2019 IL App (1st) 160460-U

No. 1-16-0460

Order filed January 17, 2019

Fourth 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 9738
	)	
OSORIO PAYTON,	)	Honorable
	)	Alfredo Maldonado,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's convictions for armed habitual criminal and armed violence where the trial court properly denied his motion to quash arrest and suppress evidence.

¶ 2 Following a jury trial, defendant Osorio Payton was convicted of armed violence (720 ILCS 5/33A-2(a), 570/402(c) (West 2012)) and armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)), and sentenced to respective, concurrent terms of 15 and 9 years' imprisonment. On appeal, defendant contends that the trial court erred in denying his motion to quash arrest and

suppress evidence because there were no specific and articulable facts to justify his stop and subsequent search pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). We affirm.

¶ 3 Defendant was charged by information with, as relevant here, armed violence, armed habitual criminal, and possession of less than 15 grams of a controlled substance based on his possession of a firearm and cocaine on April 21, 2013.

¶ 4 Prior to trial, defendant filed a motion to quash arrest and suppress evidence, arguing that the police did not have reasonable suspicion required to stop and frisk him pursuant to *Terry*. Defendant contended that "[s]ince the officers did not have the right to stop [him] in the inception, and the object was not apparent until they conducted the stop," the gun found by police was unlawfully recovered and the evidence flowing from the search and seizure should be suppressed.

¶ 5 On February 21, 2014, the trial court held a suppression hearing. Chicago police officer Robert Goins testified that he had been a police officer for eight years. On April 21, 2013, at approximately 10:30 p.m., Goins and his partner, Officer Philip Ducar, were on patrol, driving an unmarked car in the area of 1300 East 75th Street. Goins, who had worked in the area for about two years, described it as a residential neighborhood that was "known for narcotics."

¶ 6 As the officers drove westbound on 75th, Goins observed defendant, who was 30 to 50 yards away, exiting a building at 1309 East 75th. Goins described the building as a "row house," and that he had personally conducted two search warrants at that location, as well as 1309 East 75th, where cocaine and firearms were recovered. As defendant exited the building and walked to the sidewalk of 75th, Goins observed him "clutching" on to what appeared to be a heavy object in the outer-left pocket of his coat, which was "sagging" to the left. Goins, who had

previously made firearm related arrests and recovered guns from individuals, believed defendant had a firearm in his pocket. When defendant reached the sidewalk, he turned left, and walked west. As he did so, he "continuously" clutched the left side of his coat and "constantly" looked around in a "nervous manner" as if his "head [was] on a swivel." Goins thought defendant's behavior was suspicious and decided to conduct a field interview. Goins did not have an arrest warrant or a search warrant and had not observed defendant in the commission of any crime.

¶ 7 Goins drove across the street and stopped his vehicle next to the southeast corner of 75th and Kimbark Avenue. He used his vehicle's spotlight to attract defendant's attention. Defendant stood directly to the east of Goins's car door. Goins was in plainclothes but wore a bulletproof vest displaying his name, unit, and a police star as he approached defendant. Goins observed defendant who appeared nervous with his hand still near his pocket. Goins announced his office, informed defendant he was conducting a field interview, and asked for his name. As Goins began to conduct a protective pat-down, he viewed a pearl handle of a handgun protruding from defendant's left jacket pocket. Goins testified that he observed the handle of the gun as he moved in to conduct the pat-down, prior to touching defendant. He explained that, prior to observing the handle of the gun, he had "not yet gone into [defendant's] pockets" or placed his hands inside defendant's coat. Goins acknowledged that, at a preliminary hearing, he testified he observed the gun during the pat-down and did not observe it until he conducted the pat-down. After observing the gun, Goins immediately recovered it from defendant's pocket and defendant was placed in custody. The recovery of the gun occurred approximately 5 to 10 seconds after Goins had stopped his vehicle. Ducar conducted a custodial search of defendant and recovered suspect cocaine.

