2018 IL App (5th) 170063-U

NO. 5-17-0063

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 15-CF-862
	)	
ADRIAN COOPER II,	)	Honorable
	)	Randall W. Kelley,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Moore and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting the defendant's motion to quash his arrest and to suppress evidence is reversed where the defendant was not seized for fourth amendment purposes at the time that he discarded a handgun in a parking lot because he did not submit to the police officer's show of authority. Thus, the discarded gun was not the fruit of an unlawful seizure. The cause is remanded for further proceedings.

¶ 2 On July 20, 2015, the defendant, Adrian Cooper II, was charged with one count of unlawful possession of a firearm by a felon (720 ILCS 5/24-1.1(a) (West 2014)). On October 4, 2016, he filed a motion to quash his arrest and to suppress evidence, arguing that he was unlawfully seized based on information from an uncorroborated and anonymous tip and that, at the time of the seizure, the officer had no reasonable grounds to believe that he

was committing or had committed an offense. Thus, he argued that the evidence recovered, *i.e.*, a handgun, after the unlawful seizure was obtained in violation of his fourth amendment rights. After an evidentiary hearing, the circuit court denied his motion to suppress the seized handgun. Thereafter, the case was reassigned to a different judge and, on January 24, 2017, the defendant filed a motion to reconsider. After a hearing, the successor judge granted the motion and suppressed the evidence. The State filed a timely notice of appeal and certificate of substantial impairment under Illinois Supreme Court Rule 604(a)(1) (eff. Mar. 8, 2016). For the reasons that follow, we reverse and remand.

¶ 3 The following evidence was adduced at the November 7, 2016, motion hearing before the Honorable John Baricevic. At 7:40 p.m. on April 6, 2015, Leland Cherry, a patrol officer with the East St. Louis police department, received a call from police dispatch informing him that an African-American man by the name of Adrian Cooper, who was wearing blue jeans and no shirt, was in a parking lot of an apartment building on Wimmer Place and was armed with a handgun. The dispatcher received the information from an anonymous caller, and Cherry did not have any information about the caller. Cherry also did not have any information on Cooper; he acknowledged that he did not personally know Cooper, did not know if he lived in the apartment building, did not run a background check on him, and did not know whether he was a felon or had a Firearm Owners' Identification Card.

¶ 4 Less than five minutes after receiving the call, Cherry and another officer arrived at the apartment parking lot in their marked police vehicles and observed a group of 10 to 15 people hanging out and drinking. Cherry saw only one person matching the description given by the anonymous caller. The man was not doing anything illegal at the time.

Intending to conduct a *Terry*[1] stop, Cherry approached the man, who turned out to be the defendant. Cherry ordered the defendant to take his hands out of his pockets and place them in the air. In response, the defendant turned around and reached for his waistband. Cherry then unholstered his own weapon and ran toward the defendant, shouting at him to show his hands. Before Cherry reached him, the defendant pulled a handgun out of his waistband and tossed it into the crowd of people in the parking lot. Cherry then grabbed and handcuffed the defendant and took him to the police station. Cherry noted that although the defendant did not run, he had not complied with any of his orders.

¶ 5 After the evidence was presented, defense counsel argued that the anonymous phone call to the police did not provide sufficient indicia of reliability to justify a *Terry* stop and that the seizure of the gun was not attenuated by intervening circumstances, breaking the unlawful custodial situation, because the defendant did not run or indicate any intent to flee. Thus, he argued that the recovered gun should be suppressed as fruit of the poisonous tree.

¶ 6 In contrast, the State argued that the anonymous tip was corroborated by the following: Cherry noted that the defendant met the description of the suspect; the defendant refused to comply with Cherry's order to take his hands out of his pockets; instead, he turned around and reached inside his waistband; and then he pulled the gun out of his waistband and threw it into the crowd. The State also argued that, assuming a bad *Terry* stop occurred, the fruit of the poisonous tree doctrine would not bar its use of the evidence because he

[1]*Terry v. Ohio*, 392 U.S. 1 (1968).

abandoned the gun when he threw it into the crowd. The State further argued that probable cause or reasonable suspicion existed when Cherry saw the defendant toss the gun.

