IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 09/27/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellee, v. NATHAN JAREN SHADLE, Appellant.	)	1 CA-CR 10-0675 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-166615-001SE

The Honorable Barbara L. Spencer, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
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Attorneys for Appellant

B A R K E R, Judge

¶1 Nathan Jaren Shadle ("Shadle") appeals his conviction for one count of possession or use of marijuana, a Class 1 misdemeanor.[1] He argues that the trial court abused its discretion in denying his motion to suppress evidence that was taken from him after he was illegally detained.

Facts and Procedural Background

¶2 One Friday evening in August, Officer Stipp was patrolling downtown Tempe near Mill Avenue. As he later explained, "Friday nights in August, once the students come back, are really busy . . . ." At approximately 12:30 a.m. that evening, he observed "several bouncers escorting two subjects outside of the [Mill Avenue Cue Club] bar." One of the two subjects being escorted from the bar was Shadle. Officer Stipp testified that seeing several people escort an individual out of a bar was "unusual," which "led [him] to believe that something was going on." He explained that people who leave voluntarily normally do not require more than one bouncer.

¶3 Although Officer Stipp could not recall whether the bouncers had called for his attention, he testified at the suppression hearing that "when it takes several bouncers [to escort a patron out], we need to investigate what happened

[1] Although this count was originally designated a Class 6 felony in the indictment, the State moved to amend the indictment to designate count one as a misdemeanor and to conduct a bench trial, a request which the trial court granted.

inside the bar to determine whether or not a crime occurred inside the bar."

¶4 Officer Stipp and another police officer handcuffed Shadle and the other subject, escorted them to the sidewalk, and sat them on the curb. Officer Stipp explained that he did this in order to make sure that the subjects were not injured by someone walking by because it was "really busy" and the sidewalk in front of the bar was narrow (approximately 6 to 8 feet wide). The officers also placed their bikes behind the men to create a physical barrier between them and the people walking by and exiting the bar.

¶5 While one police officer stayed with the two men, Officer Stipp went inside to speak with one of the bouncers inside the bar. The bouncer told Officer Stipp that Shadle and the other man had been pushing each other near the bar and bumping into patrons. After speaking with the bouncer, Officer Stipp "determined there was probable cause to arrest [Shadle]" and arrested Shadle. Shadle was then searched by another officer who found a small package of marijuana in his pants pocket. The entire interaction from the time the officers arrived until Shadle was placed under arrest took "at most, 10 minutes."

¶6 The trial court denied Shadle's motion to suppress, reasoning that the initial detention was a valid investigative

stop because "the officers did have a reasonable suspicion, upon viewing the security personnel at the bar removing two persons from the bar, to believe that a crime may have been committed." The court noted that it had considered "the experience of Officer Stipp in this case and all of the circumstances, including the fact that it was Friday night on a busy street in Tempe near ASU[,] and the training of the security personnel."

¶7 The court further explained that it was an investigatory detention rather than an arrest, even though Shadle was handcuffed and seated behind a small barricade of bikes in the presence of an officer. Although it noted that "this is a closer call," the court found that:

> [T]he actions of the officers, under the circumstances, were reasonable, given the fact it was a Friday night, it was a crowded sidewalk, and it was necessary to remove Mr. Shadle and the other person from the immediate area at the entrance of the bar.

The court explained it was basing its decision in part on the fact that the detention "was reasonably short, no more than 10 minutes," and "[t]here was enough of a risk, given the crowds present and the circumstances that the use of handcuffs was a reasonable precaution."

¶8 Shadle filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections

12-120.21(A)(1) (2003), 13-4031 (2001) and 13-4033(A)(1) (Supp. 2008).

Discussion

¶9 Shadle argues the trial court abused its discretion in denying his motion to suppress. He contends that the marijuana found in his pocket should have been excluded because it was obtained as a result of a police stop that was either a *de facto* arrest without probable cause or an investigatory stop without reasonable suspicion.

