2019 IL App (1st) 162436-U

No. 1-16-2436

Order filed June 28, 2019

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. 14 CR 19007
	)	
ROSCOE ELY,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford concurred in the judgment.
Justice Hall dissented.

ORDER

¶ 1 *Held*: Where the police had reasonable suspicion to believe defendant was involved in criminal activity at the time they stopped his vehicle, the trial court properly denied defendant's motion to quash arrest and suppress evidence.

¶ 2 Following a bench trial, defendant Roscoe Ely was convicted of being an armed habitual criminal (AHC) (720 ILCS 5/24-1.7 (West 2014)) and sentenced to nine years in prison. On appeal, defendant contends that the trial court erred in denying his motion to quash arrest and

suppress evidence where the police stopped him "based solely on a tip that someone saw a person with a gun get into a red vehicle." For the reasons that follow, we affirm.[1]

¶ 3 Defendant's conviction arose from the events of October 14, 2014. Following his warrantless arrest, defendant was charged by information with one count of AHC, four counts of unlawful use of a weapon by a felon (UUWF), and two counts of aggravated unlawful use of a weapon (AUUW).

¶ 4 Defendant filed a motion to quash arrest and suppress evidence. In the motion, defendant asserted that "the conduct of the defendant prior to his arrest was not such as would reasonably be interpreted by the arresting officer(s) as constituting probable cause that defendant had committed or was about to commit a crime." One of the arresting officers and one passenger of defendant's vehicle testified at the hearing on the motion.

¶ 5 Chicago police officer Rogelio Ocon testified that shortly before 3:20 p.m. on the day in question, he and his partner, Officer John Valtierra, were on routine patrol on 43rd Street when they were flagged down near a mechanic's shop. The man who flagged them, Arturo Arroyo, was a tow truck driver. Arroyo had been "dropping off a vehicle or something like that" when he was approached by a man who was supposedly looking for somebody, and "that's when [Arroyo] saw the handgun." Arroyo told the officers "that a male black wearing dark clothing had a handgun" and "then went into a red Explorer and proceeded eastbound on 43rd Street."

¶ 6 Within minutes of receiving this information, Ocon saw "the car that the defendant was driving" in the direction Arroyo had pointed. The officers activated their lights and pursued the vehicle, which stopped. Defendant, whom Ocon identified in court, was the driver. There were

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

three passengers in defendant's vehicle, eating ribs or chicken. Ocon approached the vehicle's passenger side while Valtierra approached the driver's side. Valtierra ordered defendant to get out of the vehicle and put his hands up. Defendant got out of the vehicle, but was holding his midsection and complaining that the ribs he had eaten were hurting his stomach. When Valtierra repeated his command, defendant put his hands up. Valtierra then conducted a pat-down and found a gun in defendant's waistband. According to Ocon, defendant matched the description given by Arroyo.

¶ 7 Ocon acknowledged that he had not met Arroyo prior to being flagged down by him, did not know whether Arroyo was reliable or not, and did not know whether Arroyo had any animosity toward or a grudge against defendant. When asked by defense counsel whether Arroyo related where he saw the handgun, Ocon answered that Arroyo said defendant "was holding it." Ocon explained that when Arroyo pointed out the red Explorer, he and his partner "were following Mr. Arroyo's vehicle and he was pointing out to, you know, where this guy was driving." Ocon also acknowledged that he did not have an arrest warrant for defendant, and did not see defendant commit any crimes or traffic violations.

¶ 8 Dollinda Johnson, defendant's girlfriend, testified that around 3:30 p.m. on the day in question, she, defendant, and two other people were sitting in a parked vehicle near 4201 South Marshfield Avenue, which was near a McDonald's. They were eating and "waiting on a guy" who was supposed to come talk to defendant about a job. The police arrived and told everyone in the vehicle to put their hands where the police could see them. The police then took defendant out of the vehicle and searched him.

¶ 9 After the witnesses testified, defense counsel argued that the case presented a question of credibility and a question of the ability of police officers to stop a person they had not seen committing a crime. Counsel noted that the police were "going on some statement by somebody who they don't know, whose credibility they don't know." Counsel then argued that Arroyo was not credible but Johnson was, as her account of the vehicle being parked near McDonald's was corroborated by Ocon's testimony that all the passengers were eating at the time of the stop.

