provide any more specific details regarding his height, weight or jacket. As they drove to defendant’s location, they looked for anyone who matched the description, and only one person did. Officer Flaherty acknowledged that they did not stop or speak with the woman involved in the transaction, and did not know if she actually received anything. He

further acknowledged that as they approached defendant, he feared for his safety, and Officer Walker then conducted a pat-down of defendant and recovered narcotics. Officer Flaherty testified that he never saw defendant walking with a woman, and there were no other police officers in the area.

¶ 15 In closing arguments, defense counsel stated:

“You heard the testimony. I think the witness testified quite credibly as to what happened. Mr. Pleasant was leaving the location to buy a lottery ticket. At that point they were both approached by the police officers. She was not impeached in any way with her testimony. There was no arrest warrant, no search warrant. He was not doing anything illegal. The police approached him, searched him. She said she was with him the whole time. There was no other person that approached him.

The officers testified that they basically saw a transaction. They approached, based on some information they received, some information from a citizen. Was the description enough? He said male, heavy set, black jacket, blue jeans. I don't think it was enough information. Once they relocated, they saw Mr. Pleasant and just based on that testimony, they said they never talked to the female. They said they saw what looked like a transaction. But with the two officers, they couldn't stop the female. They were just able to talk to him. They never retrieved what this individual had. They come up to him and just start searching him, based on saying they were in fear for their safety. I don't think it is enough. I think the female testified credibly as to what happened, and we ask you to grant our motion at this time.”

¶ 16 The assistant State's Attorney (ASA) argued that both officers testified credibly that neither of them approached the woman. The ASA noted that Officer Walker testified that by the time they drove their vehicle around the block after the transaction, the woman had walked away beyond their ability to stop her. The ASA argued that the encounter did not occur the way Edmonds had described it. The ASA asserted that the police had probable cause to approach defendant after they received a very specific tip in person from a citizen who described a man who was selling drugs "right now" in a specific location. The officers immediately went to that location and observed that defendant was the only person there. The police then conducted surveillance and observed a suspected narcotics transaction which corroborated the citizen's tip. The ASA argued that defendant failed to meet his burden and that his motion should be denied.

¶ 17 In reply, defense counsel argued that the description given to the officers was not sufficient. Counsel also argued that the officers had enough time to stop the woman to determine what she had received and to show that what they had observed was actually a narcotics transaction.

¶ 18 The trial court discussed the testimony presented in detail. It then found that after the police officers received the tip from the citizen and observed defendant engage in a hand-to-hand transaction, there was "certainly enough for the police at that point to approach the defendant."

The court then stated:

"A strong argument could be made that they certainly had enough probable cause in that at that point, based upon their experiences and what they observed, to realize that a crime had been committed in front of them, the delivery of narcotics. The officers testified that once they put their hands on the defendant and performed a protective pat

down, based on their fear that they may have been harmed during this narcotics transaction; that with a plain feel they were able to describe, they knew what that item was; and therefore, based on that plain feel, recovered it.”

¶ 19 The court found that the case came down to a credibility determination between the testimony from the police officers and Edmonds. The court then stated:

“if the police’s version of facts are to be believed to be true, there is certainly, I believe, enough to arrest the defendant after they observed the hand-to-hand transaction, certainly after that protective pat down; and they recognized under the plain feel doctrine, that in fact that contraband was narcotics, so there’s certainly enough legal basis for the search, and what it really comes down to is whether or not I believe the police.”

¶ 20 The court then found that it had “no reason not to find the police officers credible.” Consequently, the court denied defendant’s motion to quash his arrest and suppress evidence.

¶ 21 At trial, Officer Walker testified that shortly after 6 p.m. on January 3, 2013, he and Officer Flaherty were on patrol in an unmarked police vehicle when they spoke with an individual at a gas station near 79th Street and Ashland Avenue. Thereafter, the officers drove to 78th and Paulina Streets where they observed defendant standing on the corner sidewalk. The officers exited their vehicle and conducted surveillance of defendant from a distance of approximately 100 feet. Within seconds, a woman approached defendant and engaged in a brief conversation with him. The woman handed defendant money which he placed inside his right pants pocket. Defendant then handed the woman a small item which he retrieved from the front zipper area of his pants. The woman walked away from the location heading southbound.

¶ 22 The officers ended their surveillance, returned to their vehicle, and drove to the corner of 78th and Paulina Streets where defendant was standing alone on the corner. The officers approached defendant, identified themselves as police officers, and Officer Walker then conducted a protective pat-down search of defendant. While feeling defendant's waist and the front area of his pants, Officer Walker felt a bulge in the front of defendant's pants that he believed was narcotics. The officer then observed a one-inch slit in the fabric in the front zipper area of defendant's pants, and saw a plastic bag inside the slit. Officer Walker retrieved the plastic bag from the slit in defendant's pants and found that it contained three bags which each contained packets of a white powder that he suspected was heroin. One bag contained 4 packets, the second bag contained 8 packets, and the third bag contained 12 packets for a total of 24 packets of heroin. Officer Walker also recovered \$219 from defendant's right pants pocket.