¶10 We review a trial court's ruling on the suppression of evidence for an abuse of discretion, considering only the evidence presented at the suppression hearing. *State v. Estrada*, 209 Ariz. 287, 288, ¶ 2, 100 P.3d 452, 453 (App. 2004). We "defer to the trial court's factual findings that are supported by the record and are not clearly erroneous." *Id.* However, we review the trial court's legal conclusions *de novo. Id.* Thus, "[i]n reviewing investigatory stops we defer to the trial court's findings of fact absent abuse of discretion"; however, "whether the police had a reasonable suspicion of criminal activity that justified conducting an investigatory stop is a mixed question of law and fact which we review *de novo*." *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996) (citation omitted).

¶11 Before we analyze whether the trial court erred in denying Shadle's motion to suppress, we must first consider (1) whether reasonable suspicion existed to justify an investigative stop, and (2) whether the stop became a *de facto* arrest that required probable cause.

1. Reasonable Suspicion

¶12 "'An investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion' that criminal activity is afoot." *Rogers*, 186 Ariz. at 510, 924 P.2d at 1029 (quoting *Ornelas v. United States*, 517 U.S. 690, 693 (1996)). "The reasonable suspicion standard is a lower standard than that required for probable cause to make an arrest and it requires a showing considerably less than a preponderance of the evidence." *State v. Ramsey*, 223 Ariz. 480, 484, ¶ 18, 224 P.3d 977, 981 (App. 2010). "The facts constituting reasonable suspicion cannot be viewed in isolation, or subtracted in a piecemeal fashion from the whole, but must be considered in the context of the totality of all the relevant circumstances." *Id.* at 485, ¶ 23, 224 P.3d at 982.

¶13 The Arizona Supreme Court has noted that "[a]rticulating precisely what 'reasonable suspicion' . . . mean[s] is not possible." *Rogers*, 186 Ariz. at 511, 924 P.2d at 1030 (quoting *Ornelas*, 517 U.S. at 695). Generally, reasonable suspicion requires a police officer to be able "to point to

specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the stop]." *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

¶14 The United States Supreme Court explained the reason for permitting such stops as follows:

> In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.

Illinois v. Wardlow, 528 U.S. 119, 126 (2000).

¶15 Shadle argues that the officers "had nothing but a hunch that something criminal occurred inside the bar." However, Officer Stipp was able to point to at least one "specific and articulable" fact that reasonably warranted the stop. *See Terry*, 392 U.S. at 21. Namely, although there was some conflicting testimony, Officer Stipp testified that several bouncers escorted Shadle out. For example, when responding to the question: "You saw several of them escorting the defendant out of the store," the Officer replied, "Yes." Further he testified it was "unusual" for several bouncers to escort an individual out of a bar. Officer Stipp testified that this

"caught [their] attention" and "led [them] to believe that something was going on."

¶16 Shadle points out several things that did *not* occur: "there was no report of a crime, no waiving [sic] over by the bouncers, and no direct observation of any crime by the officers." While the presence of these things would obviously have increased the likelihood of criminal activity, their absence did not eliminate the possibility that criminal activity had occurred. As discussed above, reasonable suspicion is not a "preponderance of the evidence" standard (meaning "it is more likely than not that criminal activity is afoot"), but a "considerably lower" standard ("criminal activity may be afoot based on these specific and articulable facts"). *Terry* stops contemplate that on some occasions, innocent individuals will be stopped even though their suspicious activities turn out not to be criminal. *See Wardlow,* 528 U.S. at 126 ("*Terry* accepts the risk that officers may stop innocent people.").

