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2018 IL App (3d) 140574-U

Order filed June 29, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0574
	)	Circuit No. 13-CF-467
	)	
JEFF V. ALLEN,	)	Honorable
Defendant-Appellant.	)	H. Chris Ryan, Judges, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices Lytton and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court did not err in denying the defendant's motion to suppress evidence obtained following a pat-down search where the police officers conducting the search had an objectively reasonable concern for their safety and the safety of others. Alternatively, the search was reasonable as incident to a valid arrest.

¶ 2 The defendant, Jeff V. Allen, appeals from his conviction following a bench trial on one count of unlawful possession of a controlled substance with the intent to deliver. 720 ILCS 570/401(c)(2) (West 2012). On appeal, the defendant maintained that the trial court erred in denying his motion to suppress certain evidence seized following an encounter with police

officers that resulted in the discovery of contraband on the defendant's person. This court affirmed the trial court's denial of the motion to suppress evidence and affirmed the conviction. See *People v. Allen*, 2017 IL App (3d) 140574-U. The defendant then filed a petition for rehearing. We granted the petition for rehearing and withdrew our previous order. For the following reasons, we again affirm the trial court's denial of the defendant's motion to suppress evidence and affirm the defendant's conviction.

¶ 3

### BACKGROUND

¶ 4

The defendant was charged with one count of unlawful possession of a controlled substance with the intent to deliver. At the suppression hearing, two city of La Salle police officers testified to the circumstances surrounding the defendant's arrest. Officer Matthew Fisher testified that he was on duty at the police station on October 13, 2013, when Aaron Farrell approached him in the station lobby. Fisher knew Farrell "through his occupation." Farrell told Fisher that the defendant was at Farrell's residence but refused to leave when Farrell told him to do so. Farrell asked Fisher to accompany him to his residence to remove the defendant from his residence. Based upon Farrell's complaint, Fisher went to Farrell's residence at 810 West Main Street, La Salle, Illinois. When Fisher arrived at the location, Officer William Pinter was waiting outside the apartment. Fisher testified that Farrell used his key to open the door of the apartment and invited the officers to enter. Fisher observed the defendant sitting in a chair off to one side of the room. The defendant appeared to be sleeping. The room was not well lit. Fisher shined a flashlight at the defendant, who appeared to awaken when the light hit his face. Fisher announced "Police" at which the defendant opened his eyes and immediately reached down to the front of his waistband. Fisher asked the defendant to identify himself and explain what he was doing there at the apartment. After a brief delay, the defendant provided his name. Fisher

then called in a warrant check while the defendant remained seated. Fisher testified that Officer Pinter and Farrell had entered the apartment with him and were in the room where the defendant was seated.

¶ 5 Fisher further testified that while he was calling in the warrant check, the defendant remained in the chair, but began to reach down the left side of his body with his left hand. Fisher testified that he was concerned that the defendant might be reaching for a weapon. Fisher queried the defendant regarding his movement and the defendant stated that he was reaching for a bag of fast food that was in front of him. Fisher did not believe that the defendant was reaching for the bag, since the bag was immediately in front of the defendant, and the defendant was moving toward his left, not toward the bag. Fisher told the defendant to stand up. As the defendant rose from his chair, he made a move with his left hand toward his left side, followed by a move with his right hand toward his left side. The officers both noticed the defendant's movements. Fisher testified that he was alarmed by the defendant's movements and grabbed the defendant's right hand while Pinter simultaneously grabbed the defendant's left hand. Fisher further testified that, as the officers were attempting to grab the defendant's hands, the defendant attempted to pull away from the officers. After the officers secured their grips on the defendant's hands, the defendant made motions attempting to free his hands. Fisher testified that the officers quickly gained control of the defendant and placed him in handcuffs. Fisher further testified that he grabbed the defendant's right hand because he believed that the defendant might be reaching for a weapon. He based this belief on his observation of "a bulge on the left side of his like, leg, waistband area" and the defendant's movements toward his left side.

¶ 6 Fisher testified that, after the defendant was placed in handcuffs, he reached around the defendant's midsection, while Pinter searched the defendant's leg. Fisher noticed a "bulge" in

the defendant's waistband. As Fisher reached toward the bulge, a cell phone became visible in the defendant's pocket near the waistband. Fisher testified that he then performed a "pat-down" search of the defendant because he believed the defendant may have had a weapon.

