2017 IL App (1st) 153215-U

No. 1-15-3215

Order filed October 20, 2017

Fifth 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. 13 CR 330
	)	
DONELL BURT,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's motion to quash arrest and suppress evidence where probable cause to arrest existed prior to the search of defendant's shirt pocket.

¶ 2 Following a jury trial, defendant Donell Burt was convicted of possession of a controlled substance and sentenced to six years in prison. On appeal, defendant contends that the trial court should have granted his motion to quash arrest and suppress evidence because probable cause did

not exist when the arresting police officer searched his pocket. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the events of September 14, 2012. Following his arrest, defendant was charged with one count of being an armed habitual criminal, one count of armed violence, two counts of unlawful use or possession of a weapon by a felon, four counts of aggravated unlawful use of a weapon, and one count of possession of a controlled substance. Prior to trial, defendant filed a motion and an amended motion to quash arrest and suppress evidence.

¶ 4 At the hearing on the motion, Chicago police officer Sean Mulkerrin, an eight-year veteran of the police force, testified that on the day in question, while he was dressed in plain clothes with a vest, radio, duty belt, and star displayed, he and his partner, Officer Mark Johnson, were on duty in an unmarked squad car. Around 8 p.m., as Johnson was driving the car in the area of the 4900 block of Iowa Street, Mulkerrin saw defendant "engage with" a group of four or five men on the corner of Iowa Street and Lamon Avenue. When asked to clarify what he meant by "engage with," Mulkerrin stated that defendant "was talking and there was hand gestures." The trial court stated for the record that Mulkerrin moved his hands in a manner consistent with the passage of a small object from one hand to the other. Mulkerrin did not see any money or items, but specified that he saw two or three gestures and "it was quick." As Mulkerrin and Johnson approached in their car, defendant looked in their direction and began walking away quickly with his left fist clenched. Mulkerrin testified he suspected that a narcotics transaction had occurred and that defendant had narcotics in his hand. Johnson turned the car onto the street where defendant was walking and slowed down alongside him. As Mulkerrin opened the car's

passenger door, defendant began to flee on foot. At this point, Mulkerrin was 10 to 15 feet from defendant.

¶ 5 As Mulkerrin ran after defendant, he announced his office two or three times. Defendant ran across a street and through an alley. When Mulkerrin entered the alley about 10 feet behind defendant, he heard a substantial metallic object drop and hit the ground "directly across from where the defendant was." Mulkerrin continued to chase defendant and soon detained and handcuffed him in a back yard abutting the alley. At this point, Johnson pulled into the alley. Mulkerrin handed defendant over to Johnson, went back to the area where he heard the object drop, and recovered a .380 blue steel pistol with a two-inch barrel. After the pistol was recovered and defendant was placed in custody, Johnson performed a custodial search on the scene. In Mulkerrin's presence, Johnson recovered a tinfoil packet containing suspect heroin from defendant's shirt pocket. Later, at the police station, Mulkerrin performed another custodial search and recovered a second tinfoil packet of suspect heroin from defendant's person.

¶ 6 On cross-examination, Mulkerrin agreed that he and Johnson were on routine patrol in a "high narcotic area" when he saw defendant engage in what he believed to be a hand-to-hand transaction. He clarified that when he heard the noise in the alley, it was the sound of metal striking concrete. Having dropped his own weapon on concrete more than 10 times in the past, he believed the noise he heard in the alley to be a gun. Mulkerrin also stated that he did not see anyone else in the alley.

¶ 7 On redirect, Mulkerrin acknowledged that houses abutted both sides of the alley and that there were "neighborhood" people in the area, driving around and going about their daily business. When asked whether the other men defendant had been engaged with also fled the area,

Mulkerrin answered, "They may have scattered because right where they were at, at the corner, our path as I was chasing [defendant] ran right through where they were standing." Mulkerrin admitted that he did not see any bulges on defendant's person while he was chasing him.

¶ 8 Following argument by the attorneys, the trial court denied the motion to quash arrest and suppress evidence. Thereafter, defendant filed a motion and an amended motion to reconsider, which the trial court denied. Prior to trial, the State nol-prossed all the charged counts with the exception of the count charging defendant with being an armed habitual criminal and the count charging defendant with possession of a controlled substance.