¶ 8 Defendant testified that, on the day of his arrest, he was walking from his home near 77th Street and Cornell Avenue to his friend's house at 75th Street and Dante Avenue. Defendant wore a "hoodie" with a down vest zipped up over it. He had a can of paint in one hand and a gun in an inner-left vest pocket that was zipped closed. A police officer approached him, immediately unzipped his vest and inner pocket, and recovered the handgun. Defendant denied that he was clutching his side as he walked or was ever in the row-house buildings.

¶ 9 The trial court denied defendant's motion to quash arrest and suppress evidence. In doing so the court found that:

> "The initial encounter with [defendant] was proper based upon the officer's observations, the location of where everything happened, the time of day and the particular description of the actions of [defendant] before he even came to a stop. Based on that finding the officer's—and the officer's observations, which I believe he did make even prior to the pat-down, the subsequent recovery of the weapon was proper. The further search of defendant pursuant to lawful arrest was also proper."

Defendant filed a motion to reconsider, which the court denied.

¶ 10 At trial, Goins testified consistently with his testimony at the hearing to quash arrest and suppress evidence. He added that, on the date in question, he was assigned to a tactical team tasked with curtailing gang and drug-related violence. As part of the team, he would routinely patrol areas where drug sales were known to take place or where recent shootings had occurred. Goins first observed defendant in a courtyard between the row house buildings. The area of 75th Street was well-lit by artificial light from streetlamps and lights on nearby properties.

¶ 11 After Goins exited the car and spoke to defendant, they were three to five feet apart. Goins testified that he exited the car and, before performing a pat-down search, observed the pearl handle of a handgun protruding from defendant's outer-left pocket—the same pocket defendant had been clutching earlier and which had appeared to contain a heavy object. Goins immediately recovered a .38 caliber revolver with a pearl handle which was loaded with five rounds of live ammunition. Ducar, who had exited the car at the same time as Goins but from the opposite side, was still walking around the front of the car when Goins recovered the handgun. Ducar placed defendant in custody. He conducted a custodial search and recovered suspect cocaine from the same coat pocket as the handgun.

¶ 12 Officer Ducar testified that, at 10:30 p.m. on April 21, 2013, he was in the passenger's seat of an unmarked car driven by Goins. The officers were driving westbound on 75th when he observed defendant 30 yards away in the courtyard between the two row-house buildings at 1305 and 1309 West 75th. Defendant was alone, looking around, and appeared nervous. He walked north to 75th and walked west along the street. Defendant's hands were empty, but he was "constantly adjusting" an item in the outer pocket of his jacket. The unknown item was weighing down the side of the jacket and appeared to be heavy. Ducar suspected the item was a firearm.

¶ 13 About 10 to 15 seconds after observing defendant and before defendant walked west across the intersection of 75th and Kimbark, Goins stopped the unmarked car in front of him. The driver's-side door of the car was approximately a foot away from defendant when Goins stopped the car. The officers exited and approached defendant, who stood on the southeast corner of the intersection. By the time Ducar exited on the passenger's side and walked around the car's hood to where defendant and Goins stood, Goins was already removing a pearl-handled handgun

from defendant's jacket. Goins informed Ducar about the handgun and Ducar placed defendant in custody, performed a custodial search of defendant, and recovered a bag of suspect cocaine from the same pocket which had contained the gun.

¶ 14 Officer John Schaffer testified that at approximately 11:30 p.m. on April 21, 2013, he and his partner spoke to defendant at the police station. Defendant said he had taken the gun from his boss "Henry" to use it for protection while he walked on 75th Street because he owed people money. At the time of his arrest, he was walking back to return the gun before his boss found out he had taken it. Defendant said his boss's name was "Henry," but he could not recall his last name or phone number.

¶ 15 The parties stipulated to defendant's qualifying felony convictions in two prior cases. They also stipulated that, if called, Fella Johnson, a forensic scientist from the Illinois State Police, would testify that the substance recovered in this case tested positive for the presence of cocaine and weighed less than .1 gram.

