# In the Missouri Court of Appeals
# Eastern District
## DIVISION FOUR

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| STATE OF MISSOURI, | ) | No. ED95468 |
| | ) | |
| Respondent, | ) | Appeal from the Circuit Court of |
| | ) | the City of St. Louis |
| vs. | ) | |
| | ) | Honorable Donald L. McCullin |
| ELTON J. NORFOLK, | ) | |
| | ) | |
| Appellant. | ) | Filed: November 15, 2011 |

Elton Norfolk (hereinafter, "Norfolk") appeals from the trial court's judgment finding him guilty of one count of unlawful use of a weapon, Section 571.030 RSMo (2000),[1] and one count of possession of a controlled substance, Section 195.202, after a bench trial. The trial court sentenced Norfolk to concurrent terms of three years' imprisonment on the unlawful use of a weapon charge and one year in jail on the possession charge, suspending the execution of his sentences. Norfolk raises one point on appeal, arguing the trial court clearly erred in overruling his motion to suppress and his objections to the admission of evidence seized during the search because the police officer lacked reasonable suspicion to detain him. We affirm.

On August 19, 2009, Officer Julie Reynolds (hereinafter, "Officer Reynolds") was on routine patrol in a marked police car near the 3900 block of Lexington and Vandeventer in the City of St. Louis. Officer Reynolds was patrolling that particular area

[1] All statutory references are to RSMo (2000) unless otherwise indicated.

because there had been several armed robberies there in the past. While traveling southbound on Vandeventer, Officer Reynolds observed a black male, later identified as Norfolk, standing alone on the corner. After making eye contact with Norfolk, Officer Reynolds stated he adjusted his pants in a manner which she believed he was concealing a weapon, but no bulge or weapon was visible to her. After observing this adjustment, Officer Reynolds turned her patrol car around and parked in front of a convenience store.

As Officer Reynolds exited the vehicle, Norfolk walked into the store. Officer Reynolds followed Norfolk into the store, approached him, and asked, "Will you come outside and speak with me?" to which Norfolk replied, "F--- you. I don't need to speak to you." Officer Reynolds told Norfolk, "If you're not doing anything wrong, then you'll come outside and you'll speak to me." They both exited the store. Officer Reynolds told Norfolk to turn around and place his hands on the wall of the store so that she could check him for weapons; Norfolk complied. While raising his arms, his shirt came up, and the butt of a gun became visible. Officer Reynolds put her hand against the back of Norfolk's head and called for assistance. Norfolk was arrested. While conducting a search incident to arrest, Officer Reynolds retrieved the gun she saw in Norfolk's waistband, a magazine, live cartridges, and marijuana.

Norfolk was charged with one count of unlawful use of a weapon, one count of possession of a controlled substance under thirty-five grams, and third degree assault of a law enforcement officer.[2] Norfolk filed a motion to suppress all of the items seized, arguing the search was unlawful because it was conducted pursuant to an illegal stop. The trial court denied Norfolk's motion to suppress after a hearing.

[2] Norfolk was acquitted on the assault charge. The evidence adduced relating to that charge has been omitted from our discussion because it is not relevant to the point raised on appeal.

Norfolk waived his right to a jury trial pursuant to Rule 27.01 and requested a bench trial, where Officer Reynolds and Norfolk testified. Norfolk testified Officer Reynolds approached him while he was inside the convenience store, had a taser gun in her hand, and ordered him to go outside and stand up against the wall for a search. Norfolk admitted on cross-examination that he possessed the items that were seized. The trial court found Norfolk guilty of unlawful use of a weapon and possession of a controlled substance. This appeal follows.

In his sole point on appeal, Norfolk argues the trial court clearly erred in overruling his motion to suppress and overruling his objections to the admission of evidence seized during the search because Officer Reynolds lacked reasonable suspicion to detain him. Norfolk claims any evidence obtained during the illegal search is fruit of the poisonous tree and should have been excluded at trial.

