2017 IL App (2d) 160385-U
No. 2-16-0385
Order filed September 19, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JOSE S. CASTRO, Defendant-Appellee.	))))))))))))	Appeal from the Circuit Court of Carroll County. Nos. 15-CF-83 15-CF-84 15-CM-277 15-CM-278 15-CM-279 15-CM-280 Honorable Val Gunnarsson, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendant's motion to suppress, as the smell of burnt cannabis from defendant's "facial area" did not provide probable cause to search defendant's clothing.

¶ 2 The State appeals from the judgment of the circuit court of Carroll County granting defendant Jose S. Castro's motion to suppress evidence seized from his person. The State contends that the smell of burnt cannabis coming from defendant's facial area provided probable

cause to search defendant's coat pocket. Because, under these circumstances, the smell of burnt cannabis did not provide probable cause to search defendant, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by criminal complaint with one count of unlawful possession of less than 15 grams of a controlled substance (720 ILCS 570/402(c) (West 2014)), one count of unlawful possession of less than 5 grams of methamphetamine (720 ILCS 646/60(b)(1) (West 2014)), one count of unlawful possession of not more than 2.5 grams of cannabis (720 ILCS 550/4(a) (West 2014)), one count of unlawful possession of drug paraphernalia (720 ILCS 600/3.5(a) (West 2014)), one count of unlawful possession of a hypodermic syringe (720 ILCS 635/1 (West 2014)), and one count of resisting or obstructing a peace officer (720 ILCS 5/31-1(a) (West 2014)). Defendant moved to suppress the evidence seized during a search of his person.

¶ 5 The following evidence was established at the hearing on the motion to suppress. On December 11, 2015, at approximately 12:40 a.m., defendant, after leaving his girlfriend's apartment in Savanna, was walking along the edge of a nearby residential street. While walking, defendant smoked a tobacco cigarette.

¶ 6 As Officer Mitchell Ottenhausen of the Savanna police department was patrolling in his squad car, he observed defendant walking. Because there had been recent reports of vehicle and residential burglaries in the neighborhood, Officer Ottenhausen decided to investigate defendant. He drove past defendant, turned his squad car around so that he was facing defendant, and drove toward defendant. When he was about 30 to 40 yards from defendant, he stopped, exited his squad car, and began walking toward defendant. He did not activate either his siren or his emergency lights.

¶ 7 As Officer Ottenhausen approached defendant, he identified himself as a police officer. He told defendant that he was stopping him because of the recent burglaries. Officer Ottenhausen never touched defendant or drew his service weapon. Although he never told defendant that he was free to leave, defendant admitted that he could have walked away at any time and that he considered the encounter to be consensual.

¶ 8 According to Officer Ottenhausen, when he was a few feet away from defendant, he asked defendant to remove his hands from his pockets. According to defendant, he had his cell phone in one hand and was about to place his other hand in his pocket when Officer Ottenhausen told him not to. Defendant complied. When Officer Ottenhausen asked defendant if he had any weapons or illegal substances on his person, defendant said no.

¶ 9 As Officer Ottenhausen stood a couple of feet from defendant, he smelled the odor of "burnt" cannabis coming from defendant's "facial area." According to Officer Ottenhausen, he had received training at the police academy regarding the smell of burnt cannabis. As a police officer, he had also detected the odor of burnt cannabis on several occasions.

¶ 10 Officer Ottenhausen then asked defendant if he could search his person. Defendant responded by asking Officer Ottenhausen if he had probable cause. Officer Ottenhausen answered that, if he did not search defendant, he would at least pat him down. Officer Ottenhausen asked defendant a second time if he could search him. Although Officer Ottenhausen testified that defendant agreed to a search, defendant denied doing so.

¶ 11 Officer Ottenhausen reached into a pocket of defendant's coat. He found cannabis in the pocket and arrested defendant. According to Officer Ottenhausen, the entire encounter took about a minute and a half.

¶ 12 The State contended that the search of the pocket was lawful for two reasons: it was consensual and there was probable cause based on the smell of burnt cannabis. In granting the motion to suppress, the trial court found that defendant consented to only a pat down and not a full-blown search of his person and that the smell of cannabis on defendant's breath did not provide probable cause to search his person.