¶ 9 At trial, Officer Mulkerrin related essentially the same version of events to which he testified at the hearing on the motion to quash arrest and suppress evidence, with more detail. He testified that on the day in question, he and Officer Johnson were on patrol near the intersection of Iowa Street and Lamon Avenue, a location he described as an "open-air drug market" with numerous violent crimes and shootings and "a lot" of narcotics transactions, including heroin and cannabis sales. Mulkerrin estimated that over the past 10 years, he had made between 50 and 100 narcotics arrests in that area, as well as numerous weapons arrests. Mulkerrin also added that the officers' unmarked car had "M" plates and visible lights in the front and rear windshields.

¶ 10 Around 8 p.m., as the officers were nearing the intersection in question, Mulkerrin spotted defendant standing on the sidewalk with a group of men. At first, defendant was simply engaged in conversation with the group. Then, from a distance of 30 to 50 feet, Mulkerrin "observed the defendant and another person in the group make transactions, hand movements between each other." Mulkerrin specified that he "saw the defendant reaching out as the other person in the group was reaching to the same hand. And it appeared as though they were

exchanging an object."Although Mulkerrin could not see what was in either man's hands, he explained that he had seen people engage in hand-to-hand transactions on prior occasions and had made narcotics arrests on those occasions. Based on his experience as a narcotics officer, Mulkerrin believed a narcotics transaction was occurring on the sidewalk.

¶ 11 Mulkerrin testified that Johnson continued to drive toward the group of men. The men looked in the officers' direction, split up, and started walking away. Defendant looked over his shoulder twice and clenched his left fist. Mulkerrin believed defendant could possibly be concealing an object from the narcotics transaction that just occurred. The officers followed defendant with the intention of engaging him in a field interview. Mulkerrin testified that as soon as he opened his car door, defendant began to flee on foot. Mulkerrin gave chase, following defendant along several streets and into an alley, announcing his office several times throughout the chase. When Mulkerrin was about 15 feet behind defendant in the alley, he heard a "metal clank" about 20 feet and "directly across" from where defendant was running. Based on his experience of hearing guns hitting cement 10 to 15 times in the past, Mulkerrin believed that was the sound he heard in the alley.

¶ 12 Mulkerrin continued chasing defendant and caught up with him in a back yard. Defendant stopped and put his hands up. Mulkerrin detained defendant briefly, placed him in handcuffs, and notified Johnson over the radio. Once Johnson arrived, Mulkerrin turned defendant over to him and went back to the spot in the alley where he had heard the metal clank. Among the garbage cans in that spot, Mulkerrin found a .380 semiautomatic blue steel pistol, loaded with seven live rounds. There were no other metal objects in the area. Mulkerrin recovered the pistol. After the pistol was recovered, defendant was placed into custody. Then, while still at the scene, Mulkerrin

observed Johnson conduct a search of defendant's person, during which Johnson recovered a tinfoil packet of suspect heroin from defendant's shirt pocket. The officers transported defendant to the station, where Mulkerrin searched him and found a tinfoil packet of suspect heroin in his shoe area.

¶ 13 On cross-examination, Mulkerrin admitted he never saw defendant with a gun or any unusual bulges in his clothing. He also agreed that the area where he found the pistol was "pretty much immediately adjacent to an open-air drug market" and that in his experience, drugs and guns are often associated with each other. He stated, "They don't necessarily go hand in hand, but they do find a way to intertwine each other."

¶ 14 Chicago police officer Mark Johnson, a 14-year veteran of the police force, testified that on the night in question, he and Officer Mulkerrin were working patrol in a "high gang, narcotic area" where he had made approximately 100 narcotics-related arrests and four or five weapons-related arrests in the past. About 8 p.m., he was driving on Lamon Avenue when he saw defendant from a distance of "approximately 30 feet and closing," standing near the intersection with Iowa Street. Johnson stated that defendant "appeared to be in a hand-to-hand transaction with another male within a group." He specified, "I saw his hands, as well [as] the other person's hands, kind of going in a back-and-forth motion." Johnson turned onto Iowa Street and drove toward defendant. Defendant looked in the officers' direction and began to quickly walk away. Defendant looked over his shoulder and Johnson stopped the car. When Mulkerrin got out of the car, defendant fled, and Mulkerrin pursued him on foot.

