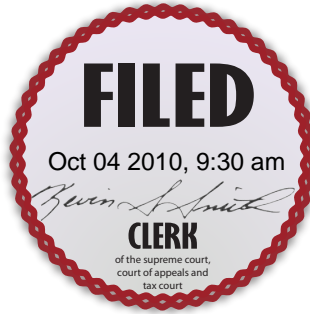


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**IN THE
COURT OF APPEALS OF INDIANA**

JAMIE KEYS,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-1002-CR-101
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Israel N. Cruz, Commissioner
Cause No. 49F10-0910-CM-91709

October 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jamie Keys appeals his conviction for Class A misdemeanor carrying a handgun without a license. He contends that because the police officers did not have reasonable suspicion to stop him, the trial court erred in admitting the handgun found on his person. Without the gun, he argues that the evidence is insufficient to support his conviction. We conclude that the officers had reasonable suspicion to conduct an investigatory stop of Keys and to pat him down. Therefore, the trial court properly admitted the handgun found on his person. We affirm his conviction.

Facts and Procedural History

Indianapolis Metropolitan Police Department officers were completing an unrelated investigation at an apartment complex on the east side of Indianapolis when they heard a loud argument between a male, later identified as Keys, and a female in front of a nearby apartment door. As Officer Jerry Torres looked toward the noise, he saw Keys move quickly away from the female and around the corner of the apartment building. The female, who was “very upset,” “excited,” and “angry,” yelled loudly, “he ha[s] a gun, he ha[s] a gun.” Tr. p. 52. Officer Torres approached the female and briefly spoke with her. The female told Officer Torres that “if [Keys] didn’t return her phone, she was going to tell the police he had a gun[.]” *Id.* at 58. Officer Torres and his partner, Officer John Burger, then chased Keys. Officer Torres followed Keys behind the building while Officer Burger went in front of the building. About one minute later, IMPD officers located Keys one block away on 42nd Street. Keys was “acting real nervous” and “wouldn’t take his hands out of his pockets.” *Id.* at 11. Keys was already

on the ground being placed in handcuffs by a third officer when Officers Torres and Burger arrived on the scene. While Officer Burger patted Keys down for officer safety and the safety of others, *id.* at 62, Officer Torres asked Keys if he had a gun, to which Keys responded affirmatively, *id.* at 55. Officer Burger recovered a gun from Keys' right front jacket pocket.

The State charged Keys with Class A misdemeanor carrying a handgun without a license. Ind. Code §§ 35-47-2-1, -23. A bench trial was held. Officers Torres and Burger, but not the female, testified for the State. Keys testified in his own defense. In the middle of trial, Keys moved to suppress the handgun on grounds that the officers did not have reasonable suspicion to stop him. *See* Tr. p. 13 (“we’d move to suppress the evidence that’s been seized as a result of this illegal seizure”), 43 (“They don’t have a valid reason to come into contact with the defendant. They would if it was a consensual encounter, and they wanted to place him in cuffs for officer safety on that account. But that’s not what we have here. We have the full fledged investigatory stop . . .”). As part of Keys’ argument, he asserted that the officers’ testimony that the female yelled “he has a gun” could not be used to establish that they had reasonable suspicion because it constituted hearsay and did not qualify as an excited utterance. Following a lengthy hearing on the motion to suppress, *see id.* at 11-51, the trial court determined that the officers had reasonable suspicion and denied Keys’ motion to suppress. The trial resumed with the court finding Keys guilty as charged. Keys now appeals his conviction.

Discussion and Decision

We first note that it is difficult to decipher the issue that Keys actually raises on appeal. Nevertheless, after examining the various concepts that Keys discusses in his brief coupled with the fact that he appeals following a completed trial, we construe his argument to be that because the police officers did not have reasonable suspicion to stop him, the trial court erred in admitting the handgun found on his person. Without the gun, the evidence is insufficient to support his conviction.

The United States Supreme Court has declared that the Fourth Amendment's "protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *Terry v. Ohio*, 392 U.S. 1, 9 (1968)). Under *Terry*, "an officer is permitted to stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks probable cause." *Armfield v. State*, 918 N.E.2d 316, 319 (Ind. 2009) (quotations omitted); *see also United States v. Cortez*, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."). In addition, *Terry* permits an officer "to conduct a limited search of the individual's outer clothing for weapons if the officer reasonably believes the individual is armed and dangerous." *Willis v. State*, 907 N.E.2d 541, 547 (Ind. Ct. App. 2009).

Officers are not required to rule out all possibility of innocent behavior before initiating a stop. *United States v. Holland*, 510 F.2d 453, 455 (9th Cir. 1975). "The

possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct.” 4 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 9.5(b) (4th ed. 2004) (quoting *In re Tony C.*, 21 Cal. 3d 888, 148 Cal. Rptr. 366, 582 P.2d 957, 960 (1978)).

We review trial court determinations of reasonable suspicion de novo. *Armfield*, 918 N.E.2d at 319. Reviewing courts make reasonable suspicion determinations by looking to the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. *Id.*

Here, the totality of the circumstances shows that while investigating an unrelated matter, the officers’ attention was drawn to Keys and the female, who were arguing in front of an apartment door. The female was very upset, excited, and angry. When Keys quickly departed, the female yelled loudly to the officers, “he ha[s] a gun, he ha[s] a gun.” Tr. p. 52. When Officer Torres approached the female, she said that Keys had her cell phone. Officers Torres and Burger then chased Keys. When Keys was apprehended one block away, he acted nervously and did not take his hands out of his pockets. A third officer handcuffed him. Believing Keys had a gun, Officer Burger patted him down for officer safety and the safety of others. Officer Torres asked Keys if he had a gun, and he said yes. Officer Burger then recovered a gun from Keys’ right front jacket pocket.

Keys argues on appeal that we cannot consider the officers’ testimony that the female yelled that Keys had a gun to establish reasonable suspicion because it constitutes hearsay and does not meet an exception, specifically, an excited utterance pursuant to Indiana Evidence Rule 803(2). First, we note that the female’s statement is not hearsay

because it was not offered for the truth of the matter asserted. *See* Ind. Evidence Rule 801(c). That is, her statement was not offered to prove that Keys in fact had a gun. Rather, it was offered for the purpose of determining whether the officers had reasonable suspicion to stop Keys in the first instance. Second, we point out that reasonable suspicion may be based in whole or in part on hearsay or even hearsay upon hearsay. 4 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 9.5 (Supp. 2010). Therefore, we can use the fact that the female yelled that Keys had a gun as part of the totality of the circumstances to establish reasonable suspicion. And based on the totality of the circumstances, we conclude that the officers had reasonable suspicion to stop Keys and believed he was armed and dangerous; therefore, they properly stopped and patted him down. Because the gun was properly recovered from Keys, the trial court did not abuse its discretion in admitting it into evidence. The evidence therefore supports Keys' conviction for Class A misdemeanor carrying a handgun without a license.

Affirmed.

MAY, J., and ROBB, J., concur.