¶ 10 The trial court denied the motion to quash arrest and suppress evidence. In the course of doing so, the court stated that it found Ocon to be a credible and compelling witness, "much more so" than Johnson. The court also noted that the police had been flagged down by a common citizen, and stated that "[c]ommon citizens are presumptively reliable."

¶ 11 Prior to trial, the State nol-prossed all charges except for the count of AHC and one count of UUWF. The count of AHC alleged that defendant knowingly possessed a handgun after having been convicted of UUWF and burglary. The count of UUWF alleged that defendant knowingly possessed a firearm after having been previously convicted of UUWF.

¶ 12 At trial, Officer Ocon testified that around 3:25 p.m. on the date in question, he was on patrol with his partner, Officer Valtierra, when they were flagged down by a civilian, Arturo Arroyo, near 43rd Street and Western Avenue. After conversing with Arroyo, the officers proceeded eastbound on 43rd Street, looking for a red Ford Explorer. Within a couple of minutes, and about half of a mile from where they spoke with Arroyo, the officers spotted a red Ford Explorer and curbed it. The vehicle had four occupants. In court, Ocon identified defendant as the vehicle's driver. At the officers' direction, defendant got out of the vehicle. As defendant did so, he was holding his stomach. Valtierra performed a protective pat-down, during which he

recovered a handgun from defendant's waistband. Ocon inspected the handgun and determined it was loaded.

¶ 13 On cross-examination, defense counsel asked Ocon how he knew that the red Ford Explorer he stopped was the same one Arroyo had told him about. Ocon answered that when he and Valtierra initially spoke with Arroyo, Arroyo was on foot. But then the officers told Arroyo they would follow him, so Arroyo got into a car and the officers drove behind him. Arroyo "kept pointing like that was it" until the officers saw the red Ford Explorer.

¶ 14 The State entered into evidence certified copies of conviction reflecting that defendant had been convicted of UUWF in 1999 and burglary in 2004.

¶ 15 Defendant's motion for a directed finding was denied.

¶ 16 Dollinda Johnson testified that on the afternoon in question, she was with defendant and two other people, in a vehicle parked behind a McDonald's. While they were parked, a police car came up behind them. The police told defendant to get out of the driver's seat. They then directed Johnson and the other passengers first to put their hands on the dashboard, and then to get out of the vehicle. Next, the police searched the vehicle. Johnson did not see the police recover a handgun, either from the vehicle or from defendant. On cross-examination, Johnson stated that she did not see the police pat down defendant.

¶ 17 Defendant testified that on the date in question, he was eating in a two-door Ford Explorer, which was parked behind a McDonald's near 34th Street and Marshfield Avenue. As he and his passengers were eating, the police drove up, jumped out of a car with guns drawn, and came over to the Explorer. An officer opened the Explorer's driver's door, had defendant get out and put his hands on top of the Explorer, and searched him. According to defendant, the officer

did not find anything during this search. The officers directed defendant to step around to the front of the Explorer and put his hands on the hood. They then handcuffed defendant and walked him to a blue and white squad car, which was one of several police vehicles that had arrived on the scene. After defendant was placed in the squad car, the police had all of the Explorer's passengers get out of the Explorer and searched it. Defendant stated that the police told him later that they found a gun in the Explorer.

¶ 18 On cross-examination, defendant stated that he had never seen the gun before and denied that it was his gun. He also denied having had "an altercation" with Arroyo and denied having driven by 43rd Street and Western Avenue prior to his interaction with the police. Rather, he had driven "straight down Ashland."

¶ 19 In rebuttal, the State entered into evidence a certified copy of conviction reflecting that defendant had been convicted of possession of a stolen motor vehicle in 2008.

¶ 20 Following closing arguments, the trial court found defendant guilty of AHC and UUWF.

¶ 21 Defendant filed a motion for a new trial and two amended motions for a new trial. In the amended motions, defendant asserted, *inter alia*, that "the court erred in denying the defendant's motion to quash his arrest & suppress evidence" and that the court erred in denying the motion to quash arrest and suppress evidence "because the defendant has a right to face his accuser, but the person who told the police that defendant had a gun on his person was never called to testify." In presenting the amended motions, defense counsel argued orally that a defendant has the right to face his accuser. Counsel also argued that the police lacked probable cause to stop defendant's vehicle where they were acting on a tip but did not know whether the tipster was credible. The trial court denied the motion. The court subsequently merged the counts and sentenced defendant

to nine years in prison for the crime of AHC. Defendant's motion to reconsider sentence was denied.