¶ 15 Johnson testified that he turned onto Lamon Avenue and lost sight of defendant and Mulkerrin for 30 seconds to a minute. He then proceeded to Walton Street, but when defendant

and Mulkerrin did not emerge there, he knew they must be in the alley. He reversed into the alley and saw defendant and Mulkerrin in a back yard. Johnson got out of the car. Mulkerrin escorted defendant to him and immediately walked away. Johnson conducted a pat-down of defendant, particularly his waist, which he checked for weapons for officer safety. Mulkerrin then returned with a .380 blue steel handgun. After Mulkerrin showed Johnson the gun, Johnson recovered a tinfoil packet containing a white powdery substance from defendant's shirt pocket. Johnson testified that he and Mulkerrin transported defendant to the station for processing. There, an additional search was performed of defendant's person, during which a tinfoil packet containing a white powdery substance was recovered from defendant's shoe area.

¶ 16 On cross-examination, Johnson acknowledged that he did not see defendant with a gun, did not see any bulges under his shirt or in his waistband, and did not see him touch his waistband.

¶ 17 A Chicago police evidence technician testified that he examined the recovered pistol, magazine, and ammunition for fingerprints but found no ridge impressions or partial ridge impressions on any of the items. The parties stipulated that defendant had two prior convictions for unlawful use of a weapon by a felon, that the item recovered from defendant's shirt pocket tested positive for less than 0.1 gram of heroin, and that the item recovered from defendant's shoe area tested positive for 0.1 gram of heroin.

¶ 18 Defendant made a motion for a directed finding, which the trial court denied.

¶ 19 Defendant testified that about 8 p.m. on the day in question, he went out to buy heroin for his own use. As he was walking home after making a purchase, he encountered a group of men "maybe shooting dice or something of that nature" on the corner of the 4900 block of Iowa

Street. He heard someone yell a code that meant police were coming, so he decided to "get out of the way because I knew I had these drugs on me." Defendant got past the group of men but then the police car cut him off. When an officer jumped out of the car, everybody, including defendant, started to run. The officer chased defendant for about a block and into an alley. Eventually, the officer caught defendant because he could not get over a gate. The officer arrested defendant and found drugs on his person. Defendant denied having a gun on him at any time and denied throwing a gun during the chase.

¶ 20 On cross-examination, the prosecutor asked defendant about the sequence of events as follows:

"Q. So as the police are coming into that immediate area, you had just been involved in a hand-to-hand; is that correct?

A. Yes.

Q. And the police were right up in that area right as you were doing this?

A. Yes.

Q. Coming the wrong way down Iowa?

A. They wasn't. I had purchased the drugs already and put them up. By the time they got there, I was on my way across the street and entering into my house.

Q. Didn't you walk away with your hands clenched with the drugs in your hand for some period of time?

A. He probably thought my hand was clenched, that I had the drugs in there.

Q. Are you saying you didn't have the drugs in there?

A. No, I didn't have the drugs in -- not in my hand at that point, no."

¶ 21 Defendant further stated on cross-examination that when he ran from the police, five men who had been on the corner also ran the same direction into the alley. Although defendant admitted possessing two separate packets of heroin, he insisted that both packets had been found in his shirt pocket. When asked whether he had drugs in his shoe, defendant answered that the officer actually found the second packet in the shirt pocket he had already searched and suggested the officer "assumed that he found it [in] my shoe because he didn't get it the first time. I guess he didn't want to tell you guys he didn't search me properly."

¶ 22 The jury found defendant not guilty of being an armed habitual criminal but guilty of possession of a controlled substance. Defendant made an oral motion for a new trial, which was denied. The trial court subsequently sentenced defendant to six years in prison.