¶ 16 The jury found defendant guilty of armed habitual criminal, armed violence, and possession of a controlled substance. Defendant filed a motion for new trial, contending that the court erroneously denied his motion to quash arrest and suppress evidence. The court denied the motion after argument.

¶ 17 At sentencing, the court merged the count of possession of a controlled substance into the count of armed violence. The court sentenced defendant to concurrent terms of 15 years' imprisonment for armed violence and 9 years' imprisonment for armed habitual criminal.

¶ 18 On appeal, defendant contends that the trial court erred when it denied his motion to quash arrest and suppress evidence because the officers had no reasonable, articulable suspicion

defendant was involved in criminal activity to justify the *Terry* stop; and had no valid basis to search him. Defendant argues that the trial court relied on certain factors to find a reasonable articulable suspicion, namely that he was in a high-crime area and acting suspiciously, which do not satisfy the requisite threshold needed for articulable suspicion.

¶ 19 The fourth amendment to the United States Constitution (U.S. Const., amend. IV), which applies to the states through the fourteenth amendment (U.S. Const., amend. XIV) and article I, section 6, of the Illinois Constitution (Ill. Const. 1970, art. I, § 6), protects against unreasonable searches and seizures. This protection generally requires a warrant supported by probable cause. *People v. Jones*, 215 Ill. 2d 261, 269 (2005) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). But the United States Supreme Court has recognized exceptions to the warrant requirement, including for an investigative stop supported by reasonable suspicion that a crime has been or is about to be committed, known as a *Terry* stop. *Terry*, 392 U.S. at 21-22; see also 725 ILCS 5/107-14 (West 2012).

¶ 20 To constitute reasonable suspicion, the evidence need not rise to the level of probable cause, and it is not necessary that the police officer witness a crime; however, a hunch is insufficient. *People v. Daniel*, 2013 IL App (1st) 111876, ¶ 33. Reasonable suspicion is based on an objective standard, with the facts viewed from the perspective of a reasonable officer at the time of the stop. *People v. Sanders*, 2013 IL App (1st) 102696, ¶ 14. A police officer must be able to point to specific articulable facts which justify the intrusion on the suspect's liberty. *Id.* These facts, taken together with natural inferences, warrant an investigative intrusion if the officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot. *People v. Jackson*, 2012 IL App (1st) 103300, ¶

17. The decision to make an investigatory stop is based on the totality of the circumstances. *Sanders*, 2013 IL App (1st) 102696, ¶ 14.

¶ 21 A *Terry* stop and frisk entails a two-part analysis. *People v. Sims*, 2014 IL App (1st) 121306, ¶ 10. First, a reviewing court must determine whether police had reasonable suspicion that criminal activity was afoot to justify the temporary detention of the suspect. *Id.* If the investigative stop is warranted, the State must demonstrate the frisk was justified. *Jackson*, 2012 IL App (1st) 103300, ¶ 19. A frisk, "a protective patdown of a properly detained citizen for possible weapons," is justified only when the officer can further articulate a reasonable belief that the suspect was armed and dangerous. *Id.*; *Sims*, 2014 IL App (1st) 121306, ¶ 10.

¶ 22 In reviewing a ruling on a motion to suppress evidence, a reviewing court applies a two-part standard of review. *Id.* ¶ 11. The trial court's factual findings are accorded great deference, and will be reversed only if they are against the manifest weight of the evidence; however, the trial court's application of law to the facts is reviewed *de novo*. *Id.* A reviewing court may affirm a ruling on a motion to suppress on any basis supported by the record, and is free to consider trial testimony as well as the evidence presented at the hearing on the motion to suppress. *People v. Hopkins*, 235 Ill. 2d 453, 471 (2009).

¶ 23 We agree with the trial court that this was a valid *Terry* stop. Based on the totality of the circumstances, a reasonable officer would have a reasonable suspicion that defendant was involved in criminal activity which warranted further investigation at the scene.