¶ 22 On appeal, defendant contends that the trial court erred in denying his motion to quash arrest and suppress evidence where the police stopped him "based solely on a tip that someone saw a person with a gun get into a red vehicle." Noting that Officer Ocon admitted he did not know whether Arroyo was a reliable witness, defendant argues that a tip from a concerned citizen is not presumptively reliable, but rather, that corroboration or other verification of Arroyo's reliability was required. Defendant further asserts that because such corroboration must be of the witness's information on criminal activity and because mere possession of a firearm was not a crime on the date in question, the police lacked reasonable suspicion to suspect he was involved in criminal activity so as to justify a *Terry* stop. Defendant maintains that because the warrantless seizure was unjustified, the recovered gun should have been suppressed as fruit of the poisonous tree and his conviction should be reversed.

¶ 23 When reviewing a trial court's ruling on a motion to suppress, 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. However, the trial court's legal ruling on whether evidence should be suppressed is reviewed *de novo*. *Id.*

¶ 24 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. *Luedemann*, 222 Ill. 2d at 544. Here, the encounter at issue is a *Terry* stop.

¶ 25 In *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), the Supreme Court held that police officers may stop a person briefly for temporary questioning where the officer reasonably believes that the person has committed or is about to commit a crime. *Sorenson*, 196 Ill. 2d at 432; *People v. Sanders*, 2013 IL App (1st) 102696, ¶ 13. To justify making a *Terry* stop, a police officer must be able to point to specific and articulable facts which, combined with the rational inferences from those facts, reasonably warrant the intrusion. *People v. Thomas*, 198 Ill. 2d 103, 109 (2001). While the facts need not rise to the level of probable cause, a mere hunch is insufficient. *Thomas*, 198 Ill. 2d at 110. Whether a *Terry* stop is reasonable is determined by an objective standard, and the facts are viewed from the perspective of a reasonable officer at the time of the stop. *Sanders*, 2013 IL App (1st) 102696, ¶ 14. On appeal, a reviewing court must be mindful that the decision to make a *Terry* stop is a practical one based on the totality of the circumstances. *Id.*

¶ 26 A police officer may initiate a *Terry* stop based upon information received from a member of the public. *Sanders*, 2013 IL App (1st) 102696, ¶ 15. In general, information provided by a "concerned citizen" is considered more credible than information from a paid informant or a person who provided the information for personal gain. *Id.* In addition, when a citizen informant identifies himself or herself, and is thus subject to potential prosecution if the information was false, it lends great weight to the reliability of the information. *People v. Topor*,

2017 IL App (2d) 160119, ¶¶ 17, 19. However, even when a police officer receives information from an identified informant, some corroboration or other verification of the reliability of the information is required. *Sanders*, 2013 IL App (1st) 102696, ¶ 15. A tip that includes predictive information and readily observable details will be deemed more reliable if the details are confirmed or corroborated by the police. *Id.* In addition, the tip must be " 'reliable in its assertion of illegality.' " *People v. Henderson*, 2013 IL 114040, ¶ 26 (quoting *Florida v. J.L.*, 529 U.S. 266, 272 (2000)).

¶ 27 Here, Officer Ocon received information from an identifiable concerned citizen who was not a paid informant or someone who stood to gain personally from talking to the police. Arroyo flagged down Ocon and his partner as they drove by him, and related that he had been approached by a black man in dark clothing who was holding a gun and was supposedly looking for someone. After speaking with Arroyo, the man got into a red Ford Explorer and drove eastbound on 43rd Street. Acting on this tip, Ocon and his partner followed Arroyo's car as Arroyo drove in the given direction and pointed out the vehicle he had seen the man drive off in. When the officers promptly curbed the vehicle, Ocon saw that it was a red Ford Explorer, and also saw that its driver, that is, defendant, matched the physical description given by Arroyo. Thus, the details provided by Arroyo, an identified concerned citizen, were confirmed and corroborated by the officers' observations. As such, we agree with the State that Arroyo's information sufficiently established defendant had been openly carrying a fully exposed gun on a public street. We disagree with defendant's position that the record "is not clear if the gun was still holstered while [defendant] had [his] hand on it."

