2017 IL App (1st) 150503-U

No. 1-15-0503

Order filed November 13, 2017

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 14 CR 14994
	)	
CHRISTOPHER FARLEY,	)	Honorable
	)	Raymond Myles,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court erred in denying motion to quash arrest and suppress evidence. The actions of defendant before being ordered to stop by police were insufficient to create reasonable suspicion that a crime had been committed or was about to be committed.

¶ 2 Following a bench trial, defendant Christopher Farley was convicted of possession of a controlled substance (less than 200 grams of dihydrocodeinone) and sentenced to two years'

probation. On appeal, defendant contends that his motion to quash arrest and suppress evidence was erroneously denied because the police stopped him without reasonable and articulable suspicion. For the reasons stated below, we agree and reverse.

¶ 3 Defendant was charged with possession of a controlled substance for allegedly possessing less than 200 grams of dihydrocodeinone on or about July 5, 2014. Defendant filed a motion to quash arrest and suppress evidence, alleging that he was detained and searched on July 5, 2014, without a warrant or probable cause. He asked the court to suppress the dihydrocodeinone found in the search.

¶ 4 At the motion hearing, Shaun Jackson testified that he is defendant's cousin. On the day in question, Jackson was with defendant and Dequon Green, walking from a store to Jackson's mother's home. They were walking in the street when an unmarked police car with two officers came towards them and "pulled up on us" near them. The officers said "Come here. What do you guys got?" and asked defendant what he had in his pocket. Jackson "didn't hear an answer" from defendant. Defendant, Jackson and Green came over, and the officers exited the car and "put us on the car" with their hands on the hood of the car. The officers searched defendant, Jackson and Green, and Jackson saw that they found "some Vicodins" on defendant. The officers told Jackson and Green they could leave, while they handcuffed defendant and put him in the car. The officers did not show a warrant at any time.

¶ 5 Police officer Daniel Pruszewski testified that, on the evening in question, he was in plainclothes with a badge around his neck, driving an unmarked police car with another officer. He saw defendant ahead of him, walking down the middle of the street with three other men. Defendant looked over his shoulder, saw Pruszewski's police car approaching from behind,

immediately started walking away from the group, and pulled up his sagging pants. Pruszewski drove towards defendant, stopped his car next to or alongside him, opened his door, and said "Police. Stop." He intended to "conduct a field interview" of defendant, and defendant was not free to leave his presence when he said "Stop." As Pruszewski and his partner exited the car, Pruszewski saw defendant stop – he had been walking – and place his right hand in his right pocket. Pruszewski told defendant not to do so and asked why he was reaching into his pocket, as he was concerned that defendant had a weapon. Defendant replied that he had Vicodin but it was not his and he was not selling it. He reached into his pocket, removed a plastic bag containing several pink pills, and handed it to Pruszewski.

¶ 6 Following arguments, the court denied the motion. After summarizing the testimony of Jackson and Pruszewski, and noting that an officer has to have reasonable suspicion of a crime to detain someone, the court found that Pruszewski had a reasonable articulable suspicion. The court noted that defendant's actions upon seeing a police car – looking over his shoulder, separating from the group, and pulling up his pants, "peaked [Pruszewski's] curiosity as to what was going on." After the police car stopped, defendant created more suspicion by reaching his right hand into his pocket, causing Pruszewski to be concerned about a weapon. At that point, the court noted, defendant admitted that he had Vicodin. The court found that defendant's detention was brief and not unreasonable.

¶ 7 A stipulated bench trial was held immediately. The parties adopted Pruszewski's testimony. The parties also stipulated to the chain of custody and forensic testing of the seven pills, which contained 3.2 grams and tested positive for dihydrocodeinone. The court found

defendant guilty as charged and, after brief discussion, sentenced him to two years of probation with community service.

¶ 8 On appeal, defendant contends that his motion to quash was erroneously denied because the police stopped him without reasonable suspicion.

¶ 9 The people of the United States and this State are protected against unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. For purposes of the constitutional right to be free from unreasonable searches and seizures, police-citizen encounters are divided into three tiers: arrests that must be supported by probable cause; brief investigatory detentions or *Terry* stops (*Terry v. Ohio,* 392 U.S. 1 (1968)) that must be supported by reasonable and articulable suspicion of criminal activity; and consensual encounters that involve no coercion or detention and thus no constitutional implications. *People v. Almond*, 2015 IL 113817, ¶¶ 52, 56; *People v. Biagi*, 2017 IL App (5th) 150244, ¶ 25.

¶ 10 A person is seized or taken into custody – that is, arrested or detained – when his freedom of movement is restrained by physical force or his submission to a show of authority. *Almond*, ¶ 57; *In re Rafeal E.*, 2014 IL App (1st) 133027, ¶ 23, citing *California v. Hodari D.*, 499 U.S. 621, 626 (1991). The test is whether a reasonable person would conclude, in light of the totality of the circumstances, that he was not free to leave. *Id.* The factors indicating a seizure when the person does not attempt to leave are the (1) threatening presence of several officers, (2) display of a weapon by an officer, (3) physical touching of the person, and (4) use of language or tone of voice compelling the person to comply with the officer's requests. *Id.* The absence of any of these factors is not dispositive but instructive on the issue of whether a seizure occurred. *Id.*

Deciding whether a person has been seized is an objective evaluation of the officers' conduct rather than the subjective perceptions of the persons involved. *Biagi*, ¶ 27.