When reviewing a trial court's ruling on a motion to suppress, we must determine whether the decision is supported by substantial evidence. State v. Waldrup, 331 S.W.3d 668, 672 (Mo. banc 2011); State v. Dienstbach, 313 S.W.3d 201, 203 (Mo. App. E.D. 2010). We will consider all evidence and reasonable inferences therefrom in the light most favorable to the trial court's ruling. Id. We defer to the trial court's factual findings and credibility determinations. State v. Sund, 215 S.W.3d 719, 723 (Mo. banc 2007); State v. Dixon, 332 S.W.3d 214, 217 (Mo. App. E.D. 2010). We will reverse a trial court's ruling on a motion to suppress only if the decision is clearly erroneous and leaves us with a definite and firm impression that a mistake has been made. Dienstbach, 313 S.W.3d at 204.

The Fourth Amendment to the United States Constitution preserves the right of citizens to be free from unreasonable searches and seizures. U.S. Const. Amend. IV. Generally, a search or seizure is only permissible if there is probable cause to believe a person has committed or is committing a crime. Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225, 13 L.Ed.2d 142 (1964). For Fourth Amendment purposes, a "seizure" occurs "whenever a police officer accosts an individual and restrains his freedom to walk away." Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). Not all "personal intercourse" between the police and individuals involves "seizures" of persons. Id. at 19 n.16. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Id. In other words, "[a] seizure occurs when the totality of the circumstances surrounding the incident indicates that 'a reasonable person would have believed that he was not free to leave.'" Sund, 215 S.W.3d at 723.

As a general rule, warrantless seizures are unreasonable and unconstitutional. State v. Pike, 162 S.W.3d 464, 472 (Mo. banc 2005). However, the United States Supreme Court has held that the Fourth Amendment allows a brief investigative detention if the officer has a reasonable suspicion, based on specific and articulable facts that illegal activity has occurred or is occurring. Terry, 392 U.S. at 21; Pike, *supra*. In determining whether the seizure and search were unreasonable, a court must determine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20. "In evaluating reasonable suspicion, courts must 'determine if the content of the information possessed by the police and its degree of reliability is

sufficient to create a 'reasonable suspicion' of criminal activity.'" State v. Grayson, 336 S.W.3d 138, 143 (Mo. banc 2011)(*quoting* State v. Berry, 54 S.W.3d 668, 673 (Mo. App. E.D. 2001)). "[W]e are mindful that police officers are permitted to make use of all of the information available to them" when forming a particularized and objective basis for suspecting criminal activity. State v. Johnson, 316 S.W.3d 390, 396 (Mo. App. W.D. 2010). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" State v. Hawkins, 137 S.W.3d 549, 558-59 (Mo. App. W.D. 2004)(*quoting* United States v. Arvizu, 534 U.S. 266, 273, 122 S. Ct. 744, 750-51, 151 L.Ed.2d 740 (2002)). Whether the facts amount to reasonable suspicion is a question of law that we review *de novo*. State v. Goff, 129 S.W.3d 857, 862 (Mo. banc 2004).

Officer Reynolds testified at the suppression hearing that her basis for approaching Norfolk was that she observed him grab the top of his waistband from the back and "adjust[] his pants in a manner which I believed he was concealing a weapon." When asked to differentiate between one merely pulling up his pants and doing so in such a way as to conceal a weapon, Officer Reynolds testified, "When they adjust their pants, they adjust in the front. They don't adjust in the back. That's what I commonly see."

Norfolk urges us to follow the holding in State v. Gabbert, 213 S.W.3d 713 (Mo. App. W.D. 2007) to overturn his conviction. In Gabbert, several police officers were called to assist other officers in a drug investigation and "well-being check" after the mother of a female juvenile reported her daughter fled their home to another residence after discovering drugs in her daughter's purse. Id. at 716. After arriving at the

residence, as a police officer approached the front door, another officer informed him that someone inside the residence had gone out the back door. The officer proceeded to the rear of the house where he observed Gabbert leaning against the outside of the house with his hands in his pocket. The police officer ordered Gabbert to remove his hands from his pockets and he complied. Then the officer asked Gabbert to consent to a pat down search. Gabbert consented, turned around, and put his hands on the house without being asked to do so. The officer recovered a knife from the inside of Gabbert's sock, which was not discovered during the initial pat down search. Gabbert was charged with unlawful use of a weapon and filed a motion to suppress all evidence and statements made as a result of the stop. The trial court granted Gabbert's motion, and the State filed an interlocutory appeal. The Western District affirmed the trial court's ruling, finding the police officer failed to articulate any reasonable grounds for detaining Gabbert. Id. at 719.