¶ 7 Officer Pinter's testimony corroborated Fisher's. Pinter testified that he received a radio dispatch with instructions to assist Fisher with a complaint regarding an unwanted subject to be removed from a residence. Pinter testified that he met Fisher and Farrell outside the apartment. Farrell unlocked the door to the apartment and invited the officers into the apartment, at which time Pinter observed the defendant apparently asleep in a chair. Pinter testified that Fisher woke the defendant, identified himself as "police," and began to explain why they were there. Pinter testified that the defendant "kept reaching" for the left side of his body, and when Fisher asked him what he was doing, the defendant claimed he was reaching for a bag of food on the floor in front of him. Fisher told the defendant to stop reaching for the bag, and to stand up. Pinter further testified that, as the defendant started to stand up, he was still "grabbing" toward the left side of his body. At that point, Fisher grabbed the defendant, but he pulled away. Pinter joined Fisher in trying to secure the defendant's hands, but the defendant continued to pull away from both officers. The officers then subdued the defendant and placed him in handcuffs.

¶ 8 Pinter testified, after the defendant was in handcuffs, he initiated a pat down of the defendant, at which time he noticed a bulge at the bottom of his pant leg near the ankle. Pinter testified that he could not tell what the object was, or whether it might be a gun or other weapon. When queried about the bulge near the defendant's ankle, Pinter testified: "I didn't know what it was\*\*\* Once I felt it, I just wanted to figure out what it was \*\*\* I couldn't determine – I couldn't feel what I was feeling. But I could feel something in there \*\*\* I don't know if it moved around but it was floating in the ankle there in the pocket or whatever, in the area of the

gathers.” Pinter testified that he then pulled the object from underneath the bottom of the defendant’s pant leg and observed a small plastic bag containing a substance that appeared to him to be drugs. The defendant was then arrested for possession of a controlled substance. The plastic bag taken from the defendant was subsequently determined to contain 1 to 15 grams of a substance containing cocaine.

¶ 9 On cross-examination, Pinter stated that he knew the person who made the complaint, Aaron Farrell, and knew that Farrell had been involved in criminal activities in the past. Pinter also acknowledged that the 800 block of West Main had several complaints of criminal activity. Pinter testified that the defendant failed to comply with an order from Fisher to stop reaching for his waistband. Pinter testified that the defendant’s continued movements, which caused both officers to be concerned that the defendant had a weapon or “something he was trying to conceal.” Pinter testified that when the officers attempted to handcuff the defendant, he resisted and pulled away. Pinter could not tell what the object was that he removed from the defendant’s ankle area until after he had removed it. On redirect examination, Pinter testified that Fisher had told the defendant that Farrell did not want the defendant to remain in his apartment.

¶ 10 Officer Fisher was recalled to testify. He stated that he went to Farrell’s residence to investigate a complaint of criminal trespass to a residence and to remove the trespasser at the request of the resident. He testified that he told the defendant that Farrell did not want him to be in the apartment. Fisher acknowledged that he never told the defendant to leave because he immediately became concerned with the defendant’s repeated movements. He also testified that the defendant was not charged with criminal trespass. Fisher testified that the entire encounter took less than two minutes.

¶ 11 During closing argument, the State argued that the officers were present at the residence to investigate a complaint of criminal trespass to residence and that the contraband was properly seized following a valid *Terry* pat-down for weapons. At the hearing on the defendant's motion to reconsider, the State alternatively maintained that the contraband was seized following a search of the defendant incident to a valid arrest for misdemeanor criminal trespass to a residence.

¶ 12 The trial court ruled that the officers were lawfully present to investigate a complaint of trespass to property, and that based upon the defendant's repeated suspicious movements and his failure to cease those movements after being instructed to do so, the officers had a reasonable suspicion that the defendant may have had a weapon which posed a threat to the safety of the officers and others. The court held, therefore, that the officers had a right to pat down the defendant to check for weapons and that the actions of both officers were consistent with that concern for safety. The court found that the officers engaged in the pat down to look for weapons, not contraband. The trial court denied that motion to suppress the evidence of the drugs found on the defendant following the pat down search. Following a bench trial, the defendant was convicted of possession of a controlled substance with intent to deliver and was sentenced to a term of 10 years in prison. On appeal, the defendant challenges the trial court's ruling denying his motion to suppress.