¶ 23 Officer Walker transported defendant to the police station. After being advised of his *Miranda* rights, Officer Walker asked defendant where he got the heroin, and defendant stated that he was selling the packets for "Bacon." Officer Walker explained that "Bacon" was a known drug dealer in that area. Defendant told police that "Bacon" would give him two packs of heroin to sell at a time.

¶ 24 On cross-examination, Officer Walker acknowledged that he could not tell how much money the woman handed defendant, and he could not see the small item that defendant handed her. He also acknowledged that neither he nor Officer Flaherty stopped the woman, and thus, he did not know exactly what she received from defendant.

¶ 25 The State presented a stipulation stating that Officer Walker recovered 24 plastic bags of white powder which he kept safe and under his control until he inventoried them in accordance

with police procedures, at which time they left his possession in a sealed condition. The stipulation further stated that a forensic chemist tested 12 of the recovered bags and found them positive for 3.8 grams of heroin. The remaining 12 bags that were not tested weighed 3.7 grams.

¶ 26 The trial court found that the evidence, including defendant's statement that he was selling the drugs for "Bacon," established that defendant intended to deliver the heroin recovered from his possession. Accordingly, the trial court found defendant guilty of possession of a controlled substance with intent to deliver.

¶ 27 In his motion for a new trial, defendant did not challenge the trial court's denial of his motion to quash arrest and suppress evidence. Defense counsel rested on the written motion, which the trial court denied. The court then sentenced defendant to eight years' imprisonment as a Class X offender based upon his criminal history.

¶ 28 On appeal, defendant now concedes, contrary to his argument before the trial court, that Officers Walker and Flaherty had reasonable suspicion to conduct an investigative detention pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Defendant acknowledges that the citizen's tip coupled with the officers' observation of him engaged in the hand-to-hand transaction was sufficient to give the officers reasonable suspicion to warrant a *Terry* stop.

¶ 29 Defendant contends, however, that the trial court erred when it denied his motion to quash arrest and suppress evidence because the police seized the heroin during an illegal pat-down search. Defendant argues, for the first time, that the police exceeded the scope of a lawful investigatory stop because Officer Walker searched defendant for weapons without reasonably suspecting that he was armed and dangerous. Defendant claims that the officers failed to provide specific articulable facts that explained why they feared for their safety to justify the weapons

search. Defendant also argues for the first time that the police exceeded the scope of the plain feel doctrine when Officer Walker explored a large bulge in the zipper area of defendant's pants and found heroin. Defendant asserts that Officer Walker did not explain why he believed the bulge was narcotics, and that he "clearly had to grope or manipulate the 'large bulge'" to conclude that it was possibly narcotics.

¶ 30 Defendant concedes that he failed to preserve his issue for appeal because "defense counsel neglected to include the suppression issue in his motion for new trial." He claims, however, that "the legality of the stop and search was litigated in a pre-trial motion to quash arrest and suppress evidence." He then asserts that this court should review his issue under the second prong of the plain error doctrine because his constitutional rights against an illegal search and seizure are at issue.

¶ 31 The State responds that defendant forfeited his issue when he failed to raise it in his posttrial motion. The State further asserts that the plain error doctrine does not apply because no error occurred where the officers had reasonable suspicion to conduct a *Terry* stop and protective pat-down, during which they found the heroin. The State argues that Officer Walker acted reasonably when he performed the protective pat-down, and that the officer's discovery of the heroin comported with the plain feel doctrine.

¶ 32 Our review of the trial court's ruling on a motion to quash arrest and suppress evidence presents questions of both fact and law. *People v. McCarty*, 223 Ill. 2d 109, 148 (2006). The court's factual findings will not be disturbed on review unless they are against the manifest weight of the evidence, while the court's ruling on the motion is a question of law which we review *de novo*. *People v. Close*, 238 Ill. 2d 497, 504 (2010).

¶ 33 In this case, however, the record reveals that, defendant’s motion to quash and suppress challenged the legality of his arrest. In his written motion, defendant never alleged that Officer Walker searched him for weapons without reasonably suspecting that he was armed and dangerous, or that the officer exceeded the scope of the plain feel doctrine when he explored the bulge in his pants and found heroin. Defendant has raised these claims for the first time in this appeal. This court has previously held that where a defendant fails to raise an allegation in his written motion to suppress and does not raise the issue in his posttrial motion, the issue is waived. See *People v. Williams*, 272 Ill. App. 3d 868, 876 (1995); *People v. Cleesen*, 177 Ill. App. 3d 103, 114 (1988).