Norfolk's reliance on Gabbert is misplaced. While we find Gabbert instructive because the officer had more indicia of reasonable suspicion than demonstrated here, and the Western District held it did not rise to the level to justify a Terry stop, the facts are distinguishable. Specifically, the officer was responding to the residence as part of an active investigation and there was credible evidence that someone left the residence upon his arrival, creating a fluid situation to which the officer had to respond. The officer found Gabbert behind the house, but admitted Gabbert was not fleeing, there was nothing to indicate criminal activity, and there was no risk of danger to or from any person inside or outside of the home. Id. Moreover, Gabbert consented to the pat down search, although this was insufficient to purge the illegality of the initial stop. Id. at 719-20.

The State argues this case is similar to United States v. Maher, 145 F.3d 907 (7th Cir. 1998). In Maher, the defendant was convicted of possessing a firearm as a convicted felon pursuant to federal law. Id. at 908. The defendant argued on appeal that the district court erred in denying his motion to suppress evidence because the police officer had no reasonable suspicion to detain him on the street, ask investigatory questions, and seize him. The Seventh Circuit upheld the conviction, finding the police officer had a reasonable suspicion the defendant "had been, was, or was about to engage in criminal activity." Id. at 909. Specifically, the court pointed to the officer's testimony that: (1) he had been dispatched to investigate gunshots that had just been fired; (2) the defendant seemed nervous and was "clutching" his front pants pocket as he approached the patrol car; and (3) when he asked to perform a pat down search, the defendant fled the scene. Id.

Here, the State claims the present case is similar to Maher in that Officer Reynolds was patrolling an area known for criminal activity, Norfolk shifted his pants in a manner that, based on her experience, indicated he was concealing a weapon, and that when she asked if she could speak with him, he refused with an expletive and started to walk away. When taking these circumstances together, the State argues Officer Reynolds had reasonable suspicion to believe criminal activity was afoot. We disagree, finding the facts of Maher readily distinguishable. First, the officer in Maher was responding to a call based upon immediate gunshots, unlike Officer Reynolds who was on routine patrol. Second, the officer in Maher indicated the defendant was nervous and clutching at his pants pocket while being questioned. There was no evidence presented that Norfolk was nervous or that he was clutching anything in his pants pockets. Third, it is evident

Norfolk did not wish to speak to Officer Reynolds, unlike the defendant in Maher who voluntarily spoke to police. Finally, the defendant in Maher fled when asked if he would consent to a pat down search. There was no evidence Norfolk attempted to evade Officer Reynolds. To the contrary, the record shows Norfolk complied with her orders to turn around and stand against the wall for the pat down search.

Finding no Missouri case factually on point, our research revealed United States v. Jones, 606 F.3d 964 (8th Cir. 2010). In Jones, the police officer was on routine patrol in a high crime area when he saw the defendant walking across a church parking lot wearing a long-sleeved hooded sweatshirt and "clutching the front area of his hoodie pocket with his right hand." Id. at 965. The defendant watched the marked police car drive by and continued to walk across the parking lot, clutching his sweatshirt pocket. The police officer decided to stop and frisk the defendant because he was trained to look for clues that an individual is carrying a firearm and the defendant's action of clutching his sweatshirt against his body aroused his suspicion. The defendant stopped walking when the police cruiser approached him. The police officer exited the vehicle, told the defendant to place his hands behind his back, and conducted a pat down search for weapons. The search uncovered a 9-millimeter handgun and a loaded magazine clip. The defendant moved to suppress the seized firearm and ammunition, arguing the police officer lacked reasonable suspicion to stop and frisk him. The district court granted the motion. The government filed an interlocutory appeal, which was affirmed by the Eighth Circuit.