¶17 It seems self-evident that a reasonable person would suspect that *something* happened in the bar. Whether this *something* was criminal activity is a closer question, as there are certainly several reasons for being ejected from a bar that do not involve illegal activity. For example, individuals may be ejected for simply falling asleep or passing out. The possibility that Shadle was being ejected for "innocent"

behavior, however, does not mean that the police were unjustified in making their investigatory stop. "The police are not required to rule out the possibility of innocent explanations for a defendant's conduct." *Ramsey*, 223 Ariz. at 485, ¶ 23, 224 P.3d at 982 (citing *Wardlow*, 528 U.S. at 125-26). Based on the fact that it took several bouncers to escort Shadle from the bar, we concur that reasonable suspicion of criminal activity justified Shadle's investigatory stop.

¶18 Shadle's argument that mere presence in an area of expected criminal activity is not enough to justify an investigative stop is true, but irrelevant. Shadle was not "merely present"; he was being removed from a bar by several bouncers.

¶19 While Shadle is correct that the balancing of factors to determine reasonable suspicion may differ depending on whether the criminal activity is completed or ongoing, investigative stops are in no way limited to ongoing criminal activity. *See United States v. Hensley*, 469 U.S. 221, 227 (1985) (explicitly rejecting the argument that police should not be allowed to conduct a *Terry* stop for past criminal activity: "We do not agree with the Court of Appeals that our prior opinions contemplate an inflexible rule that precludes police from stopping persons they suspect of past criminal activity unless they have probable cause for an arrest.").

¶20 Thus, there was no error in determining the stop was reasonable. The next question is whether the officers' handcuffing and detaining Shadle for ten minutes converted the stop into a *de facto* arrest.

2. **De Facto *Arrest***

¶21 There is no per se rule that converts an investigatory stop into a *de facto* arrest. *See, e.g.*, *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982) ("A brief but complete restriction of liberty if not excessive under the circumstances, is permissible during a Terry stop and does not necessarily convert the stop into an arrest."). Whether an arrest has occurred for Fourth Amendment purposes "turns upon an evaluation of all the surrounding circumstances to determine whether a reasonable person, innocent of any crime, would reasonably believe that he was being arrested." *State v. Winegar*, 147 Ariz. 440, 448, 711 P.2d 579, 587 (1985).

¶22 Shadle argues that the stop became a *de facto* arrest when the officers handcuffed him. He quotes a statement from *Winegar*, 147 Ariz. at 447-48, 711 P.2d at 586-87, to support his argument: "An arrest is complete when the suspect's liberty of movement is interrupted and restricted by the police." He also cites A.R.S. § 13-3881(A), which describes how arrests are made: "An arrest is made by an actual restraint of the person to be

arrested, or by his submission to the custody of the person making the arrest."

¶23 However, as mentioned above, there is no *per se* rule that governs when a *Terry* stop is transformed into an arrest. It cannot be the case that *all Terry* stops are *de facto* arrests; otherwise, there would be no reason for an exception to the probable cause requirement. Yet in all *Terry* stops, the individual's liberty of movement is in some way restricted and interrupted by the police. *See, e.g.*, *State v. Clevidence*, 153 Ariz. 295, 299, 736 P.2d 379, 383 (App. 1987) ("The fact that defendant was not free to leave does not, in and of itself, transform a valid investigatory detention into a traditional arrest with its probable cause requirement."); *State v. Aguirre*, 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (App. 1981) ("When an officer is engaged in an investigation, he may detain a person under circumstances which would not justify an arrest."). These cases would be legally inconsistent if the rule were, as Shadle argues, that a *Terry* stop becomes a *de facto* arrest as soon as an individual's liberty is restrained by police officers.

