

SUPREME COURT OF ILLINOIS

Springfield, Illinois, October 3, 2013

THE FOLLOWING CASE ON THE REHEARING DOCKET WAS DISPOSED OF AS INDICATED:

No. 111835 - People State of Illinois, appellant, v. Michael Colyar, appellee.

Appeal, Appellate Court, First District.

Petition for rehearing denied.

Burke, J., dissenting upon denial of rehearing.

Dissent attached.

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

(Docket No. 111835)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v.
MICHAEL COLYAR, Appellee.

Opinion filed April 18, 2013.

CHIEF JUSTICE KILBRIDE delivered the judgment of the court, with opinion.

Justices Garman, Karmeier, and Theis concurred in the judgment and opinion.

Justice Thomas specially concurred, with opinion.

Justice Burke dissented, with opinion, joined by Justice Freeman, and dissented upon denial of rehearing, with opinion.

Dissenting Opinion Upon Denial of Rehearing

¶ 124

JUSTICE BURKE, dissenting:

¶ 125

As I noted in my previous dissent, the validity of a stop and frisk is “constitutionally permissible if two conditions are met. First, the investigatory stop must be lawful. That requirement is met in an on-the-street encounter, *Terry* determined, when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.” *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009). In this case, defendant argued in his brief that the officers’ actions amounted to an “unlawful seizure,” that the officers “could not reasonably believe a crime was being committed,” and that “*Terry* does not support the officers’ conduct because the surrounding circumstances in this case were ‘absolutely benign.’” *Supra* ¶¶ 29, 30, 56. Thus, defendant clearly maintained that the factual circumstances did not amount to reasonable suspicion of criminal

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activity pursuant to *Terry* and, thus, did not justify his initial stop or seizure.

¶ 126 The majority, however, ignored defendant's argument regarding the illegality of his seizure. Instead, they accepted a "concession" made by defense counsel during oral arguments when he offered contradictory answers in response to a question from the bench. Counsel first stated that the officers could, under *Terry*, order defendant from his car. Immediately afterward, counsel argued that the police could only "ask" defendant out of the car and perform a "*Terry*-like inquiry." Counsel later responded "yes" when a justice asked whether officers had a right to a pat-down search under *Terry*. This court did not ask defense counsel to clarify his position or to address whether defendant intended to abandon the position argued in his brief.

¶ 127 As my dissent stated, my view is that it was inappropriate for this court to take counsel's conflicting statements made to the bench as a binding concession on an issue of law. Moreover, the majority's decision failed to recognize defense counsel's many statements during oral arguments that there was "no criminal activity" in this case and "nothing that would give rise to suspicion of any criminal activity." The majority erroneously accepted as valid only those statements which appeared to concede the legality of the seizure, while ignoring the many statements establishing that the officers lacked a reasonable suspicion of criminal activity which would warrant the seizure.

¶ 128 Defendant now clarifies in his petition for rehearing that he had no intention of conceding the legality of his seizure. Rather, he asserts that he has "consistently maintained that the factual situation did *not* give rise to being characterized as a *Terry* stop." (Emphasis added.) Defendant states that, during oral arguments, his counsel's intent was to present an alternative argument in the event that the court upheld the application of *Terry* to this case. The alternative argument counsel meant to pose to the court was that, even if *Terry* applied, the "conduct of the officers far exceeded what was reasonable under the circumstances." Defendant further reiterates in his petition the argument presented in his brief that the surrounding circumstances did not justify the officers' seizure under *Terry*.

¶ 129 I believe that it is improper for this court to avoid reaching an issue of law based on a concession that defendant clearly never intended to make. Because the rehearing stage is defendant's first

opportunity to address the court's finding that he conceded a crucial point of law, I would allow rehearing to address defendant's argument that the initial seizure of his person was illegal under *Terry*.