The Eighth Circuit recognized the police officer's testimony that in his four years as a cruiser officer, he stopped ten other individuals walking in a manner similar to the

defendant and each one was found to be carrying a firearm. Id. at 966. However, the court found the police officer did nothing more than articulate a suspicion that the defendant was carrying a gun, while admitting on cross-examination that he was unable to see the size or shape of whatever was being clutched in the sweatshirt pocket, and the defendant exhibited none of the other clues the officer had been trained to observe when looking for concealed weapons. Id. at 966-67. The court further faulted the government for failing to clarify whether the other ten individuals stopped also exhibited only the clutching observed here. Id. at 967. The Eighth Circuit dismissed the other "suspicious" circumstances -- that the defendant was walking in a high crime area on a sunny day with a sweatshirt on while watching a police cruiser drive by -- as those which "were shared by countless, wholly innocent persons" and which added nothing to explain the defendant's clutching of *something* in his sweatshirt pocket. Id. at 967. The court acknowledged "the need to credit law enforcement officers who draw on their experience and specialized training" but concluded that "too many people fit this description for it to justify a reasonable suspicion of criminal activity." Id. (citations omitted). Finally, the court found that while the defendant made an admission regarding the gun after he was arrested, thus confirming the police officer's instincts and eliminating a serious risk to public safety, the search nonetheless violated the defendant's Fourth Amendment rights. Id. at 968.

Recognizing the holding in Jones is not binding on this Court, we find Jones persuasive given its strikingly similar factual pattern and legal analysis. As in Jones, Officer Reynolds was on routine patrol in a high crime area and made eye contact with Norfolk, while observing him engaging in activity that could be "shared by countless,

wholly innocent persons", namely pulling up his pants from behind. Like the officer in Jones, Officer Reynolds testified about her past experience, stating, "In the past of every weapons arrest I've been assisting or been on, a lot of individuals that carry weapons happen to adjust the weapon for some reason when the police come. I don't know if it's a subconscious thing they check it. So I believe the way he adjusted his pants was not in a manner to pull his pants up, as if he was checking to see if a weapon or the item that he had was still there." However, the State failed to flesh out how many previous weapons arrests Officer Reynolds had engaged in and whether the individuals stopped only pulled up their pants in a way to suggest concealing a weapon with nothing more before being detained. The record is clear Officer Reynolds did not see any bulge or shape of a gun before searching Norfolk, she had no knowledge of Norfolk engaging in any criminal activity, and there was no immediate crime reported in the area, all similar to Jones. Moreover, she acknowledged she had been on the police force only two years and conceded Norfolk could have been merely pulling up his pants at the time she observed him.[3]

Therefore, based on the totality of the circumstances and viewing the facts *de novo*, we find the evidence failed to support a finding that Officer Reynolds articulated a

[3] Chief Judge Loken concurred with the majority in Jones, but focused on a narrower issue: "whether anyone reasonably *suspected* of having a firearm in his or her pocket or purse may be forcibly stopped and searched when the police have no particularized reason to suspect that the person is *unlawfully* carrying a weapon", particularly in a state which permits its citizenry to lawfully carry a concealed weapon. Id. at 968. Chief Judge Loken believed because the government failed to offer any evidence the police officer had reasonable suspicion the defendant lacked a valid permit, it also failed to prove a valid stop to enforce Nebraska's concealed carry law. Id. at 969. We note this concurrence because Norfolk's defense counsel raised a similar argument at the motion to suppress hearing. Defense counsel noted citizens may lawfully carry and conceal weapons in Missouri and questioned Officer Reynolds about these statutory requirements. Officer Reynolds testified she did not know how old Norfolk was at the time of the arrest, and she never questioned whether he had a permit to carry a concealed weapon pursuant to Missouri law. While this issue was not raised on appeal, and we need not resolve it here, we find it provides another parallel to the legal analysis in Jones.