¶ 28 Having determined that Arroyo's tip was reliable in its predictive information and readily observable details, the question becomes whether it was reliable in its assertion of illegality. Defendant argues that the tip failed to provide reasonable suspicion of criminal behavior, as "simply possessing a firearm was not a crime when [defendant] was stopped." Citing *People v. Aguilar*, 2013 IL 112116, ¶¶ 16-22, he asserts that "[s]ince at least 2013, Illinois law has clearly recognized that a categorical ban on carrying ready-to-use guns outside the home violates the Second Amendment." We reject defendant's position.

¶ 29 First, we note that defendant never argued to the trial court that the conduct described by Arroyo did not constitute criminal activity. He did not raise the issue in his motion to quash arrest and suppress evidence, at the hearing on that motion, in his initial or amended posttrial motions, or when arguing his posttrial motions. As such, the trial court did not have the opportunity to address the *Aguilar* issue. Because defendant failed to raise the issue in the trial court, he has forfeited it. See *People v. McCarty*, 223 Ill. 2d 109, 141-42 (2006) (where the defendants did not challenge the breadth and lack of particularity of warrants in their motions to suppress or at their consolidated suppression hearing, the trial court did not consider the arguments and the issues were forfeited for appeal); *People v. Jaynes*, 2014 IL App (5th) 120048, ¶¶ 37-38 (issue of staleness of warrant was forfeited where the defendant did not raise the claim either in his motion to suppress or in his posttrial motion).

¶ 30 Second, even if defendant did not forfeit the issue, it would fail. In *Aguilar*, 2013 IL 112116, ¶ 21, our supreme court held that the portion of the AUUW statute that categorically prohibited the possession and use of an operable firearm for self-defense outside the home violated the second amendment. However, the *Aguilar* court further held that the second

amendment right to keep and bear arms outside the home is not unlimited and is "subject to meaningful regulation." *Id.* ¶ 21. In Illinois, meaningful regulation includes laws such as the UUWF statute, which prohibits felons from possessing firearms. 720 ILCS 5/24-1.1(a) (West 2014). Other regulations include the requirement that, in order to possess a handgun, a person must carry a Firearm Owner's Identification (FOID) card issued to him or her by the state police. 430 ILCS 65/2 (West 2014). If a person has a valid FOID card, the Firearm Concealed Carry Act (Act) allows him or her to carry a concealed firearm. 430 ILCS 66/10, 25(2) (West 2014). The Act defines a concealed firearm as one that is "completely or mostly concealed," and specifies that a concealed carry license permits the carrying of a "fully concealed or partially concealed" firearm. *Id.* §§ 5, 10(c)(1). "As a result, the [Act] implicitly prohibits individuals from carrying *fully exposed* handguns in view of the public." (Emphasis in original.) *People v. Thomas*, 2019 IL App (1st) 170474, ¶ 37.

¶ 31 Here, Arroyo related to the police that he was approached by a man who was holding a gun and who thereafter got into a vehicle and drove off. Given this tip, the facts available to the police at the time of the stop supported a reasonable suspicion that, in violation of the Act, defendant was carrying a fully exposed handgun in view of the public. See *Thomas*, 2019 IL App (1st) 170474, ¶ 34 (where the defendant was seen handing a gun to another person in the common area of an apartment building that was not his land or home, the facts indicated a probability that he had violated the Act by exposing his gun in a semi-public place). For all these reasons, Arroyo's tip was reliable in its assertion of illegality. Accordingly, were it not forfeited, defendant's *Aguilar*-based argument would fail.

¶ 32 In summary, we find that the police conducted a proper *Terry* stop, which resulted in the discovery of a firearm. As such, the trial court did not err in denying defendant's motion to quash arrest and suppress evidence.

¶ 33 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 34 Affirmed.

¶ 35 JUSTICE HALL, dissenting:

¶ 36 I respectfully disagree with the majority's holding in this case.

¶ 37 In reviewing a trial court's ruling on a motion to suppress, we accept the court's findings of fact unless they are against the manifest weight of the evidence, but review its ultimate ruling as to whether suppression is warranted *de novo*. *People v. Rhinehart*, 2011 IL App (1st) 100683, ¶ 9, citing *People v. Harris*, 228 Ill. 2d 222, 230 (2008).