¶ 11 Under *Terry*, a police officer may conduct a brief investigatory stop of a person when he reasonably believes that the person has committed, or is about to commit, a crime. *People v. Timmsen*, 2016 IL 118181, ¶ 9. The purpose of a *Terry* stop is for an officer to investigate the circumstances provoking his suspicion, confirming or dispelling his suspicion using the least intrusive means reasonably available. *People v. Close*, 238 Ill. 2d 497, 512 (2010). The officer must have a reasonable articulable suspicion that criminal activity is afoot, which requires less than probable cause but more than a mere inchoate suspicion or "hunch" of criminal activity. *Timmsen*, ¶ 9. The investigatory stop must be justified at its inception and the officer must be able to point to specific and articulable facts which, together with rational inferences therefrom, reasonably warrant the stop. *Id*. A reasonable suspicion determination must be based on commonsense judgments and inferences about human behavior. *Id.*, ¶ 14. In reviewing the officer's conduct, we consider the totality of the circumstances under an objective standard, considering whether all the facts available to the officer at the time of the seizure would cause a person of reasonable caution to believe that the stop and investigation were appropriate. *Id.*, ¶ 9.

¶ 12 When a ruling on a motion to quash involves factual determinations or credibility assessments, the trial court's findings will not be disturbed on review unless they are against the manifest weight of the evidence. *Id.*, ¶ 11. However, we review *de novo* the ultimate legal ruling to grant or deny the motion. *Id*. In our *de novo* review of a ruling on a motion to quash, we may affirm on any basis supported by the record. *People v. Bianca*, 2017 IL App (2d) 160608, ¶ 16.

¶ 13 Here, the trial court, in denying the motion to quash, implicitly found Pruszewski more credible than Jackson, as the court's factual findings followed Pruszewski's account rather than Jackson's. We see no reason to disturb the court's factual determinations.

¶ 14 Even accepting Officer Pruszewski's account as an accurate description of events, we conclude the *Terry* stop was not justified. Officer Pruszewski saw the defendant ahead of him walking down the middle of the street.[1] After defendant noticed the officer, he broke off from the group and pulled up his saggy pants. It is at this point that Officer Pruszewski told defendant to stop. The defendant adhered to this command. Officer Pruszewski further testified that once he told the defendant to stop, the defendant was no longer free to leave. This brief encounter represented the totality of the pair's interaction prior to the *Terry* stop.

¶ 15 These actions appear to have created no more than a "hunch" because Officer Pruszewski did not identify what crime he believed defendant committed or was about to commit based on what he had just observed. Officer Pruszewski did not testify that he saw any concealed object nor did he testify that he believed defendant was attempting to conceal an object by lifting his pants. There is no testimony that defendant's change of direction was an attempt to flee. In *Terry*, a case relied on by the State here, Officer McFadden observed the defendant's actions and became suspicious they were about to commit a robbery. *Terry v. United States*, 392 U.S. 1, 5 (1968). Unlike the officer in *Terry*, Officer Pruszewski does not connect defendant's actions to any possible criminal behavior.

¶ 16 Defendant's suspicious action of reaching into his pocket cannot sustain the initial stop where such action occurred after the officer told the defendant to stop and defendant was no

[1] We note that neither the arresting officer nor the State suggested the reason for the stop was defendant's walking down the middle of the street. Accordingly, the State has forfeited any argument on this fact and it is not part of our analysis. See *People v. Lucas*, 231 Ill. 2d 169, 175 (2008) (noting the doctrine of forfeiture applies equally to the State).

longer free to leave. "[U]nder *Terry*, the reasonableness of police action taken during an investigative detention involves a dual inquiry: (1) whether the officer's actions were justified at its inception; and (2) whether the officer's action was reasonably related in scope to the circumstances which justified interference in the first place." *People v. Baldwin*, 388 Ill. App. 3d 1028, 1031-32 (2009) (quoting *Terry*, 392 U.S. 1 (1968)). "Whether an investigatory stop is valid is a separate question from whether a search for [contraband] is valid." *People v. Flowers*, 179 Ill. 2d 257, 263 (1997) (citing *People v. Galvin*, 127 Ill. 2d 153, 163 (1989). Officer Pruszewski admitted that it was only after he told defendant to stop that defendant reached toward his pocket. It was only after this point that Officer Pruszewski believed defendant had a firearm. As the above cases demonstrate, this action cannot be utilized to justify the initial stop.

¶ 17 The State focuses on defendant's action of pulling up his pants as suspicious and points to several cases where defendants have been found to have firearms in their waistband. *People v. Almond*, 2015 IL 113817, ¶ 21; *People v. Mosley*, 2015 IL 115872, ¶ 5; *People v. Torres*, 2012 IL 111302, ¶ 24. We take no issue with this proposition and are well aware of the dangers faced by officer's confronting suspects with firearms concealed in their waistband, but the officer in this case did not testify he believed the defendant was attempting to conceal a weapon (or any item) by pulling up his pants when the initial contact occurred. As previously stated, the officer did not connect the pre-stop suspicious behavior to any criminal activity.

¶ 18 Based on the above, we conclude defendant's actions were insufficient to create a reasonable suspicion in a police officer that defendant had committed or was about to commit, a crime. Accordingly, we reverse the denial of defendant's motion to quash.

¶ 19 We agree with the defendant that there were no intervening circumstances that could attenuate the recovery of the drugs from the unlawful stop. *People v. Shipp*, 2015 IL App (2d) 130587, ¶ 62. The Vicodin is therefore suppressed as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). The suppression of the Vicodin tablets necessitates the reversal of defendant's conviction for possession of a controlled substance. *People v. Christmas*, 396 Ill. App. 3d 951, 960 (2009) ("Because the State will be unable to prove its case without the evidence of narcotics, we reverse outright").

¶ 20 For the foregoing reasons, we reverse the trial court's order denying defendant's motion to suppress evidence. We also reverse his conviction for possession of a controlled substance.

¶ 21 Reversed.