

ORIGINAL

COURT OF APPEALS
STATE OF COLORADO

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<p>El Paso District Court Honorable J. Patrick Kelly Case Number 06CR6026</p>	
<p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Plaintiff-Appellee</p> <p>v.</p> <p>Anthony Thomas</p> <p>Defendant-Appellant</p>	
<p>Douglas K. Wilson, Colorado State Public Defender LYNN M. NOESNER, #39209 1290 Broadway, Suite 900 Denver, Colorado 80203</p> <p><u>Appellate.pubdef@coloradodefenders.us</u> (303) 764-1400 (Telephone)</p>	<p>Case Number: 07CA2367</p>
<p>OPENING BRIEF OF DEFENDANT-APPELLANT</p>	

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INTRODUCTION

Defendant-Appellant was the defendant in the district court and will be referred to by name or as the Defendant. Plaintiff-Appellee, the State of Colorado, will be referred to as the prosecution or the State. The record in this case is in electronic format. The pleadings file or clerk's record is titled "Trial Court File," and transcripts are titled "Year-Month-Day." Therefore, cites to the clerk's record will be in the format "File, page number," and cites to transcripts will be in the format "Date, page number."

STATEMENT OF THE ISSUE PRESENTED

I. Whether the district court committed reversible error and violated Mr. Thomas' constitutional rights by failing to suppress evidence obtained as a result of an unlawful, warrantless search and seizure?

STATEMENT OF THE CASE

On or about December 28, 2006, the state charged Mr. Thomas with possession of a schedule II controlled substance, one gram or less, a class six felony, in violation of C.R.S. § 18-18-405(1)(2.3)(a)(I); and possession of drug paraphernalia, a class two petty offense, in violation of C.R.S. § 18-18-428(1).(File, p10-11)

Through counsel, Mr. Thomas filed a motion to suppress all evidence and statements collected in violation of Mr. Thomas' constitutional rights.(File, p24-28)

INTRODUCTION

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Through counsel, Mr. Thomas filed a motion to suppress all evidence and statements collected in violation of Mr. Thomas' constitutional rights.(File, p24-28)

The district court heard the motion on April 20, 2007 and subsequently denied it at the hearing.(2007-04-20, p64-69)

Mr. Thomas tried the case to a jury on August 14-15, 2007.(2007-08-14, p1-126; 2007-08-15, p1-11) The jury acquitted him of the drug paraphernalia charge, but found him guilty of possessing a controlled substance.(File, p33-34) The district court sentenced Mr. Thomas to two years in the custody of the Department of Corrections, running concurrently with his sentence in case number 05CR2739, and granted him 309 days of credit for time served. (File, p38; 2007-10-19, p6)

STATEMENT OF THE FACTS

The following facts are based on evidence presented at the suppression hearing. Around 1:45 p.m. on December 15, 2006, police detectives Tracey Fox and Olav Chaney saw a woman and two African-American males walking on the side walk on East Platte Avenue, a high crime area.(2007-04-20, p9-10, 50-51) Detective Chaney recognized the woman as Jennifer Evans, an individual who had been arrested several times for prostitution and drug possession, and ran her name through his computer.(2007-04-20, p10) After learning she had an existing warrant for her arrest, Detective Fox pulled over and contacted Ms. Evans.(2007-04-20, p10) At the same time, Detective Chaney also pulled over and approached Mr. Thomas, one of the males who had been walking with Ms. Evans.(2007-04-20, p19, 38)

As Detective Chaney was patting Mr. Thomas down, he asked Mr. Thomas if he had anything on him that should concern Detective Chaney.(2007-04-20, p39-40) Detective Chaney testified that Mr. Thomas admitted to having a “crack pipe” about the same time Detective Chaney felt a round tube in Mr. Thomas’ right jacket pocket.(2007-04-20, p39, 42) Detective Chaney searched Mr. Thomas’ right jacket pocket and found a pen.(2007-04-20, p39, 42) Detective Chaney then proceeded to search his other pocket, and after finding a pipe, he placed Mr. Thomas under arrest.(2007-04-20, p42-43) Detective Chaney subsequently found other drug paraphernalia and a small amount of crack cocaine on Mr. Thomas.(2007-04-20, p43, 44-45)

At trial, Mr. Thomas denied having possession or knowledge of the drugs and paraphernalia. He testified that he had accidently took his roommate’s jacket that day, had no idea what items were in the pockets, and never admitted to having crack pipes in his possession.(2007-08-14, p93-95, 97-99) The parties also presented contradictory testimony as to whether Detective Chaney found the crack cocaine in Mr. Thomas’ jacket in a cigarette pouch or in Mr. Thomas’ wallet rolled up in a tissue.(File, p2; 2007-08-14, p23, 95, 99-100)

SUMMARY OF THE ARGUMENT

The district court erred in finding that the police had reasonable suspicion to detain Mr. Thomas, where the police did not observe Mr. Thomas engage in any criminal activity or any activity otherwise related to crime, and their sole reason for stopping Mr. Thomas was based on whom he was seen walking with. Thus, the district court violated Mr. Thomas' constitutional rights by failing to suppress all evidence and statements resulting from the unlawful search and seizure of Mr. Thomas.

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR AND VIOLATED MR. THOMAS' CONSTITUTIONAL RIGHTS BY FAILING TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF AN UNLAWFUL, UNJUSTIFIED WARRANTLESS SEARCH AND SEIZURE.

At the suppression hearing, the district court heard testimony from Detective Fox and Chaney. Based on their testimony, the district court found that the "intrusion was reasonable." The district court laid out the three criteria which must be met for an investigatory stop to be constitutionally valid and found as follows:

As far as an investigatory stop, there must be three criteria that should be met for an investigatory stop not offending constitutional prohibition against search and seizure. The first must be some articulable and specific bases for suspecting; that is, a reasonable suspicion that some criminal activity has taken place and some progress is about to occur.

The Court would find that based upon the officers' experience, as well as their having worked in this specific area—one of three areas as testified to by Officer Fox in which there is a high incidence of narcotics and prostitution—coupled with the fact that they're identifying Ms. Evans walking down the street with two individuals in this location, that was a reasonable suspicion on the officers' part that some activity could be taking place – that being prostitution – perhaps even interrupting the negotiations of the act of prostitution.

The second factor the Court must look at is the purpose of the intrusion must be reasonable. Obviously in looking at the totality of the circumstances.

Again, the Court is looking at the issues such as the relevant circumstances surrounding where they are. One of those that we can look at is perhaps the lateness of the hour. That is not the case here, simply because this was in the afternoon. However, we can look at the character of the area as testified to by the officers. This is an area that is experiencing a lot of narcotic and prostitution activity.

The reaction to the presence of the officers? Well, they did not scatter like doves. However they did, to some extent – defendant walked away from the officers. The other gentleman went and sat on a wall. There was some amount of a minimal nature as far as their reaction of going a different direction.

There is also the nature of whether a companion is being arrested, and in this case the officers determined they happened to have a warrant for her arrest, so that comes into play, as well.

Obviously the Court can look at all of these factors in viewing the totality of the circumstances, determine whether the purposes for the intrusion was reasonable. And I think it was reasonable in this case.

Then the Court must look at the third area, and that is the scope and character of the intrusion. It must be reasonably related to its purpose.

First of all, the intrusion, I think, was reasonable, given the fact that they noticed Ms. Evans had a warrant for her arrest, were going to effect that arrest. I think that the officer approaching this – being Officer Chaney – approaching defendant and contacting him, given the nature of – the knowledge of Ms. Evans’ background and her business, was reasonable under the circumstances. The fact that the officer told the defendant that he would be patting him down, while not necessarily requesting consent, nonetheless was for officer safety. The Court could find that given the nature of the area, given the nature of the offenses that the officers had explored and investigated in this area would cause them concern for their own safety, and it would be a reasonable intrusion for them to pat down the defendant.(2007-04-20, p67-69)

Subsequently, at trial, the drug paraphernalia and crack cocaine was admitted consistent with the district court’s ruling.(2007-08-14, p26-28)