¶ 13 ANALYSIS

¶ 14 The defendant's sole contention on appeal is that the trial court erred in denying his motion to suppress evidence. Specifically, the defendant argues that the substance containing cocaine recovered by the police officers was obtained in violation of the fourth amendment to the United States Constitution (U.S. Const., amend. IV) and article I, section 6 of the Illinois Constitution

(Illinois Const. 1970, art. I, § 6). The defendant maintains that the trial court erred in denying his motion to suppress the drugs discovered during the pat-down search of his ankle area. The defendant argues that the scope of the search was excessive once Pinter touched the object though the pant leg and was arguably able to determine that the object was not a weapon.

¶ 15 When reviewing a trial court’s ruling on a motion to suppress evidence, the reviewing court will defer to the trial court’s factual findings and credibility assessments and will reverse those findings only if they are against the manifest weight of the evidence. *People v. Close*, 238 Ill. 2d 497, 504 (2010). However, a reviewing court will review *de novo* the ultimate legal question of whether the trial court should have granted or denied a motion to suppress. *Id.* at 504; *People v. Claypool*, 2014 IL App (3d) 120468, ¶ 14. Moreover, "courts reviewing the propriety of \*\*\* [Terry] stops must decide each case on its own unique facts." *People v. Colyar*, 2013 IL 111835, ¶ 37 (citing *Terry v. Ohio*, 392 U.S. 1, 30-31(1968)).

¶ 16 In *Terry*, the Supreme Court provided an exception to the otherwise constitutionally protected warrant and probable cause requirements necessary for a valid police search. “Under *Terry*, a police officer may conduct a brief, investigatory stop of a person where the officer reasonably believes that the person has committed, or is about to, commit a crime.” *Close*, 238 Ill. 2d at 505. Additionally, under *Terry*, “if the officer reasonably believes that the person questioned may be armed and dangerous, the officer may conduct a limited patdown search for weapons, commonly called a frisk.” *People v. Love*, 199 Ill. 2d 269, 275 (2002). However, the scope of the frisk is limited. “[W]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, the officer may conduct a pat-down search [or frisk] to determine whether the person is in fact carrying a weapon.” *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001). The officer

need not be absolutely certain that the individual is armed; the issue is “whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Id.* at 433. In determining whether the officer acted reasonably in such circumstances, “due weight must be given to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” *Id.* However, the reasonableness of a frisk must be judged by all the particular facts and circumstances surrounding it, and “[e]ach case must stand or fall on its own set of concrete facts.” *People v. Galvin*, 127 Ill. 2d 153, 174 (1989). Courts apply an objective standard to determine whether a weapons search was lawful, asking whether a reasonably prudent person would have justifiably feared for his or others’ safety under the circumstances. *Id.* An objectively reasonable concern for safety does not, however, provide officers with a justification to conduct a search without constraint. Rather, our courts have consistently held that the sole justification for a frisk is to ensure the safety of the officers and others nearby, and not to gather evidence. If a protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits would be suppressed. *Sorenson*, 196 Ill. 2d at 432.

¶ 17 In this case, the crux of the defendant's argument is that Pinter was "unsure" of what the object was after "feeling" it through the defendant's pants leg. Being unsure of what the object was, Pinter could not testify that the object was a weapon. Since Pinter could not identify the object as a weapon, the defendant argues, it could not have been a weapon and any further attempt to determine the identity of the object was an unreasonable search under *Terry*. His argument is that, once it was apparent to Pinter that the object was not a weapon all further efforts to identify the object should have ceased. He further argues, that under the “plain touch” doctrine articulated in *Dickerson*, an officer is permitted to touch an object concealed in the

suspects clothing, and may lawfully seize the object, only if it can be easily determined to be a weapon. If, on the contrary, the identity of the object cannot be easily determined, the officer is not permitted to conduct a further search of the suspect by “squeezing, sliding and otherwise manipulating the contents of the defendant’s pocket.” *People v. Mitchell*, 165 Ill. 2d 211, 219 (1995). Thus, the defendant maintains, if an object is neither obviously a weapon, nor easily identifiable as contraband by “plain touch,” an officer cannot investigate the content of the suspect’s clothing to see what the object might be. *Galvin*, 127 Ill. 2d at 173. The defendant maintains that the “bulge” in his pant leg was neither obviously a weapon nor was it easily identifiable as contraband, and thus Pinter’s actions went beyond the scope of a permissible search.