¶ 23 On appeal, defendant contends that the trial court should have granted his motion to quash arrest and suppress evidence because probable cause did not exist when Officer Johnson searched his pocket. Defendant argues that the police pursued him for what they suspected might have been a drug transaction, but actually arrested him based on the gun recovered in the alley. Defendant asserts that pursuant to *People v. Horton*, 2017 IL App (1st) 142019, police do not have probable cause to arrest when they "spot a gun on a person," and therefore, there was no probable cause to arrest him and the heroin recovered from his shirt pocket was the product of an unlawful search incident to arrest. Defendant concludes that in these circumstances, the motion to quash and suppress should have been granted and, because the State could not prevail at trial

without the recovered heroin, his conviction for possession of a controlled substance must be reversed outright.

¶ 24 When reviewing a trial court's ruling on a motion to suppress, we may consider the testimony given at trial in addition to the testimony provided at the suppression hearing. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). We give great deference to the trial court's findings of fact and will reverse those findings only if they are against the manifest weight of the evidence. *People v. Cregan*, 2014 IL 113600, ¶ 22. In contrast, the trial court's ultimate legal ruling on whether evidence should be suppressed is reviewed *de novo*. *Id*. Here, no factual or credibility dispute exists. Accordingly, our review in the instant case is *de novo*.

¶ 25 Under the fourth amendment, people are guaranteed the right to be free from unreasonable searches and seizures. *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001). However, not every encounter between the police and a private citizen results in a seizure. *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006). Our supreme court has divided police-citizen encounters into three tiers: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions, or *Terry* stops, which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) consensual encounters, which involve no coercion or detention and thus do not implicate fourth amendment interests. *Id*. at 544. In the instant case, the parties agree that the encounter between defendant and the police was an arrest. The question then becomes whether probable cause existed to support the arrest.

¶ 26 Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the suspect has committed a crime. *People v. Grant*, 2013 IL 112734, ¶ 11. The existence of probable cause depends upon the

totality of the circumstances at the time of the arrest and is governed by commonsense considerations. *Id*. The standard for determining whether probable cause exists is probability of criminal activity, not proof beyond a reasonable doubt. *Id*. Probable cause "does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false." *People v. Wear*, 229 Ill. 2d 545, 564 (2008). A police officer's factual knowledge, based on prior law-enforcement experience, is a relevant factor when considering whether probable cause existed at the time of arrest. *Grant*, 2013 IL 112734, ¶ 11. In addition, probable cause may be established from police officers' collective knowledge when they are working in concert in investigating a crime or possible crime. *People v. Walter*, 374 Ill. App. 3d 763, 775 (2007).

¶ 27 Here, the totality of the circumstances supports a finding of probable cause. Officer Johnson, a 14-year police veteran who had made approximately 100 narcotics-related arrests, described the neighborhood he and Officer Mulkerrin were patrolling as a "high gang, narcotic area." Mulkerrin, an eight-year veteran of the police force who had made between 50 and 100 narcotics arrests in the area in question, also was familiar with the location and described it as an "open-air drug market." Johnson testified that when he saw defendant, he "appeared to be in a hand-to-hand transaction" with another man, as their hands were "kind of going in a back-and-forth motion." Mulkerrin testified that he "saw the defendant reaching out as the other person in the group was reaching to the same hand. And it appeared as though they were exchanging an object." Based on his experience as a narcotics officer, Mulkerrin believed a narcotics transaction was occurring on the sidewalk. Both officers related that defendant looked in the officers' direction and then began to walk away while glancing over his shoulder. Mulkerrin noted that at this time, defendant's hand was clenched. Both officers testified that when

Mulkerrin opened his car door, defendant fled. Mulkerrin related that as he gave chase through an alley, he heard a "metal clank" about 20 feet and "directly across" from where defendant was running. Based on having dropped his own weapon on concrete more than 10 times in the past, Mulkerrin believed the sound to be a gun hitting the cement. Finally, after defendant had been detained, Mulkerrin went back to the spot in the alley where he had heard the "metal clank" and found a pistol.

¶ 28 It was after all these events transpired that defendant was placed under arrest and his shirt pocket was searched. Given the totality of the circumstances in this case, we find that at the time of arrest, a reasonably cautious person would believe that defendant was committing a crime. See *Grant*, 2013 IL 112734, ¶ 11. Accordingly, we find that the officers had probable cause to arrest defendant and the trial court did not err in denying defendant's motion to quash arrest and suppress evidence.