¶ 13 The State filed a motion to reconsider, contending only that the smell of burnt cannabis provided probable cause for the search. In denying the motion to reconsider, the trial court further found that defendant had been illegally detained when Officer Ottenhausen smelled the cannabis. The court alternatively ruled that, under the circumstances, the smell of cannabis coming from defendant's face did not provide a valid basis for the search.

¶ 14 The State filed a certificate of impairment (see Ill. S. Ct. R. 604(a)(1) (eff. Mar. 8, 2016)) and a timely notice of appeal.

¶ 15 II. ANALYSIS

¶ 16 On appeal, the State contends that: (1) the encounter was consensual when the officer smelled the burnt cannabis; and (2) the smell of burnt cannabis on defendant's breath provided probable cause to search his person. Defendant effectively concedes that the initial encounter, including when the officer smelled the cannabis, was consensual. However, defendant maintains that the smell of burnt cannabis, as opposed to the smell of raw or actively burning cannabis, did not provide probable cause to believe that he possessed cannabis. He alternatively argues that, because of the lawful medicinal uses for cannabis and the recent reduction in penalties for possession of a small amount of cannabis, it is no longer reasonable to rely on the smell of cannabis as a basis to believe that a person possesses it illegally.

¶ 17 In reviewing a trial court's ruling on a motion to suppress evidence, a reviewing court applies a two-part standard. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)). Under that standard, a reviewing court reviews a trial court's findings of fact only for clear error and must give due weight to any inferences drawn by the trial court from those facts. *Luedemann*, 222 Ill. 2d at 542. A reviewing court, however, remains free to independently assess the facts in relation to the issues and may draw its own conclusions when deciding what relief should be granted. *Luedemann*, 222 Ill. 2d at 542. Accordingly, the court reviews *de novo* the trial court's ultimate legal ruling as to whether suppression is warranted. *Luedemann*, 222 Ill. 2d at 542-43.

¶ 18 We begin by addressing whether defendant was seized when Officer Ottenhausen smelled the burnt cannabis. As noted, defendant has effectively conceded that the encounter was consensual, at least when Officer Ottenhausen smelled the cannabis. We agree.

¶ 19 It is well established that there are three tiers of police-citizen encounters. *Luedemann*, 222 Ill. 2d at 543. The trilogy consists of: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions or "*Terry* stops," which must be supported by reasonable, articulable suspicion; and (3) encounters that involve no coercion or detention and thus do not require any evidentiary justification. *Luedemann*, 222 Ill. 2d at 544.

¶ 20 For purposes of the fourth amendment, an individual is seized when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *Luedemann*, 222 Ill. 2d at 550. Generally, there are four factors that are relevant to whether there has been a seizure: (1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the citizen; and (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Luedemann, 222 Ill. 2d at 553 (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Although those factors might establish that a seizure occurred, in their absence, otherwise inoffensive contact between a citizen and the police cannot, as a matter of law, amount to a seizure. *Luedemann*, 222 Ill. 2d at 553.

¶ 21 Assessing the relevant factors in light of the undisputed evidence here, we conclude that defendant was not seized when Officer Ottenhausen smelled the burnt cannabis. There was no physical touching of defendant and no show of authority. Officer Ottenhausen did not activate his siren or emergency lights. Nor did he draw his weapon. Further, although a second officer arrived at the scene at some point, the record does not show that he did so before Officer Ottenhausen smelled the cannabis. Even if the second officer was present, there is no indication that there was a "threatening" presence of several officers as contemplated by *Mendenhall*. See *People v. Cosby*, 231 Ill. 2d 262, 279 (2008) (presence of two officers, without any indication of coercive behavior by the officers, did not constitute a show of authority). Finally, although Officer Ottenhausen asked defendant to remove his hand from his pocket (or not place it in the pocket), there is no indication that he used any language or tone of voice indicating that compliance with his request might be compelled. Even if there was, merely ordering a citizen to remove his hands from his pockets during a police-citizen encounter, without more, does not turn an otherwise consensual encounter into a seizure. When viewed in their totality, the relevant factors show that Officer Ottenhausen had not yet seized defendant when he smelled the cannabis. Therefore, Officer Ottenhausen was in a position he was entitled to be when he smelled the cannabis.

¶ 22 We next address whether the smell of burnt cannabis supplied the probable cause needed to search defendant's coat pocket. It did not.