¶ 18 The defendant points to Pinter’s testimony as proof that he had no concern that the defendant was armed, but was instead curious as to the nature of the object in his pant leg: “I didn’t know what it was\*\*\* Once I felt it, I just wanted to figure out what it was \*\*\* I couldn’t determine – I couldn’t feel what I was feeling. But I could feel something in there \*\*\* I don’t know if it moved around but it was floating in the ankle there in the pocket or whatever, in the area of the gathers.” The defendant maintains that this testimony conclusively established that Pinter was certain that the object was not a weapon and that he was curious to determine if the defendant possessed any contraband and conducted a search for that purpose. He maintains that a search to determine whether a defendant is in possession of contraband exceeded the scope of any constitutionally viable search. *Id.*

¶ 19 The State maintains that the officers acted in an objectively reasonable manner at all times as the officers were only searching for a weapon based upon a reasonable concern for safety. The State argues that, under these particular facts and circumstances, it was objectively reasonable

for the officers to be concerned that the defendant had a weapon. The State points to the fact that the defendant was noncompliant with the officers' reasonable requests that he stop engaging in suspicious movements as well as the fact that it was necessary to subdue and restrain the defendant. Taken as factually true by the trial court, the officers' testimony established that the defendant was uncooperative from the beginning of the encounter. When Fisher identified himself as a police officer, the defendant made an immediate move toward his left side. Fisher testified that he immediately became concerned that the defendant might be attempting to access a weapon concealed in his pants. Moreover, the trial court credited the officers' testimony that the defendant did not comply with the instruction to stop reaching for his left side, and that this noncompliance necessitated the grabbing of his arms and subsequent restraint of the defendant. The trial court's factual findings that the defendant's actions were suspicious and potentially threatening in nature cannot be said to be against the manifest weight of the evidence.

¶ 20           Regarding protective weapon searches, the focus is on the officer's reasonable belief that his safety or the safety of others is in danger. *Sorenson*, 196 Ill. 2d at 433. The fact that the officer may also believe that the defendant possessed contraband at the time does not negate an officer's concern for safety. *Id.* at 434. Here, the defendant maintains that Pinter's testimony that he "didn't know what it was" and that he "just wanted to figure out what it was" conclusively established that the officer was not concerned about safety, but was merely curious about the object he felt while struggling to subdue the defendant. We disagree.

¶ 21           The evidence established that the officers were concerned for their safety and the safety of others from the beginning of their encounter with the defendant where he was noncompliant with instructions to stop reaching for his left side. The concern for safety was reasonably heightened by the dim light and the difficulty the officers had seeing the defendant. Their

concern was objectively reasonable where, rather than comply with those instructions, the defendant offered an explanation that he was reaching for a bag of fast food; an explanation which the officers believed to be untrue since he was reaching in a different direction. When the defendant persisted in reaching toward his leg, the officers both testified that they reacted by taking steps to subdue and restrain the defendant. It was during the course of subduing and restraining the defendant that the contraband was discovered. Pinter testified, that at the time he noted the presence of the object, he did not know what the object was or whether its presence posed a danger. Thus, at the point in time when Pinter removed the object, a reasonable person in this situation would be justified in continuing the search to determine whether the object was a weapon that posed a threat to safety. *People v. Day*, 202 Ill. App. 3d 536, 543-44 (1990). Moreover, our courts have "frequently noted that objects which are not *per se* deadly weapons may be used in such a manner as to become deadly weapons." *Id.* at 544.

¶ 22 Here, the defendant maintains that even if, under the circumstances, it was objectively reasonable for the officers to search him for a weapon, their independent justification for removing the object from his pant leg was unreasonable. He maintains that Pinter had neither a subjective belief that the object was dangerous, nor an objective basis for continuing the search. He maintains, that Pinter's testimony that he did not know what the object was or whether it was dangerous is inherently inconsistent with a finding that his further efforts to investigate whether the object posed a danger were reasonable. We disagree. To say that he did not know what the object was is not the same as saying he knew it did not pose a danger.