¶24 Further supporting this conclusion is the fact that at least two Arizona cases have held that the use of handcuffs did not automatically transform a *Terry* stop into a *de facto* arrest. *See, e.g.*, *State v. Navarro*, 201 Ariz. 292, 296, ¶ 17, 34 P.3d 971, 975 (App. 2001) ("[Defendant] concedes his brief

handcuffing was part of a valid *Terry* stop."); *Aguirre*, 130 Ariz. at 56, 633 P.2d at 1049 (detaining, frisking, handcuffing, and placing a suspect in a patrol car did not transform an investigative stop into an arrest). Many Ninth Circuit cases also specifically approve of the use of handcuffs during a *Terry* stop. *See, e.g., United States v. Galindo-Gallegos,* 244 F.3d 728, 735 (9th Cir. 2001) (Paez, J., concurring) ("We have approved of *Terry* stops that include handcuffing the suspect during questioning . . . ."); *United States v. Meza-Corrales*, 183 F.3d 1116, 1123-24 (9th Cir. 1999) ("Under such conditions, the agents' initial actions, including temporarily detaining [the defendant] with the use of handcuffs while questioning him, were reasonable responses, and the encounter did not escalate into a full-blown arrest."); *Bautista,* 684 F.2d at 1289-90 (explaining that "[w]e specifically approved the use of handcuffs" in another case while analyzing a *Terry* stop). Thus, the fact that Shadle was handcuffed during the stop does not automatically turn the stop into a *de facto* arrest. Instead, the analysis turns on a consideration of the totality of the circumstances, including the duration of the detention, the reason for the detention, and the manner of the detention.

¶25 The United States Supreme Court rejected setting a "rigid time limitation on *Terry* stops," directing courts to examine "whether the police diligently pursued a means of

investigation that was likely to confirm or dispel their suspicions quickly" during the detention. *United States v. Sharpe*, 470 U.S. 675, 685-87 (1985). It held that the twenty-minute detention at issue in *Sharpe* was acceptable because it "[did] not involve any delay unnecessary to the [officers'] legitimate investigation," and the defendants had "presented no evidence that the officers were dilatory in their investigation." *Id.* at 687. The Court also noted that "[a] brief stop of a suspicious individual, in order to determine his identity or maintain the status quo momentarily while obtaining more information, may be the most reasonable [course of action] in light of the facts known to the officer at the time." *Hensley*, 469 U.S. at 232 (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)).

¶26 Here, the police officers saw the bouncers escorting two men out of the club. The officers handcuffed the men and sat them on a curb no more than ten feet in front of the club for no more than ten minutes while one of the police officers went to ask the bouncers what happened. The crowded nature of the sidewalks, with many pedestrians walking by, was a factor justifying the use of handcuffs. Without the handcuffs, one police officer would have been left to manage two potentially unruly and uncooperative individuals by himself in the midst of

a large crowd of moving people.[2] Because neither man had been frisked, the police officers had no way of knowing whether either man was carrying a weapon.[3] As in *Sharpe*, there is no allegation that the police caused any unnecessary delay because the stop lasted no longer than ten minutes before Officer Stipp returned with information from the bouncer that the men had been assaulting each other and other patrons. At that point, they were placed under arrest. We find that in such circumstances it was reasonable for the police officers to handcuff the men for safety purposes in order to prevent them from fleeing or being injured by the crowd. *See Hensley*, 469 U.S. at 235 (Police officers "were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.").

¶27 Given our finding that no *de facto* arrest occurred, we need not decide whether probable cause existed prior to the questioning of the bouncer. Shadle does not argue that his arrest subsequent to the questioning of the bouncer violated his

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[2] While it is true that the officers called for reinforcements and that a third officer had arrived by the time Officer Stipp returned from speaking with the bouncer, Officer Stipp testified that when he arrived on the scene, only one other officer was available to help him with the suspects.

[3] Here, we are careful to note that there was no evidence that police officers suspected that the individuals had a weapon; we merely state the obvious, that the police officers had no knowledge on this subject.

constitutional rights. Because Shadle's constitutional rights were not violated by the *Terry* stop, the trial court did not err in denying Shadle's motion to suppress evidence of the marijuana found in his pants pocket after he was arrested.

Conclusion

¶28 For the foregoing reasons, we affirm Shadle's conviction and sentence.

/s/
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DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
ANN A.SCOTT TIMMER, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge