STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0750

State of Minnesota,
Respondent,

vs.

Julious Holly,
Appellant.

Filed August 5, 2008
Reversed and remanded
Ross, Judge

Hennepin County District Court
File No. 06007557

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Considered and decided by Ross, Presiding Judge; Toussaint, Chief Judge; and Wright, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Julious Holly appeals his conviction of fifth-degree controlled substance crime, challenging the denial of his pretrial motion to suppress evidence of cocaine that officers obtained during his arrest. Holly argues that the evidence of cocaine recovered after his arrest should have been suppressed because the officers lacked probable cause to arrest him for misdemeanor loitering with intent to sell drugs. Although the district court was correct that the officers had a reasonable, articulable suspicion to stop Holly and investigate, the record establishes that the officers did not stop and investigate but instead immediately arrested Holly. Because the officers lacked probable cause to arrest Holly for misdemeanor loitering with intent to sell drugs, we reverse the denial of his motion to suppress, and we remand.

FACTS

At 8:45 in the evening on February 1, 2006, two patrolling police officers noticed three men outside a dance studio in downtown Minneapolis. One officer saw a man in this group, later identified as appellant Julious Holly, extend his hand toward another, who looked at it. Holly then put his hand in his pocket. Holly immediately noticed the officers' squad car, appeared startled, and whistled. The three men dispersed and Holly entered the dance studio. Holly spoke briefly with a security guard and then left the building.

The officers approached Holly and immediately announced that he was under arrest as he left the building. One officer placed his hand on Holly, but Holly shook free.

Holly removed a baggie from his jacket pocket and threw it over the officers' heads and tried to run. One officer struggled with Holly while the other recovered the baggie. Holly pulled free and fled, leaving his jacket behind. The officers caught Holly and arrested him. The baggie contained cocaine, and the state charged Holly with fifth-degree felony controlled substance crime.

Holly moved to suppress evidence of the cocaine, arguing that the officers lacked probable cause to arrest him. The district court concluded that the officers had probable cause to arrest Holly for misdemeanor loitering with intent to sell drugs and alternatively concluded that the officers had a reasonable, articulable suspicion to stop Holly for further investigation. The court therefore denied Holly's motion to suppress. Holly was convicted of fifth-degree possession of crack cocaine. He appeals.

D E C I S I O N

Julious Holly argues that the officers lacked probable cause to arrest him. The facts surrounding Holly's arrest are undisputed. We therefore review de novo the denial of his pretrial motion to suppress. *See State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The federal and state constitutions guarantee the right of the people to be secure in their persons against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless seizures are unreasonable, with several exceptions. *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985); *accord Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967). A warrantless search is reasonable if it is made incident to a valid arrest. *State v. Walker*, 584 N.W.2d 763, 766 (Minn. 1998). But an arrest is invalid and the accompanying search is therefore unreasonable if the arrest is not

based on probable cause. *See Walker*, 584 N.W.2d at 766 (explaining that if police do not have probable cause to arrest, a search incident to arrest is not justified); *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997) (stating that officer who has probable cause to arrest may conduct search incident to arrest). Holly's abandonment of the cocaine in response to the arrest does not change the analysis. If an arrest is illegal, evidence the arrestee discarded in response to that arrest must be suppressed. *See In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) ("Since [the defendant] abandoned the cocaine *after* he was unlawfully directed to stop, the abandonment was the suppressible fruit of the illegality."); *cf. State v. Balduc*, 514 N.W.2d 607, 611 (Minn. App. 1994) ("An attempt to dispose of incriminating evidence . . . is a predictable and common response to an illegal search" and "evidence [will] be suppressed if the initial police intrusion was illegal.").

We therefore first consider whether the officers had probable cause to arrest Holly. Police must have probable cause at the time of the arrest for the arrest to be valid. *State v. Riley*, 568 N.W.2d 518, 524 (Minn. 1997). A police officer has probable cause to arrest a person if he reasonably believes that the person has committed a crime, based on his observations, inferences, and experience. *State v. Olson*, 436 N.W.2d 92, 94 (Minn. 1989), *aff'd*, 495 U.S. 91, 110 S. Ct. 1684 (1990). "[Probable cause exists when] the objective facts are such that under the circumstances, a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *G.M.*, 560 N.W.2d at 695. The arrest occurred when the officer told Holly that he was under arrest. *See State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001)

(concluding that an officer telling a suspect that he was "under arrest" indicates arrest) *review denied* (Minn. Dec. 11, 2001). Holly's postarrest abandonment of the baggie therefore cannot support probable cause for his arrest.

The district court held that at the time of arrest, the officers had probable cause to arrest Holly for misdemeanor loitering with the intent to sell or buy drugs, a violation of Minneapolis City Ordinance 385.50(d) (2007). The district court relied on the following facts in holding that probable cause existed: First, the officers saw Holly show his open hand to a person in his group and quickly return his hand to his pocket. One officer testified that, in his experience, that behavior is consistent with a hand-to-hand drug transaction. Second, the officers considered it to be unusual that a group of people were gathered outside on an "extremely cold" evening. Third, the officers thought it unusual that the adult men stood near the entrance of a dance studio that was usually frequented by adolescent girls. The officers had not previously seen anyone enter that studio not wearing dance attire. Fourth, when Holly saw the police, he appeared to be startled and whistled. In the officers' experience, whistling is a method sometimes used by drug dealers to alert others that police are present. Fifth, within a few seconds of the whistle, the group dispersed.

On balance, we hold that these combined actions do not support a finding of probable cause to arrest Holly for loitering with intent to sell or buy drugs. We agree that these actions reasonably arouse suspicion. But "[a] person cannot be arrested and searched merely because he is found in suspicious circumstances." *State v. Clark*, 312 Minn. 44, 49, 250 N.W.2d 199, 202 (1977). The officers witnessed no hand-to-hand

exchange of anything and no repetitive or prolonged conduct by anyone. The group dispersed immediately when Holly saw the officers and whistled after only momentary observation.

We see difficulties regarding both the *actus reus* and *mens rea* components of the ordinance as applied to the holding of probable cause. The brevity of the officers' observations of Holly weighs against the holding. "Loitering" assumes immobility for some period. The Minneapolis ordinance does not define loitering, and neither do the provisions in the Minnesota Statutes that prohibit loitering for various purposes or in various places, such as section 609.3243 (2006) (loitering for prostitution) and section 37.25 (2006) (loitering at fairgrounds). But the traditional definitions of loitering strongly imply the concept of lingering for at least some period of time: "To be dilatory; to be slow in movement; to stand around or move slowly about; to stand idly around; to lag behind; to linger or spend time idly. . . . to be slow in moving, to delay, . . . to saunter." Black's Law Dictionary 942 (6th ed. 1990). And the commonly relied-upon treatise recommends that district courts instruct jurors with a similar definition of loitering: "'Loitering' means to be slow in moving, delaying, lingering, sauntering, or lagging behind." 10 *Minnesota Practice* CRIMJIG 12.73 (2006). The officers' testimony describes only a very brief pre-arrest observation period of Holly, consisting of the several seconds it took for Holly to open and withdraw his hand. At that moment, Holly noticed the officers and entered the dance studio. It may not take long for a person's lawful standing to become potentially unlawful lurking or loitering, but our understanding of the offense informs us that not

every momentarily motionless person is a loiterer. We hold that loitering must consist of more than existing momentarily in a location and that the record establishes an insufficient period of observation for probable cause of loitering here. On these facts, the officers lacked probable cause to conclude that Holly's behavior satisfied the *actus reus* component of the ordinance.

The officers also lacked probable cause regarding the *mens rea* element of the ordinance. Even if a person loiters, he does not illegally loiter under the ordinance unless he loiters while intending to deal drugs. We hold that there was insufficient indicia of Holly's specific intent to deal drugs to establish probable cause. Holly showed an open hand and returned it to his pocket, but the officers did not testify that they saw anything in Holly's hand or that anyone removed anything from or placed anything into his hand. The lawful reasons one might expose an open hand to another in public are too obvious and numerous to list. And returning an open hand to a pocket on what the state describes as a bitterly cold evening is no more indicative of intent to deal drugs than the presence of three men at the entrance to a downtown Minneapolis building, which is not an especially uncommon occurrence. Although the district court deemed Holly's presence at the entrance to the dance studio to be suspicious, reasonable officers would appreciate that a dance studio frequented by adolescent girls will necessarily be attended occasionally by nondancing adults, such as parents.

The Minneapolis ordinance itself guides Minneapolis officers in discerning when a person's conduct demonstrates the intent to deal drugs, listing reasonable examples that clearly do not apply here:

> Repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or other bodily gesture. . . . Acts as a look-out . . . . Transfers small objects or packages of currency or any other thing of value in a furtive fashion which would lead an observer to believe or ascertain that a drug transaction has or is about to occur . . . . Carries small objects or packages in one's mouth and transfers such objects or packages to another person for currency or any other thing of value, or swallows or attempts to swallow the objects or packages if approached by a law enforcement officer.

Minneapolis, Minn. Code of Ordinances § 385.50(d)(2-5) (2007). We do not suggest that this list is intended to be exhaustive or that officers should disregard other suspicious behavior. But a brief observation of a group of three men, one of whom shows the other his hand and whistles after he sees police, does not create probable cause to arrest that man for intent to deal drugs, an element of the charged loitering offense.

A comparison between the scant facts of this case and the extensive observation and facts of *Terry v. Ohio* illustrates the lack of probable cause here. In *Terry*, the Supreme Court analyzed a police encounter under the reasonable, articulable suspicion standard upon its understanding that the officer there had acted "without probable cause to arrest." *Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877 (1968). In *Terry*, an officer watched Terry and another man acting suspiciously for 10 to 12 minutes. 391 U.S. at 6, 88 S. Ct. at 1872. The men ritualistically repeated various motions—strolling down a downtown street, peering into the same store window, walking a short distance,

turning back, and then conferring. The officer observed the men follow this course in succession five or six times each and then meet with a third man. *Id*. The observing officer was a detective with 30 years devoted to the same downtown area. 391 U.S. at 5, 88 S. Ct. at 1871. Even so, the Supreme Court quoted agreeably the district court's conclusion that it "would be stretching the facts beyond reasonable comprehension to find that Office McFadden had had probable cause to arrest the men before he patted them down for weapons." 391 U.S. at 7–8, 88 S. Ct. at 1872–73.

The circumstances of *Terry* come far closer to establishing that Terry was casing the store intending to rob it, as the officer suspected, than the circumstances of this case come to establishing that Holly was intending to deal drugs, as the officers here suspected. We repeat that Holly's conduct was indeed suspicious, and the officers were reasonable in suspecting illegality; he acted nervously when he saw officers, and when he whistled the trio dispersed. But suspicion and probable cause are distinct concepts, and, on balance, we hold that the officers lacked probable cause to believe that Holly intended to deal drugs.

We turn to the district court's reliance on the officers' reasonable suspicion as the alternative basis to deny Holly's motion to suppress. We agree with the district court that, under *Terry*, the officers had sufficient grounds for a reasonable, articulable suspicion to justify a stop and investigation to explore their suspicion. This would lead us to affirm, but the officers in fact did not conduct an investigatory *Terry* stop. Instead, they approached Holly and *immediately* told him that he was under arrest. And this arrest

resulted in the seizure of the evidence of Holly's cocaine possession. The fact that the officers *could have* conducted a *Terry* stop is not relevant.

Clearly, the officers had a reasoned basis for their suspicion and, as it turns out, their suspicion was quite justified. But the federal and state constitutions require officers to develop their suspicion further before making an arrest. Because the officers lacked probable cause to arrest Holly, and because they did not discover the cocaine before developing probable cause that they might have developed during a *Terry* stop, we hold that the evidence should have been suppressed.

Reversed and remanded.