¶ 23 Considering all the facts, particularly the defendant's non-compliance with the officers' requests that he stop his suspicious movements, and giving due weight to the trial court's finding that Pinter was not reasonably certain that the object in the defendant's left pant leg could not be

used as a weapon, we conclude that a reasonably prudent police officer in these circumstances would be warranted in believing that his safety, and the safety of others, was in danger. The un rebutted evidence established that the defendant was hell-bent on resisting the commands of the officers not to make any movements. Despite clear instruction to the contrary, the defendant continued to make furtive movements in a manner that would give a reasonable person concern that the defendant was reaching for *something* that could be a dangerous weapon. Simply stated, in the context of this encounter, where the trial court found that the defendant was actively resisting lawful commands of the officers and had to be subdued and restrained, it was both subjectively and objectively reasonable for an officer to investigate the potential danger posed by an object concealed on the defendant's person, even if the officer "didn't know what it was" and "just wanted to figure out what it was." The violent nature of the encounter would have justified a subjective belief that the defendant was armed with a dangerous weapon. In other words, absent the fact that the officers had to subdue and restrain the defendant, Pinter's "just want[ing] to figure out what [the bulge] was" would have been unreasonable. Objectively, it was reasonable under the circumstances, given the defendant's physical resistance to the officer's lawful commands, to investigate *any* object on the defendant's person as a potentially dangerous weapon. Had the defendant peacefully complied with the officer's instructions, there would have been no objective reason to consider the possibility that the defendant was armed. We find, therefore, that the pat-down that resulted in the discovery of the plastic bag was within the parameters of a protective search for weapons, even though no weapon was in fact discovered as a result of the search.

¶ 24           Although our finding that the search was reasonable under *Terry* is a sufficient basis upon which to affirm the trial court, we also agree with the State's alternative argument that the

evidence was properly seized as the result of a constitutionally valid custodial search incident to an arrest. When affirming a trial court's ruling the suppression of evidence, we will affirm the court's ruling based upon any rationale supported by the record. *People v. Calhoun*, 382 Ill. App. 3d 1140, 1146 (2008).

¶ 25 The right to conduct a warrantless search incident to a lawful arrest is a well-established exception to the limitation under *Terry*. *People v. McKinney*, 274 Ill. App. 3d 880, 888 (1995). A custodial arrest of a suspect based upon probable cause is "a reasonable intrusion under the Fourth Amendment [and] that intrusion being lawful, a search incident to the arrest requires no additional justification." (Internal quotation marks omitted.) *People v. Hoskins*, 101 Ill. 2d 209, 216 (1984). In addition, police officers have broad statutory authority to conduct a search once they have initiated a lawful arrest. 725 ILCS 5/108-1 (West 2012). The statutory authority includes not only officer safety, but also the potential for discovery of "any instruments, articles, or things which may have been used in the commission of, or which may constitute evidence of, an offense." 725 ILCS 5/108-1(1)(d) (West 2012).

¶ 26 The State maintains that, even though he was not subsequently charged, the defendant was, in effect, under lawful arrest for the offense of criminal trespass to property. 720 ILCS 5/21-3 (West 2012). We agree.

¶ 27 Probable cause to arrest exists "when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a [person] of reasonable caution in believing that an offense has been committed and that the person arrested has committed the offense." (Internal quotation marks omitted.) *People v. Creach*, 79 Ill. 2d 96, 101 (1980). Whether probable cause for an arrest exists in a particular case depends upon the facts and circumstances known to the officer at the time of the arrest, which are not subject to everyday interpretation and are not

disposed to be "unduly technical." *Id.* at 102. A person commits criminal trespass to property when he "knowingly and without lawful authority enters or remains within or on a building." 720 ILCS 5/21-3(a)(1) (West 2012). Here, the officers had knowledge that led them to reasonably believe that Ferrell was the legal occupant of the residence and that the defendant, knowingly and without authority, remained in the building after Ferrell had asked him to leave. These facts alone established reasonable cause to arrest the defendant for the offense of criminal trespass to property. See *People v. DeRossett*, 237 Ill. App. 3d 315, 326 (1992) (an individual commits criminal trespass to property when he remains on the property of another after being told to leave even if the initial entry was lawful).

¶ 28 Moreover, the fact that the defendant was not ultimately charged with criminal trespass is not relevant. The relevant factor in determining whether an arrest was lawful is whether the defendant could have been arrested for the offense based on facts known to the arresting officer at the time the defendant was placed under arrest. *People v. Taylor*, 388 Ill. App. 3d 169, 179-80 (2009) (valid search occurred where the defendant was searched incident to lawful traffic arrest but was subsequently charged only for a drug offense based upon search); *People v. Mathis*, 55 Ill. App. 3d 680, 684-85 (1977) (officer justified in arresting the defendant for armed robbery following arrest for invalid driver's license even though the defendant was not ultimately charged with a license offense).

¶ 29 Here, the record clearly established that the defendant could have been arrested for the offense of criminal trespass to property and the search at issue was, therefore, constitutionally valid.

¶ 30

#### CONCLUSION

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 32 Affirmed.