¶ 29 As noted above, defendant argues that the police arrested him "based on the gun Officer Mulkerrin recovered in the alley," that pursuant to *Horton*, 2017 IL App (1st) 142019, police do not have probable cause to arrest when they "spot a gun on a person," and that therefore, the trial court erred in denying the motion to quash arrest and suppress evidence. Defendant's argument fails for three reasons.

¶ 30 First, defendant's argument is premised on the trial court's statement, made when denying the motion to quash arrest and suppress evidence, that "Once the gun is recovered, there's probable cause to arrest the defendant." This statement is a finding of law to which we owe no deference. "In reviewing a circuit court's ruling on a motion to suppress evidence *** a reviewing court remains free to undertake its own assessment of the facts in relation to the issues

presented and may draw its own conclusions when deciding what relief should be granted." *People v. McDonough*, 239 Ill. 2d 260, 266 (2010). Given that our review is *de novo*, the trial court's statement is immaterial to our analysis. We have found that the totality of the circumstances at the time of arrest was sufficient to support a finding of probable cause.

¶ 31 Second, *Horton* is readily distinguishable from the instant case. In *Horton*, a police officer had a hunch, based on seeing a "metallic object" in the defendant's waistband, that the defendant might have a handgun, and pursued him. *Horton*, 2017 IL App (1st) 142019, ¶ 1. Eventually, police found a handgun hidden under a mattress in a bedroom where they found the defendant, and he was charged with possession. *Id*. The defendant filed a motion to quash arrest and suppress evidence, arguing that the police had no probable cause to arrest him, which the trial court denied. *Id*. ¶¶ 8, 17. On appeal, this court reversed, stating, "Post-[*People v*.] *Aguilar*, [2013 IL 112116,] the possible observation of a handgun is not in itself, without any other evidence of a crime, sufficient to provide an officer with probable cause for arrest." *Id*. ¶ 50.

¶ 32 Unlike *Horton*, in this case, there was more evidence of a crime than the mere possibility that defendant had a firearm. Additionally, while the officer in *Horton* testified that he saw the defendant standing in front of a porch with what he believed was a gun in his waistband (*id*. ¶¶ 9, 22), here, Officer Mulkerrin testified that the "metal clank" of a gun landing on concrete occurred approximately 20 feet from where defendant was running, which suggests Mulkerrin believed defendant had thrown a gun away while leading a foot chase. Mulkerrin's testimony indicates that the gun did not innocuously fall from defendant's pants, as defendant proposes in his reply brief, but rather, that he threw the gun, which he admits would be "a more questionable move."

¶ 33 Third, the continued viability of the holding in *Horton* is questionable. On July 20, 2017, after briefing was complete in the instant case, the Illinois Supreme Court issued its decision in *People v. Holmes*, 2017 IL 120407. In *Holmes*, the defendant was arrested in 2012 solely based on a Chicago police officer having observed a revolver in his waistband. *Id*. ¶¶ 1, 5. The defendant filed a motion to quash arrest and suppress evidence, arguing that in light of *Aguilar*, which was decided in 2013, well after the defendant's arrest, probable cause was retroactively invalidated. *Id*. The circuit court granted the defendant's motion, this court affirmed, and the State appealed. *Id*. ¶ 2.

¶ 34 Our supreme court determined that the void *ab initio* doctrine does not retroactively invalidate probable cause that was based on a statute later held to be unconstitutional. *Id*. ¶ 37. Because probable cause existed at the time of the *Holmes* defendant's arrest in 2012 and probable cause was not retroactively invalidated by the subsequent declaration of unconstitutionality on second amendment grounds in *Aguilar* in 2013, the exclusionary rule did not apply. *Id*. Therefore, the *Holmes* court reversed the granting of the motion to quash arrest and suppress evidence and remanded to the circuit court for further proceedings. *Id*. ¶¶ 37, 39.

¶ 35 For the reasons explained above, we find that the officers had probable cause to arrest defendant and the trial court did not err in denying defendant's motion to quash arrest and suppress evidence. Accordingly, we affirm the judgment of the circuit court.

¶ 36 Affirmed.