¶ 38 The fourth amendment applies to all seizures of a person. *People v.* Bailey, 314 Ill. App. 3d 1059, 1063 (2000). 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.' " *Florida v. Bostick*, 501 U.S. 429, 434 (1991), quoting *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968). An individual cannot be seized absent reasonable, objective grounds for doing so. *United States v. Mendenhall*, 446 U.S. 544, 556 (1980); *People v. Gherna*, 203 Ill. 2d 165, 186 (2003). In *Terry v. Ohio*, 392 U.S. 1, 29-31 (1968), the United States Supreme Court held that a police officer "may, within the parameters of the fourth amendment, conduct a brief, investigatory stop of a citizen when the officer has a reasonable, articulable, suspicion of criminal activity." A *Terry*, analysis involves a dual inquiry: (1) whether the officer's action was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances

that justified the interference in the first place. *People v. Parra*, 352 Ill. App. 3d 584, 587 (2004), citing *People v. Gonzalez*, 204 Ill. 2d 220, 228 (2003). While reasonable suspicion is a less demanding standard than probable cause, the fourth amendment requires at least a minimal level of objective justification for making the stop. *Rhinehart*, 2011 IL App (1st) 100683, ¶ 11; citing *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

¶ 39 A *Terry* stop may be initiated based on information received from a member of the public. *People v. Sanders*, 2013 IL App (1st) 1026956, ¶ 15. In *Florida v. J.L.*, 529 U.S. 266, 268 (2000), the Supreme Court held that an anonymous telephone tip that a young black man standing at a particular bus stop and wearing a plaid shirt was carrying a gun was not sufficiently reliable to justify a *Terry* stop. Here, the informant provided the tip in person, which allowed the officer to speak to him and develop an initial impression of his credibility. See *Rhineheart*, 2011 IL App (1st) 100683, ¶ 14. However, to justify a *Terry* stop, the State must point to specific, articulable facts that give rise to the officer's reasonable suspicion of criminal activity. *Rhineheart*, 2011 IL App (1st) 100683, ¶ 14 (citing *People v. Payne*, 393 Ill. App. 3d 175, 180 (2009)). As we noted in *Rhineheart*, as an example, the officer could have relied on his observations of defendant's behavior to justify the *Terry* stop if he had seen defendant attempt to conceal an object or act in some other way that aroused suspicion of criminal activity. *Rhineheart*, 2011 IL App (1st) 100683, ¶ 14. See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975). Further, we noted in *Rhineheart* that the officer could have also relied on the tip to justify the *Terry* stop if the informant had accurately predicted defendant's behavior or explained how she knew of his criminal behavior, or if the informant's name and address had been obtained so that she could have been held accountable if the information had been

fabricated. *Rhineheart*, 2011 IL App (1st) 100683, ¶ 14; *J.L.*, 529 U.S. at 270-71. The informant in this case provided a general description of a black man in dark clothing driving a red vehicle. Here, as in *Rhineheart*, the State has not presented evidence explaining the reasons the officer considered the information reliable.

¶ 40 I believe this to be an invalid *Terry* stop. The informant told police that a black man in dark clothing driving a red vehicle had a gun. I would find that this, standing alone, did not give the police reasonable suspicion of any criminal activity by defendant; as our supreme court noted in *People v. Aguilar*, 2013 IL 112116, *People v. Burns*, 2015 IL 117387 and *People v. Mosley*, 2015 IL 115872, it is not unlawful for a person to carry a firearm in their vehicles, outside the home or on a public way. Additionally, those cases concluded that the subsections of the aggravated unlawful use of a weapon statute that prohibited persons from carrying uncased firearms in vehicles, outside of the home, or on a public way violated the second amendment right to bear arms on its face. See *Aguilar*, 2013 IL 112116, ¶ 22; *Burns*, 2015 IL 117387, ¶ 32; *Mosley*, 2015 IL 115872, ¶ 61. Once defendant was ordered out of his vehicle and to put his hands up, he was seized within the meaning of the fourth amendment without reasonable justification, and subsequently subjected to an illegal search. As such, I would find that this was an invalid *Terry* stop as it is not unlawful to carry a gun without more.

¶ 41 I would reverse the decision of the trial court and grant defendant's motion to suppress.