¶ 24 Goins's testimony was that, at 10:30 p.m. on April, 21, 2013, he and Ducar were on patrol, driving in the area of 1300 East 75th Street, and observed defendant in between the row houses. Goins was familiar with the area, having worked there for two years, and described it as

being "known for narcotics." Goins had also previously been involved in the execution of search warrants in both row-houses during which firearms and narcotics had been recovered.

¶ 25 As the officers watched defendant, he walked north from the row house to the sidewalk on the south side of 75th and proceeded west along the street. Defendant was "continuously" clutching on to what appeared to be a heavy object in the left side of his coat, which was sagging to the left. Defendant also "constantly" looked around in a "nervous manner" as if his "head [was] on a swivel." Goins, who had previously made firearm related arrests and recovered guns from individuals, believed defendant's behavior was suspicious and that he had a firearm in his pocket. Ducar testified that defendant was "constantly adjusting" an item in the outer pocket of his jacket and the item was weighing down the jacket. Ducar suspected the item was a firearm. Viewing these facts as a whole and considering the totality of circumstances known to the officers prior to the stop, we conclude that they had a reasonable suspicion that criminal activity was afoot to justify the stop. *Jackson*, 2012 IL App (1st) 103300, ¶ 23 (the defendant's unusual conduct, plus his presence in a high-crime neighborhood, constituted reasonable suspicion to justify a *Terry* stop).

¶ 26 Defendant cites *People v. Surles*, 2011 IL App (1st) 100068, and contends that, in this case, although the individual factors from which an articulable suspicion was formed would not, when considered alone, be a sufficient basis to justify a *Terry* stop, those factors combined would form a sufficient basis. We find *Surles* is factually distinguishable from this case. In *Surles*, the only basis for stopping defendant was his presence in a high-crime area. Here, by contrast, there were several bases: the officers were investigating narcotics sales and gang activity and were in what they knew to be a high-crime area; it was 10:30 p.m. and defendant

was the only person on the street; he appeared to be carrying a heavy object in his outer-left coat pocket; and he was displaying suspicious behavior and appeared nervous. Thus, here, unlike *Surles*, there was no single factor that justified the stop. Instead, the basis was a totality of all these circumstances prior to the stop, including defendant's actions, which gave rise to a reasonable articulable suspicion to justify the *Terry* stop.

¶ 27 Defendant next argues that the handgun was recovered illegally as the result of an invalid *Terry* frisk. We disagree.

¶ 28 When an officer is justified in believing that the individual whose suspicious behavior he is investigating is armed and presently dangerous to the officer or others, the officer may conduct a physical pat-down search to determine whether the person is in fact carrying a weapon. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

¶ 29 Here, the handgun was not recovered as a result of a *Terry* frisk, but in the process of the *Terry* stop. Although Goins testified he observed the handgun "during" a protective pat-down, his description of his actions after the stop show that he observed the gun during the stop. His subsequent testimony—at both the motion hearing and during the trial—was that he observed the pearl handle of the gun protruding out of defendant's pocket as he moved in to conduct the pat-down, prior to touching defendant. He explained that, prior to observing the handle of the gun, he had "not yet gone into [defendant's] pockets" or placed his hands inside defendant's coat. Thus, the weapon was not recovered in the course of a protective pat-down typical of a *Terry* frisk.

¶ 30 When Goins observed the handgun in plain view while making the *Terry* stop, he knew defendant was, in fact, armed and possibly dangerous and could have lawfully performed a *Terry* frisk. However, as explained above, the handgun was discovered during the *Terry* stop, prior to a

Terry frisk occurring. Regardless, whether recovered during the *Terry* stop or a *Terry* frisk, the handgun was recovered legally, and the trial court correctly denied defendant's motion to suppress.

¶ 31 In sum, for the reasons explained above, we conclude that the trial court did not err when it denied defendant's motion to quash arrest and suppress evidence.

¶ 32 For the reasons stated above, we affirm defendant's conviction.

¶ 33 Affirmed.