

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL CAIVARY GRAY,

Defendant-Appellant.

UNPUBLISHED
February 27, 2018

No. 336625
Wayne Circuit Court
LC No. 13-009458-01-FH

Before: GLEICHER, P.J., and BORRELLO and SWARTZLE, JJ.

PER CURIAM.

Defendant, Earl Caivary Gray, appeals by right his bench-trial convictions of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced on the felony-firearm conviction, second offense, to the mandatory five years of imprisonment and to time served on the remaining convictions. We affirm.

I. BACKGROUND

At the preliminary examination, Detroit police officer Thomas Houston testified that on October 4, 2013, at about 7:40 p.m., he was on routine patrol driving a marked scout car at Russell and State Fair Streets with two other police officers as passengers, all dressed in police uniforms with badges displayed. As Officer Houston drove eastbound on State Fair, he saw a red Chevy Impala blocking the moving lane of traffic on Russell. This was a ticketable offense, and Officer Houston turned his vehicle southbound on Russell. He saw defendant leaning on the vehicle, standing in the middle of the street at the driver's side front window, engaged in some type of conversation with a woman in the driver's seat. Officer Houston noticed a bulge in defendant's back-right pocket. As Officer Houston pulled up to the scene, defendant looked in his direction and then walked in front of a parked white Buick, and the Impala pulled forward and parked. As defendant walked away, he pulled out his tucked-in shirt to cover the bulge. When Officer Houston told defendant to come toward him, defendant hesitated. Officer Houston testified that, given his experience, defendant's behavior led him to believe that defendant was hiding a weapon. Officer Houston conducted a pat-down search and found a .22-caliber handgun in defendant's right-rear pocket. The firearm was loaded with six rounds. Officer Houston asked defendant if he had a license to carry the firearm, defendant responded that he did not, and Officer Houston placed defendant under arrest.

Defendant was bound over and filed a motion to suppress evidence of the firearm, claiming that the evidence was obtained as a result of an unjustified search of defendant's person. The trial court held an evidentiary hearing during which Officer Houston testified consistent with his preliminary-exam testimony. The trial court concluded that Officer Houston had reasonable suspicion to believe that defendant was armed and denied the motion without prejudice. Defendant then raised two issues regarding Officer Houston's credibility. First, defendant argued that the circumstances regarding the absence of dash-camera footage were suspicious and should create an inference that Officer Houston was not telling the truth. Next, defendant argued that Officer Houston's credibility should be questioned because he told the driver of the Impala that she would be mailed a ticket, and the driver never received a ticket. The trial court ordered the parties to look into the issues and stated that defendant could bring the matter up again during the bench trial.

During the bench trial, defendant renewed his motion to suppress. Officer Houston testified consistent with his prior testimony. The two other police officers also testified. Although neither officer testified that he witnessed a bulge in defendant's pocket, one officer testified that he witnessed defendant adjust his shirt as the officers began the investigation.

The driver of the Impala also testified. She said that she was defendant's friend and that she stopped to talk to defendant on the day of the incident. She stated that defendant was not leaning over her vehicle and that he did not adjust his shirt to cover his pants pocket. According to the driver, she was told that she would receive a ticket in the mail, but she never did.

The trial court received evidence that there was not any dash-camera footage of the encounter because the scout car did not have a dash camera. There was also evidence that the driver of the Impala did not receive her ticket in the mail, but that Officer Houston had done his part to process the ticket. The trial court found Officer Houston's testimony credible and denied defendant's renewed motion to suppress. The trial court then found defendant guilty of the charged crimes.

At sentencing, defense counsel told the trial court that defendant wanted counsel to move to dismiss the felony-firearm conviction because there was no underlying felony. Defense counsel stated on the record that she had informed defendant that felon in possession was the underlying felony for the felony-firearm conviction, and the court replied, "There's—yeah, there's a case right on point there. Yeah." Then, the trial court added, "CCW is not a predicate." Defense counsel agreed and opined that she thought "that's why they added this felon in possession just so they could do that."

Two years after his sentencing, defendant filed a post-judgment motion to set aside the felony-firearm conviction and vacate the conviction with prejudice, arguing that the trial court did not specify whether the felony-firearm conviction was based on the underlying conviction of felon in possession or the underlying conviction of carrying a concealed weapon. At the hearing on defendant's post-judgment motion, the trial court referred to the information, which clearly stated that the felony-firearm charge was based on the underlying charge of felon in possession. Defense counsel argued that in order for the trial court to find that defendant was guilty of felony firearm, the court had to include a statement that "it was based on felon in possession." The trial court asked, "[W]hat else would it be based on?" In denying defendant's post-judgment motion,

the court stated that of the two other counts charged, only one could have been the predicate felony for felony firearm, and the trial court found as a matter of law that defendant committed that crime. This appeal followed.

