FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-2605

FORREST ATWOOD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Escambia County.
Linda L. Nobles, Judge.

October 12, 2022

LONG, J.

Atwood appeals an order denying his motion to suppress evidence obtained during a traffic stop. During a consensual weapons pat-down, Atwood agreed to the removal of his cell phone from his pocket. The deputy sheriff removed not only Atwood's cell phone but also a bag of heroin. Atwood argues the subsequent events were fruits of an illegal search. We agree that the deputy exceeded the scope of Atwood's consent when he removed the bag. However, we do not agree that the subsequent events were fruits of that illegal search. We therefore affirm.

I

Deputies of the Escambia County Sheriff's Office observed Atwood in the driver's seat of an illegally parked car. The car was stopped facing oncoming traffic and was blocking the roadway. Two deputies approached Atwood and temporarily detained him to address the traffic violation. Atwood does not challenge the legality of the initial contact and detention. Atwood then consented to a search of the car. One deputy spoke with Atwood while the car was searched. The deputy, concerned for his own safety after observing Atwood's nervousness, asked Atwood if he would consent to a pat-down to check for weapons. Atwood agreed.[*]

As the deputy was patting down the left side of Atwood's body, the deputy felt what he said was "a tied-off corner baggy of an unknown powder." While his hand was outside the pocket on top of the bag, the deputy asked Atwood what "it" was. Atwood, who also had a cell phone in the same pocket, responded that it was his cell phone and that the deputy could remove it. The deputy then went into Atwood's pocket and "removed the corner baggy with a white powder substance and his cellphone."

After the deputy removed the phone and bag, Atwood attempted to flee. He ran around the illegally parked car and was subsequently arrested in front of a patrol car. During his attempted flight, Atwood tossed two other bags to the ground, containing heroin and cannabis. Atwood was charged with trafficking in heroin, possession of cannabis, possession of drug paraphernalia, and resisting an officer without violence.

Atwood filed a motion to suppress the evidence obtained from this encounter. He argued that he did not consent to have his pockets searched and that probable cause did not arise from the pat-down because the deputy could not identify what the object was before removing it from his pocket. Because the search was illegal, he argued, everything that occurred afterward must be suppressed as well. The State argued Atwood consented to the

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[*] There was a factual dispute as to whether Atwood consented to the pat-down. The trial court found Atwood did consent.

search of his pockets and that the bag could be seized under the plain-touch exception. The State also argued the bags tossed to the ground during Atwood's flight were abandoned and so could be used as evidence independent of the pocket search.

The trial court denied the motion to suppress. It found Atwood consented to the removal of the phone from his pocket, and when the phone was removed, "the baggy came out." The trial court did not elaborate on this conclusion. The trial court found the evidence tossed by Atwood was abandoned. Atwood reserved the right to appeal this order and then pleaded no contest. He now seeks review of the denial of his motion to suppress.

II

The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. It states

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While the amendment itself includes no enforcement mechanism, the United States Supreme Court created the exclusionary rule. A conception of the court, "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). "As a result, whether the exclusionary rule applies in a particular case is a separate issue from whether an individual's Fourth Amendment rights were violated." *Wingate v. State*, 289 So. 3d 566, 568 (Fla. 1st DCA 2020).

There are three types of police-citizen encounters: consensual, investigatory stops, and arrests. *Golphin v. State*, 945 So. 2d 1174, 1180 (Fla. 2006). While the Fourth Amendment looks to the sufficiency of the justification for investigatory stops and arrests, consensual encounters "do not invoke constitutional safeguards."

Id. This is because "[d]uring a consensual encounter a citizen may either voluntarily comply with a police officer's requests or choose to ignore them." *Popple v. State*, 626 So. 2d 185, 186 (Fla. 1993). For this reason, any consensual police-citizen encounter must be tailored to the limits of the consent given. *See Davis v. State*, 594 So. 2d 264, 266 (Fla. 1992).

On the flip side, during a consensual encounter, law enforcement officers need not ignore crime. In the same way that police officers, operating from a lawful vantage point, can seize evidence in plain view, *see Texas v. Brown*, 460 U.S. 730, 737 (1983), they can also seize evidence they know to be contraband from its "contour or mass," or plain touch, *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). Both the plain view and plain touch doctrines depend on "the legality of the intrusion that enables them to perceive and physically seize the property in question," and the "probable cause to associate the property with criminal activity." *Brown*, 460 U.S. at 737–38.

So then, with each challenged government action we proceed through our stepped inquiry. We first ask if Fourth Amendment protections are triggered by the nature of the action. If so, we then address whether those protections were trespassed. And finally, if they were, we evaluate whether the resulting evidence should be excluded.

III

Turning to Atwood's case, the authority for the pat-down rested entirely on consent. We therefore evaluate the consent Atwood gave and determine whether "the search was conducted within the limits of the consent given." *Davis*, 594 So. 2d at 266.

Atwood agreed to allow the deputy to conduct a pat-down. During the pat-down, the deputy felt what he said was "a tied-off corner baggy of an unknown powder" in one of Atwood's pockets. There is no suggestion that the bag of powder was a weapon. As the deputy's hand was still on the bag, the deputy asked Atwood what "it" was. Atwood "advised [the deputy] it was his cellphone and [the deputy] could remove it." On the limited consent to remove the cell phone, the deputy "removed the corner baggy with a white powder substance and his cellphone." This action exceeded

the bounds of Atwood's consent and both triggered and trespassed his Fourth Amendment protections.