¶ 23 We begin by focusing on the concept of probable cause. The United States Supreme Court has stated that a police officer has probable cause to search when the facts available to him would warrant a person of reasonable caution to believe that contraband or evidence of a crime is present. *Florida v. Harris*, 568 U.S. 237, 243 (2013). The test for probable cause is not reducible to a precise definition or quantification. *Harris*, 568 U.S. at 243. Rather, the test is whether there is a fair probability upon which reasonable, prudent people, not legal technicians, act. *Harris*, 568 U.S. at 244. Indeed, probable cause is a fluid concept that depends not on a neat set of legal rules, but rather on an assessment of probabilities in a particular factual context. *Harris*, 568 U.S. at 244. In assessing whether law enforcement has met that practical, common-sense standard, the courts are to look at the totality of the circumstances. *Harris*, 568 U.S. at 244.

¶ 24 In this case, when we examine the totality of the circumstances, as known to Officer Ottenhausen when he conducted the search of defendant's coat pocket, we conclude that there was not probable cause for that search. The only indication that defendant possessed cannabis was Officer Ottenhausen's detection of the smell of burnt cannabis coming from defendant's "facial area." That fact, without more, did not warrant a person of reasonable caution to believe that there was evidence of cannabis possession on defendant's person. That is so for the following reasons.

¶ 25 First, the smell of "burnt" cannabis, as opposed to actively "burning" cannabis, did not sufficiently link defendant to the commission of a crime. Although the smell of actively burning cannabis would imply the current presence of cannabis, the smell of burnt cannabis merely suggested that defendant had, at some undefined time in the past, been in the presence of burning cannabis. Absent some evidence to narrow down the time when defendant had been in the

presence of burning cannabis, the mere fact that he had been in the past was too vague to reasonably conclude that he possessed cannabis when the search occurred.

¶ 26 Second, the smell of burnt cannabis coming from defendant's "facial area" did not indicate that defendant possessed cannabis on his person. Without some evidence that the cannabis smell was coming from defendant's clothing, it was not reasonable to conclude that it was coming from defendant's coat pocket.

¶ 27 Third, we emphasize that there was no other evidence indicating that defendant possessed cannabis. The only suspicious fact identified by Officer Ottenhausen was the smell of burnt cannabis. As discussed, absent some other indication that defendant possessed cannabis, the smell alone under the facts of this case was insufficient to establish probable cause to search.

¶ 28 Although the State points to cases involving the smell of cannabis coming from a vehicle (see *People v. Stout*, 106 Ill. 2d 77, 87-88 (1985); *People v. Smith*, 2012 IL App (2d) 120307, ¶ 2) in support of the search here, those cases are distinguishable, as the smell here came from a pedestrian. Likewise distinguishable is *People v. Zayed*, 2016 IL App (3d) 140780, a case not cited by either party, in which the court held that the smell of *burnt* cannabis coming from a vehicle provided probable cause to search the driver. *Zayed*, 2016 IL App (3d) 140780, ¶ 23.

¶ 29 The State also cites *People v. Tippit*, 17 Ill. App. 3d 163 (1974), in support of its position. That case, however, is distinguishable from this case. In *Tippit*, the defendant was a high school student who was brought to the principal's office for loitering. *Tippit*, 17 Ill. App. 3d at 163. After a police officer, who was present in the principal's office, detected a scent of cannabis, he placed his hand on the defendant to help him stand up to be searched. *Tippit*, 17 Ill. App. 3d at 163. In doing so, the officer felt a bulge in the defendant's pocket. *Tippit*, 17 Ill. App. 3d at 163-64. A search revealed a handgun. *Tippit*, 17 Ill. App. 3d at 164. Although the court

concluded that the smell of cannabis contributed to probable cause for the search, it held that the search was valid "[u]nder all of the circumstances," which clearly included the additional fact that the officer felt a bulge in the defendant's pocket. *Tippit*, 17 Ill. App. 3d at 165. Here, however, there was no additional suspicious behavior or indication that defendant possessed cannabis. Thus, *Tippit* does not support the search in this case.

¶ 30 Because Officer Ottenhausen lacked probable cause to search defendant's coat pocket for cannabis, that search was improper. Hence, the seizure of the cannabis and the related arrest were invalid, as was the search incident to that arrest. Thus, the trial court properly granted the motion to suppress all of the evidence seized from defendant.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the judgment of the circuit court of Carroll County granting defendant's motion to suppress.

¶ 33 Affirmed.