¶ 34 Section 114-12 of the Code of Criminal Procedure of 1963, which provides the requirements for motions to suppress evidence, specifically states, in pertinent part:

“The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant.” 725 ILCS 5/114-12(b) (West 2012).

In analyzing this section, the Fourth District of this court has adopted the following analysis:

“ ‘A motion to suppress is, in effect, a pleading to the extent that it frames the issues to be determined in a pretrial hearing on the motion. The fundamental role of a pleading is to give an opposing party notice of the pleader’s position concerning the facts and law so that the opposing party can begin to prepare his defense. A pleading thus both defines and limits the areas of consideration at a trial or other evidentiary hearing ***, by enabling the court to determine the relevance of offered evidence.’ ” *People v. Ramirez*,

2013 IL App (4th) 121153, ¶ 60 (quoting *State v. Johnson*, 519 P.2d 1053, 1057 (Or. Ct. App. 1974)).

¶ 35 Our supreme court recently found that where a defendant raised arguments on appeal that were almost entirely distinct from the arguments he raised before the trial court, the defendant did not adequately preserve his claims for review. *People v. Hughes*, 2015 IL 117242, ¶ 45. In *Hughes*, the defendant, who was charged with and ultimately convicted of first degree murder, filed a motion to suppress claiming that his confession was involuntary. *Id.* at ¶¶ 1-2. Before the trial court, the defendant argued that his statements were involuntary because the police questioned him off camera and without advising him of his *Miranda* rights, and due to physical coercion from handcuffs being kept on him for an excessively long time. *Id.* at ¶ 2. The trial court denied his pretrial motion to suppress, and also denied his posttrial motion where the defendant raised the issue again. *Id.* On appeal, the defendant argued that his confession was involuntary and should have been suppressed for reasons different than what he argued before the trial court, including his age, educational level, sleep and food deprivation, prior substance abuse, deceptive conduct by police, and lack of experience with the criminal justice system. *Id.* at ¶ 25. The State argued that the defendant waived the issue for appeal because he did not present these reasons for suppression to the trial court. *Id.* at ¶ 26. The appellate court, with one justice dissenting, found that the issue was not forfeited because he had raised the issue of voluntariness in his posttrial motion. The court concluded that the confession should have been suppressed, and reversed and remanded for a new trial. *Id.* at ¶ 27.

¶ 36 On appeal, the supreme court found that defendant's reasons for suppression in the trial and appellate courts were almost entirely distinct from one another. *Id.* at ¶ 40. The court noted

that defendant presented no evidence or arguments to the trial court for the claims he raised on appeal. *Id.* at ¶ 41. The court therefore found that when defendant failed to raise his claims in the trial court, he deprived the State of its opportunity to present evidence and arguments challenging those claims, he deprived the trial court of the opportunity to decide the issue on those bases, and he deprived the appellate court of an adequate record to make its determination on review. *Id.* at ¶ 46. The court concluded that defendant did not adequately preserve his claims for appeal, and that the trial court did not err when it denied defendant's motion to suppress. *Id.* at ¶ 47.

¶ 37 Similar to *Hughes*, in this case, defendant has raised issues on appeal that were not litigated before the trial court. Defendant claims that Officer Walker searched him for weapons without reasonably suspecting that he was armed and dangerous, and that the officers failed to provide specific articulable facts that explained why they feared for their safety to justify the weapons search. Defendant further claims that the police exceeded the scope of the plain feel doctrine when Officer Walker explored a large bulge in the zipper area of defendant's pants and found heroin. Defendant argues that Officer Walker did not explain why he believed the bulge was narcotics, and that he "clearly had to grope or manipulate the 'large bulge'" to conclude that it was possibly narcotics.

¶ 38 The record shows that defendant did not raise either of these issues in his written motion to quash and suppress, and he never presented any evidence or argument in support of these specific claims before the trial court. There is no evidence in the record to support his claim that Officer Walker groped or manipulated the bulge to determine that it was narcotics. Because these claims were not litigated before the trial court, the State never had the opportunity to present any

evidence or arguments to challenge these claims. Had the issues been raised below, the State could have elicited further testimony from the officers in an attempt to show that their fear for their safety was reasonable and that the protective pat-down was proper.

¶ 39 Moreover, we find that the trial court was deprived of the opportunity to rule on these issues. It therefore follows that because the trial court did not rule on these issues, there is no error for this court to review. As in *Hughes*, we are deprived of an adequate record to consider defendant's claims.

¶ 40 Based on these findings, we conclude that defendant did not preserve these claims for appeal. We further find that defendant has not identified an error by the trial court for this court to review. Accordingly, we find that the trial court's denial of defendant's motion to quash arrest and suppress evidence was proper.

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

¶ 42 Affirmed.