The trial court found that when the phone was removed, "the baggy came out." The State argues on appeal that this could mean the trial court believed the bag was removed inadvertently. If the trial court did intend to find the bag's removal was inadvertent, that finding would be unsupported by competent, substantial evidence. *Carter v. State*, 313 So. 3d 1191, 1193 (Fla. 1st DCA 2021) ("When reviewing a trial court's ruling on a motion to suppress, the appellate court defers to the trial court's findings of fact if supported by competent, substantial evidence, but reviews de novo the application of the law to those facts."). The officer's testimony is clear that the bag was removed on consent to remove only the phone and there is nothing to suggest it was accidental or inadvertent.

The State also argues that the plain touch doctrine applies. But for this doctrine to apply, the touch alone must provide sufficient information to the officer to develop probable cause—that is, it must be plain. When relying on plain touch, it is the development of probable cause through the otherwise lawful touch that permits the subsequent search and seizure. Based on its feel, the deputy must be "reasonably certain [the object] is contraband." *Harris v. State*, 790 So. 2d 1246, 1249 (Fla. 5th DCA 2001). For example, a deputy could testify to his "knowledge acquired through specific experience with the unique texture of crack cocaine" and his experience with "the size, shape, and texture of the package." *Doctor v. State*, 596 So. 2d 442, 445 (Fla. 1992) (emphasis removed). He could testify to his training and experience and explain that illegal drugs are often carried in the tied-off corners of plastic bags. Here, the deputy could have connected his training and experience with what he felt in Atwood's pocket to explain that he was reasonably certain the bag contained contraband. But he gave no such testimony. Instead, the deputy said only that it was "a tied-off corner baggy of an unknown powder."

With the limited testimony given, there is insufficient evidence to determine the existence of probable cause for the search of Atwood's pocket. We must therefore conclude that the bag removed from Atwood's pocket was removed in violation of his

Fourth Amendment right to be free from unreasonable searches and seizures. And the exclusion of the evidence unlawfully removed from his pocket fits well within the traditional application of the exclusionary rule. The bag removed from Atwood's pocket should have been suppressed.

IV

Having determined that the bag of heroin was unlawfully removed from Atwood's pocket, we must now consider how, if at all, that act affects the admissibility of the other evidence seized during the same encounter. The State argues that even if the search of Atwood's pocket was unlawful, he could still be convicted based on his attempted flight and the other bags he tossed. Those bags, the State claims, were abandoned and so Atwood no longer had any privacy interest in them. We agree.

The encounter began as a lawful traffic stop. So we begin our analysis there. A brief seizure to investigate a traffic violation is "tolerable" under the Fourth Amendment. *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). "A seizure for a traffic violation justifies a police investigation of that violation." *Id.* Authority for the stop continues until "tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.* In addition, "ordinary inquiries incident to [the traffic] stop" are also permissible. *Illinois v. Caballes*, 543 U.S. 405, 408 (2005). "Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Rodriguez*, 575 U.S. at 355. Lawful detention is ongoing as these tasks are being completed.

The uncontradicted testimony below reflects that Atwood was lawfully detained for a traffic violation. And one of the deputies was conducting a driver's license and warrant check when Atwood attempted to flee. Atwood was not free to leave during this period. In Florida, a person commits a criminal offense by "resist[ing], obstruct[ing], or oppos[ing] any officer . . . in the lawful execution of any legal duty, without offering or doing violence to the person of the officer." § 843.02, Fla. Stat. Atwood was arrested and charged with this offense.

Use of the exclusionary rule to suppress evidence is a last resort and applies only when its remedial objective is efficaciously served. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Its objective, as stated above, is to deter improper law enforcement conduct. There was nothing improper about what occurred after the search of his pocket. Atwood was lawfully detained and then lawfully arrested after he obstructed law enforcement's duty to investigate the traffic violation. The fruits of the poisonous tree doctrine does not serve "to immunize a defendant from arrest for new crimes," and the deputies here did not detain Atwood "hoping that [he] w[ould] commit new crimes in their presence." *Tims v. State*, 204 So. 3d 536, 540 (Fla. 1st DCA 2016) (citations omitted).

While Atwood may not have run but for the illegal search, "but-for causality is only a necessary, not a sufficient, condition for suppression." *Hudson*, 547 U.S. at 592. And Atwood abandoned the bags of drugs on his own accord. *State v. Anderson*, 591 So. 2d 611, 613 (Fla. 1992) ("[I]f [a] stop is valid, there is no basis to suppress evidence abandoned during stop."). But even had he not discarded them, the bags would have inevitably been found on him during the full lawful search of his person subsequent to his arrest. For all these reasons, there would have been insufficient basis to suppress the heroin and cannabis that Atwood abandoned during this lawful detention and attempted flight.

V

The State argues that the bags Atwood abandoned serve as independent evidence sufficient to support each of the drug convictions. After a careful review of the record, we agree that suppression of the initial bag would not have been dispositive of the case. *See Morgan v. State*, 486 So. 2d 1356, 1357 (Fla. 1st DCA 1986) ("An issue is dispositive only if, regardless of whether the appellate court affirms or reverses the lower court's decision, there will be no trial of the case."). The record demonstrates that the additional bags of drugs abandoned by Atwood would support convictions on all counts.

We reject Atwood's remaining arguments without further discussion.

AFFIRMED.

RAY and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Jessica J. Yeary, Public Defender, and David A. Henson, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Zachary F. Lawton, Assistant Attorney General, Tallahassee, for Appellee.