¶ 7 On November 10, 2016, the trial court entered an order denying the motion to suppress, stating as follows:

> "The defendant's motion to suppress evidence pursuant to an invalid arrest was called, witnesses heard and argued. The evidence is undisputed. Officer Cherry received a call from his dispatcher advising him of a description of an individual with a gun. Officer Cherry located the defendant, who matched the description, pulled his gun on the defendant, ordered him loudly and with authority to show his hands. At that point, the defendant discarded a weapon. The officer testified he was making a *Terry* stop and had no probable cause other than the dispatcher's call. The dispatcher did not testify. I do not know what the dispatcher was told, only what was argued. I have insufficient evidence before me to prove that the tip was from an unknown source."

¶ 8 Shortly thereafter, the case was reassigned to the Honorable Randall Kelley.[2]

¶ 9 On January 24, 2017, the defendant filed a motion to reconsider ruling, stating that counsel for both parties had previously approached Judge Baricevic and asked him to elaborate on his order and that he had indicated that, "if it would have been proven that the call was anonymous he would have granted the motion to quash arrest and suppress evidence." After this conversation, the State delivered to defense counsel the "911" call made to the dispatcher in which the caller refuses to give his name. Thus, based on this new

[2]The Honorable John Baricevic lost the November 2016 election for his judicial seat.

evidence, the motion argued that the defendant's motion to quash arrest and suppress evidence should be granted.

¶ 10 On February 14, 2017, a hearing was held on the motion for reconsideration before Judge Kelley. At the hearing, defense counsel indicated that Judge Baricevic ruled that the defendant had not met his *prima facie* case that the "911" caller was anonymous but noted that he had subsequently obtained the recording of the call where the dispatcher asked the caller his name and the caller refused and disconnected the call. Thus, he again argued that the anonymous phone call to the police did not provide sufficient indicia of reliability to justify a *Terry* stop. The State argued that the caller's tip was corroborated in that the defendant matched the description of the person provided by the caller. After hearing the arguments, the court found that it was "proper and incumbent to set aside or to reconsider Judge Baricevic's ruling, to overturn that ruling and rule in favor of the defendant and the motion to suppress that was previously filed." The State filed a certificate of substantial impairment and this appeal followed.

¶ 11 The State does not challenge the circuit court's ruling that the anonymous tip was insufficient to create a reasonable, articulable suspicion of criminal activity that justified a seizure under *Terry*. Instead, the State contends that the defendant was not seized until after Cherry observed him throw the handgun into the crowd and, thus, he abandoned the gun. Because the abandoned gun was not the fruit of an illegal seizure, the order suppressing the evidence should be reversed. The defendant initially argues that the State has forfeited this argument by failing to raise it in the trial court. Notwithstanding the forfeiture argument, the defendant contends that he was seized before he tossed the gun because he submitted to the

officer's show of authority by not running or indicating any intent to leave when Cherry approached him and ordered him to take his hands out of his pockets. Thus, the issue on appeal is at what point was the defendant "seized" within the meaning of the fourth amendment.

¶ 12 Initially, we address the defendant's contention that the State has forfeited this argument on appeal. Although the arguments presented at trial focussed on whether any seizure was supported by reasonable suspicion, the record is sufficient for us to consider the issue of whether the defendant was seized when he discarded the handgun. See *People v. Jackson*, 389 Ill. App. 3d 283, 286 (2009) (the State's failure to make any argument in the trial court concerning the legality of the seizure did not render the issue forfeited for appellate review because the record was sufficient for the appellate court to consider the issues raised by the State on appeal). We note that it was the defendant's burden to make a *prima facie* showing that the evidence was obtained due to an illegal seizure. See *People v. Reedy*, 2015 IL App (3d) 130955, ¶ 45. In making the argument that he was unreasonably seized before Cherry saw the gun, the defendant elicited testimony from Cherry as to what happened when he approached the defendant. Thus, the record was fully developed on the details of the arrest. We also note that the defendant further argued that because he did not flee, he did not "[break] the unlawful custodial situation." The State responded by arguing that reasonable suspicion for the seizure arose after the defendant tossed the gun into the crowd, that the discarded gun was not fruit of the poisonous tree, and that the gun was instead abandoned property. Thus, the issue of at what point the defendant was "seized" for

fourth amendment purposes was argued in the trial court, and the record is sufficient for us to review this issue on appeal.

¶ 13 There is a two-part standard that applies to our review of a circuit court's ruling on a motion to suppress evidence. *People v. Lake*, 2015 IL App (4th) 130072, ¶ 23. As to the court's factual findings, we apply a manifest-weight-of-the-evidence standard. *Id.* With regard to the court's ultimate legal ruling granting or denying the motion to suppress, we apply a *de novo* standard of review. *Id.*

¶ 14 The fourth amendment guarantees the right to be free from unreasonable searches and seizures. U.S. Const., amend. IV; *People v. Lockett*, 311 Ill. App. 3d 661, 666 (2000). However, not every encounter between the police and a private citizen results in a seizure. *Lake*, 2015 IL App (4th) 130072, ¶ 35. There are three tiers of police-citizen encounters: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions, referred to as "*Terry* stops," which must be supported by reasonable, articulable suspicion of criminal activity; and (3) consensual encounters, which involve no coercion or detention and thus do not implicate the fourth amendment. *Id.*

¶ 15 A person is seized when his freedom of movement is restrained by physical force or a show of authority. *Id.* ¶ 36. The relevant test is whether a reasonable person would conclude, in light of the totality of the circumstances, that he was not free to leave. *Id.* In *United States v. Mendenhall*, the United States Supreme Court listed four examples in which a nonconsensual seizure might occur: (1) the threatening presence of several officers; (2) an officer's display of a weapon; (3) the physical touching of the individual's person; or (4) the use of language or tone of voice indicating that compliance with the officer's request might

be compelled. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). This test states a necessary, but not a sufficient, condition for seizure effectuated through a show of authority. *California v. Hodari D.*, 499 U.S. 621, 628 (1991).

¶ 16 Assuming that Cherry's ordering the defendant to take his hands out of his pockets and put them up was a show of authority, the relevant issue on appeal is whether this show of authority constituted a seizure that implicated fourth amendment protection.

¶ 17 In *California v. Hodari D.*, the United States Supreme Court considered whether a defendant had been "seized" within the meaning of the fourth amendment at the time that he dropped evidence. *Id.* at 623. In that case, two officers in an unmarked police car observed a group of youths, including defendant, standing around a parked car. *Id.* at 622. As the officers approached, the young men ran away, and the officers gave chase; one officer remained in the car and the second officer chased defendant on foot. *Id.* at 623. When the officer on foot was close to catching defendant, defendant tossed away what appeared to be a small rock but was later determined to be crack cocaine. *Id.* The officer then tackled defendant and handcuffed him. *Id.* In the juvenile proceeding brought against him, defendant sought to suppress the discarded crack cocaine. *Id.* The Supreme Court determined that defendant had not been seized at the time that he discarded the cocaine because defendant did not comply with the officer's show of authority, *i.e.*, the officer's pursuit. *Id.* at 625-27. In so concluding, the Court stated that the language of the fourth amendment "does not remotely apply *** to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure." *Id.* at 626. The seizure of an individual requires either physical force or, where that is absent,

submission to the assertion of authority. *Id.* Because the Court concluded that defendant had not been "seized" at the time that he dropped the crack cocaine, the cocaine was abandoned by defendant and not considered fruit of a seizure. *Id.* at 629. Thus, the cocaine was lawfully recovered by the police, and defendant's motion to suppress evidence was properly denied. *Id.*

¶ 18 Our supreme court addressed the same issue in *People v. Thomas*, 198 Ill. 2d 103, 110 (2001). In *Thomas*, a police officer attempted to stop and question defendant, who was riding a bicycle, by placing his squad car in defendant's path. *Id.* at 106. Before reaching the squad car, defendant abruptly turned into an alley and departed the area at an accelerated pace. *Id.* Another officer observed defendant's evasion and pursued defendant down the alley. *Id.* at 107. This officer overtook defendant, pulled his squad car alongside, and directed defendant to stop. *Id.* Defendant ignored the officer's order and changed direction. *Id.* The officers gave chase, and defendant abandoned his bicycle and began to run. *Id.* Defendant was eventually taken into custody for obstructing a police officer, and a pat-down search uncovered three rocks of crack cocaine in his pants pocket. *Id.* The trial court granted his motion to suppress, which was reversed by this appellate court. *Id.*

¶ 19 On appeal, the supreme court agreed with this court's analysis that defendant was not seized by the officer's attempted roadblock because he refused to halt and chose to run. *Id.* at 112. Instead, the court found that defendant was only seized when physical force was applied after he was caught. *Id.* The supreme court also agreed with the following analysis:

> "Had the defendant stopped when his path was obstructed, had he submitted to [the officer's] show of authority, a seizure of the kind offensive to our constitution

would have occurred. *** However, [the officer's] attempt to effect an unlawful stop did not implicate the fourth amendment because the defendant took flight and prevented it." (Internal quotation marks omitted.) *Id.*

¶ 20 In another show-of-authority case, the appellate court in *People v. Ramirez* addressed the issue of whether discarded evidence was properly seized as abandoned property. *People v. Ramirez*, 244 Ill. App. 3d 136, 145 (1993). In that case, defendant fled from officers who had ordered him to halt. *Id.* As he fled, he dropped a brown paper bag that contained cocaine. *Id.* He was eventually apprehended, and the discarded bag was retrieved. *Id.* The appellate court concluded that defendant was not seized when he dropped the bag because, at that time, there had not been the application of physical force or submission to the assertion of authority. *Id.* Instead, the court found that defendant was seized after he abandoned the package. *Id.*

¶ 21 Relying on the above cases, the defendant argues that he was seized when he threw the gun into the crowd because he submitted to Cherry's show of authority by not fleeing and not indicating any intention to flee. The State counters that the court's evaluation of whether the defendant submitted to authority is not based on whether he fled but whether he obeyed the officer's order to take his hands out of his pockets and put them in the air. In support, the State cites *People v. Billingslea*, 292 Ill. App. 3d 1026 (1997).

¶ 22 In *Billingslea*, a police officer was on routine patrol in a marked police car when he observed defendant and two other men talking to the occupants of a parked vehicle in a " 'high narcotics area.' " *Id.* at 1028. The officer exited the car and asked defendant to come toward him. *Id.* As defendant approached, the officer noticed that defendant's hands were in

his pockets and that he had a " 'bundle' " in his waistband. *Id.* The officer then ordered defendant to keep his hands where the officer could see them. *Id.* After taking a couple of steps in the officer's direction, defendant turned slightly and took an evasive step away. *Id.* The officer moved in front of defendant to block his path so that defendant could not flee. *Id.* Defendant then turned his back on the officer, removed a handgun from his waistband, and threw it to the ground. *Id.* The officer recovered the handgun and arrested defendant. *Id.* The trial court denied defendant's request to suppress the evidence, finding that the officer's conduct in calling defendant over to his vehicle did not amount to a *Terry* stop and that the officer had lawfully seized the weapon that was in plain view on the ground. *Id.* at 1028-29. The trial court did not address whether a seizure occurred when the officer moved to block defendant. *Id.* at 1029.

¶ 23 On appeal, the court concluded that the officer's action in stepping to block defendant while telling him to " 'come here' " was a show of force indicating the officer's intent to restrain defendant. *Id.* at 1030. However, the court, noting that a defendant is not seized when he ignores a show of authority, found that defendant was not seized within the meaning of the fourth amendment because he chose not to submit. *Id.* Instead, defendant turned away, reached for the handgun in his waistband, and threw it to the ground. *Id.* "At that moment, defendant was not detained by physical force and did not submit to the assertion of authority." *Id.* Thus, the court concluded that the officer's recovery of the gun did not result from a search or seizure of defendant. *Id.*

¶ 24 The State also relies on *People v. Lockett*, 311 Ill. App. 3d 661 (2000), in support of its position that the defendant did not submit to Cherry's show of authority. In that case, a

police officer was at an apartment building, responding to a noise complaint, when he observed the occupants of the apartment ask defendant to leave the building. *Id.* at 663-64. After observing defendant, the officer believed that he was either drunk or high on something. *Id.* at 664. Defendant refused to leave, and the officer requested his name and identification. *Id.* Defendant refused to give his name and said that he did not have any identification. *Id.* The officer observed that defendant was trying to hide his left hand. *Id.* Fearing that defendant had a weapon in his hand, the officer asked defendant what was in his left hand. *Id.* When defendant refused to show the officer his hand, the officer reached for it, but defendant moved his hand away. *Id.* Defendant then made a sudden movement toward his face with his left hand. *Id.* The officer, who believed that defendant's hand was coming toward his face, deflected the hand, causing defendant to drop an object that appeared to be rock cocaine. *Id.* at 664-65.

¶ 25 The trial court denied defendant's motion to suppress evidence, which was affirmed by the appellate court. *Id.* at 665, 671. The appellate court concluded that, regardless of whether the officer had sufficient facts to justify a *Terry* stop, defendant was not seized until after he dropped the cocaine in plain view of the officer because he did not submit to the officer's show of authority, *i.e.*, reaching for defendant's left hand, and, instead, made a sudden movement toward his face in an effort to swallow contraband. *Id.* at 670-71. Thus, the court concluded that the officer's discovery of the cocaine was not the result of a search or seizure of defendant. *Id.*

¶ 26 The State also relies on two cases in which defendants submitted to the show of authority by obeying the officers' orders. The appellate court in *Jackson*, 389 Ill. App. 3d at

288, concluded that where an officer approached defendant and ordered him three or four times to remove his hands from his pockets, a seizure occurred when defendant submitted to that show of authority by obeying the order. Similarly, in *In re Rafeal E.*, an officer observed defendant standing and talking with four to six other individuals at the mouth of an alley. *In re Rafeal E.*, 2014 IL App (1st) 133027, ¶ 5. Defendant looked in his direction and walked away from the group at a "brisk walk." *Id.* ¶ 6. After observing this, the officer drove directly parallel to defendant and asked him to stop. *Id.* Defendant complied, and the officer then asked him to take his hands out of his pockets. *Id.* Defendant removed his hands from his pockets and put them in the air. *Id.* As a result of his movement, his shirt lifted, and the officer observed a plastic bag protruding from his waistband. *Id.* The officer recovered the plastic bag, which he suspected contained crack cocaine. *Id.* ¶ 7. The appellate court concluded that defendant's response, *i.e.*, taking his hands out of his pockets and putting them in the air, to the officer's show of authority constituted a submission to that authority. *Id.* ¶ 23. Thus, the court found that defendant was seized for purposes of the fourth amendment. *Id.*

¶ 27 We find the cases cited by the State instructive. The defendant was standing in a parking lot when Cherry, who was wearing a holstered service weapon, got out of his marked squad car and ordered him to remove his hands from his pockets and put them in the air. This was not a request; it was an order. Had the defendant obeyed Cherry's order, a seizure within the meaning of the fourth amendment would have occurred. However, the defendant chose not to submit and turned around and reached for his waistband. Cherry then unholstered his weapon and ran toward the defendant, shouting at him to show his hands.

Again, the defendant did not comply with the order. Instead, he pulled a handgun out of his waistband and tossed it into the crowd of people in the parking lot. At that moment, the defendant was not detained by physical force and did not submit to Cherry's assertion of authority. It was not until he was physically restrained, after he threw the handgun, that he was seized.

¶ 28 The defendant argues that he was seized when Cherry ordered him to take his hands out of his pockets because he did not flee and that the two cases cited by the State (*Rafeal* and *Jackson*), which did not involve flight, deemed that seizures had occurred because defendants did not attempt to flee, not because they affirmatively submitted to police authority by obeying the officers' commands to remove their hands from their pockets and/or put their hands in the air. However, we do not read these two cases in such a way; instead, we find that the courts' decisions as to when defendants were seized were based on defendants' compliance with the officers' orders. Moreover, we note that Cherry did not order the defendant to remain in place as the defendant was standing in a parking lot when Cherry approached. He was not walking down the street like the defendants in *Hodari* and *Ramirez*. Therefore, our decision as to when the defendant was seized is not determined by the fact that the defendant did not attempt to flee or did not indicate an intention to flee. Our decision is based on the fact that he disobeyed Cherry's command by not showing his hands, turning around, pulling a handgun from his waistband, and tossing it into a crowd of people. The handgun was abandoned before he was physically restrained and was not the fruit of an unlawful seizure. Accordingly, we reverse the suppression order entered by the circuit court, and the cause is remanded for further proceedings.

¶ 29 For the foregoing reasons the judgment of the circuit court of St. Clair County is hereby reversed and remanded.

¶ 30 Reversed and remanded.