reasonable suspicion that criminal activity was afoot when she seized Norfolk coming out of the convenience store and searched him. As such, the search violated Norfolk's Fourth Amendment rights. As a general rule, "all evidence obtained by searches and seizures in violation of the Constitution is ... inadmissible in state court." State v. Grayson, 336 S.W.3d 138, 146 (Mo. banc 2011)(*quoting* Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961)). The exclusionary rule also requires excluding the "'fruit of the poisonous tree,' that is, 'evidence discovered and later found to be derivative of a Fourth Amendment violation.'" Grayson, 336 S.W.3d at 147 (*quoting* State v. Miller, 894 S.W.2d 649, 654 (Mo. banc 1995)).

The State argues on appeal that Norfolk suffered no prejudice by the admission of this evidence because there was overwhelming evidence of his guilt. Specifically, the State cites Officer Reynolds' testimony regarding the items she seized during the search and Norfolk's admission on cross-examination that he possessed the items seized. Norfolk disagrees, arguing were it not for Officer Reynolds illegal search, she could not have witnessed or testified about the seized items. As such, Norfolk believes all evidence that is derivative of the illegal search should have been suppressed as fruit of the poisonous tree, and without that evidence, there was insufficient evidence to support the convictions.

Not all constitutional errors require reversal of criminal convictions. State v. Storey, 986 S.W.2d 462, 466 (Mo. banc 1999). "[W]e have repeatedly affirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." State v. Pate, 859 S.W.2d 867, 870 (Mo. App. S.D.

1993)(*quoting* Rose v. Clark, 478 U.S. 570, 576, 106 S. Ct. 3101, 3105, 92 L.Ed.2d 460 (1986)). A constitutional error is harmless when no reasonable doubt exists that the admitted evidence did not contribute to the verdict obtained. State v. Hill, 247 S.W.3d 34, 41-42 (Mo. App. E.D. 2008).

While we believe the trial court clearly erred in denying Norfolk's motion to suppress, we find this error was harmless beyond a reasonable doubt because the evidence sought to be suppressed would have been cumulative to Norfolk's trial testimony. Norfolk voluntarily stated under oath at trial that he possessed the gun and the drugs found after the search. This confession prevents us from providing Norfolk any claim of relief on his point of error. "It would be trifling with the administration of the criminal law to award [a defendant] a new trial because of a particular error committed by the trial court, when in effect he [or she] has stated under oath that he [or she] was guilty of the charge preferred against him [or her]." Pate, 859 S.W.3d at 870 (*quoting* Motes v. United States, 178 U.S. 458, 20 S. Ct. 993, 44 L.Ed. 1150 (1900)). *See also*, State v. Nunn, 646 S.W.2d 55, 57 (Mo. banc 1983)(no reversible error even if motion to suppress statements should have been granted because defendant testified under oath at trial confirming the truth of the incriminating statements); State v. Patino, 12 S.W.3d 733, 741 (Mo. App. S.D. 1999)(even if drugs should have been suppressed because of an illegal traffic stop, admission into evidence was harmless error because defendant's voluntary testimony amounted to a confession which made the admission of the drugs cumulative); State v. Davalos, 128 S.W.3d 143, 148 (Mo. App. S.D. 2004)(although troubled by defendant being forced to testify in the face of possibly illegally obtained

evidence, defendant's voluntary incriminating statements rendered the admission of the evidence cumulative and harmless beyond a reasonable doubt).

While Missouri precedent compels this result, we echo the concerns raised in Davalos, specifically that, "[a[lthough we note that the Motes case was decided in 1900, prior to Terry and its progeny, at this point if Pate is not to be followed, we believe it is the Missouri Supreme Court that must make that decision." Davalos, 128 S.W.3d at 149. Until then, we are constrained to find the violation of Norfolk's constitutional rights does not require reversal of his convictions in the face of his voluntary trial testimony. Norfolk's point is denied.

The trial court's judgment is affirmed.

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George W. Draper III, Sp.J.

Patricia L. Cohen, P.J., and
Robert M. Clayton III, J., concur.