II. ANALYSIS

Reasonable Suspicion Justified the Terry Search. On appeal, defendant first argues that the trial court erred in denying his motion to suppress evidence of the firearm found in defendant's pocket because there was not particularized reasonable suspicion to justify the search. We review a trial court's findings of fact at a suppression hearing for clear error and review de novo its ultimate decision on a motion to suppress the evidence. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009).

"A police officer may perform a limited patdown search [commonly referred to as a *Terry* search] for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons." *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001), citing *Terry v Ohio*, 392 US 1, 27; 88 S Ct 1868; 20 L Ed 2d 889 (1968). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 US at 27.

"Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). When reviewing whether an officer had reasonable suspicion, this Court looks to the entirety of the circumstances. *Id.* To demonstrate reasonable suspicion, an officer must have "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry*, 392 US at 21. An officer's experience in recognizing criminal or dangerous activity is a relevant consideration in determining whether reasonable suspicion existed to support the *Terry* search. *Id.* at 30.

We conclude that Officer Houston had reasonable suspicion to believe that defendant was armed. Officer Houston observed a bulge in defendant's back pocket. Officer Houston testified that when defendant noticed the officers, he walked away and pulled out his shirt to cover the bulge. When Officer Houston engaged defendant, defendant hesitated. Based on his previous experience, Officer Houston believed that defendant was hiding a weapon. Given the observed bulge and evasive behavior, a reasonable officer in Officer Houston's position would be warranted in his or her belief that defendant was armed.

Defendant argues that, because Officer Houston was the only officer to testify that he saw a bulge in defendant's pocket, his story is suspect. Yet, the other officers did not testify that there was no bulge, just that they did not notice one, and one officer confirmed Officer Houston's testimony that defendant adjusted his shirt to cover his pocket. Although the driver of the Impala testified that defendant did not adjust his shirt, the trial court found Officer Houston's testimony credible. We defer to the trial court's credibility determinations in a bench trial as it is in a better position than this Court to judge the credibility of the witnesses before it. See *People v Hardiman*, 466 Mich 417, 431; 646 NW2d 158 (2002). Thus, we conclude that the *Terry* stop

was justified by Officer Houston's reasonable suspicion that defendant was armed and that the trial court properly denied defendant's motion to suppress.

Felon in Possession Was the Underlying Felony for Defendant's Felony-Firearm Conviction. Defendant next argues that his right to due process of law was violated by the trial court's failure to specify the underlying felony for his felony-firearm conviction. In actions where the trial court sits as factfinder, the trial court must "find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." MCR 2.517(A)(1). "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). Where there is sufficient doubt that the trial court correctly applied the law to the facts, remand for additional fact finding or explanation is necessary. *People v Jackson*, 390 Mich 621, 628; 212 NW2d 918 (1973); see also, *People v Maghzal*, 170 Mich App 340, 347; 427 NW2d 552 (1988). "A court's failure to find the facts does not require remand where it is manifest that the court was aware of the factual issue, that it resolved the issue, and that further explication would not facilitate appellate review." *People v Legg*, 197 Mich App 131, 134-135; 494 NW2d 797 (1992). Where the record indicates the court was aware of the law, "it would be a waste of judicial resources to remand a case to the circuit court for articulation." *People v Kreger*, 214 Mich App 549, 555; 543 NW2d 55 (1995).

MCL 750.227b specifically lists the four felonies that cannot serve as the predicate for a felony firearm charge: (1) unlawful sale of a firearm, MCL 750.223; (2) carrying a concealed weapon, MCL 750.227; (3) unlawful possession of a firearm by licensee, MCL 750.227a; and (4) alteration of identifying marks on a firearm, MCL 750.230; see also *People v Mitchell*, 456 Mich 693, 697-698; 575 NW2d 283 (1989) (holding that only these four felonies are excluded from serving as the underlying felony for a felony-firearm conviction). In this case, there were only two underlying felonies: (1) carrying a concealed weapon, MCL 750.227; and (2) felon in possession, MCL 750.224f. Carrying a concealed weapon cannot serve as the underlying felony for felony firearm. Therefore, the only possible felony that could serve as the underlying felony for felony firearm in this case was felon in possession.

The exchanges between defense counsel and the trial court at the sentencing hearing and at the hearing on defendant's post-judgment motion demonstrate that the trial court, and defendant's attorney, clearly understood that the felony underlying defendant's felony-firearm conviction was defendant's felon-in-possession conviction. Both the trial court and defendant's attorney explained this to defendant, and defendant has not shown any due-process violation. Remand for further articulation is unnecessary because it is manifest that the trial court was aware of the legal requirements to find defendant guilty of felony firearm, properly applied those requirements, and explained its decision. *Kreger*, 214 Mich App at 555; *Legg*, 197 Mich App at 134-135.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Stephen L. Borrello

/s/ Brock A. Swartzle