A. Standard of Review

Review of a district court’s suppression order involves a mixed question of law and fact. *People v. Gothard*, 185 P.3d 180, 183 (Colo. 2008). A reviewing court must determine whether the district court’s factual findings are adequately supported by competent evidence in the record. *People v. Kirk*, 103 P.3d 918, 921 (Colo. 2005). However, the district court’s legal conclusions are subject to *de novo* review. *See People*

v. Graham, 53 P.3d 658, 661 (Colo. App. 2001); *People v. D.F.*, 933 P.2d 9, 14 (Colo. 1997). A reviewing court bears the responsibility of determining whether the district court's legal conclusions are supported by sufficient evidence and whether the district court applied the correct legal standard. *People v. King*, 16 P.3d 807, 812 (Colo. 2001). A reviewing court will correct conclusions of constitutional law that are either inconsistent with or unsupported by evidentiary findings, as well as any applications of erroneous legal standards. *People v. Kirk*, 103 P.3d 918, 921 (Colo. 2005).

B. Applicable Law

The Fourth Amendment to the United States Constitution and Article II, Section 7 of the Colorado Constitution guarantee the right of the people to be secure in their persons against unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Stone v. People*, 485 P.2d 495, 497 (Colo. 1971); *People v. Davis*, 903 P.2d 1, 3-4 (Colo. 1995); *People v. Greer*, 860 P.2d 528, 530 (Colo. 1993). These constitutional protections extend to brief investigatory stops. *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *People v. Canton*, 951 P.2d 907, 909 (Colo. 1998). Thus, it is only under “narrowly defined circumstances” that a police officer “may make a limited intrusion into an individual’s personal security on less than probable cause.” *People v. Rahming*, 795 P.2d 1338, 1341 (Colo. 1990); accord, *People v. Dixon*, 21 P.3d 440, 444 (Colo. App. 2000).

Specifically, an officer who has less than probable cause to arrest may detain an individual temporarily without violating constitutional constraints, as long as three conditions are met: (1) the officer has a reasonable suspicion that the individual has committed, or is about to commit, a crime; (2) the purpose of the detention is reasonable; and (3) the character of the detention is reasonable when considered in light of its purpose. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *Stone*, 485 P.2d 495, 497 (Colo. 1981); *Greer*, 860 P.2d at 530; *see also* C.R.S. § 16-3-103. Because an investigatory stop constitutes a seizure, it must be brief in duration, limited in scope, and narrow in purpose. *Outlaw v. People*, 17 P.3d 150, 156 (Colo. 2001). The prosecution bears the burden of proving the constitutionality of the stop. *Id.* at 155; *King*, 16 P.3d at 814.

As a threshold matter, the legality of an investigatory stop hinges on whether the police have an articulable and specific basis in fact for suspecting that the defendant is involved in criminal activity. *People v. Arias*, 159 P.3d 133, 138 (Colo. 2007); *Outlaw*, 17 P.3d at 156; *People v. Padgett*, 932 P.2d 810, 814-15 (Colo. 1997). The police must have more than an unparticularized, subjective suspicion or hunch that the suspect may be engaging in crime. *Arias*, 159 P.3d at 138; *People v. Coca*, 829 P.2d 385, 387 (Colo. 1992). The inquiry is objective and turns on what facts were known to the police officer immediately prior to the stop. *Arias*, 159 P.3d at 138.

C. Analysis

The parties do not dispute that Mr. Thomas was seized when Detective Chaney summoned him and subsequently detained him. Rather, the issue concerns whether the seizure was constitutionally permissible—whether the government’s intrusion into Mr. Thomas’ personal security, liberty, and privacy was justified under the facts and circumstances known to the police at the time of the stop. Here, both evidence in the record and applicable case law refute the district court’s finding that the stop amounted to a reasonable intrusion based on a reasonable suspicion.

1. The Police Lacked An Articulate And Specific Basis In Fact For Suspecting That Mr. Thomas Was Committing, Had Committed, Or Was About To Commit A Crime.

The evidence presented at the suppression hearing failed to show that the police had an articulable and specific basis in fact for suspecting that Mr. Thomas was committing, had committed, or was about to commit a crime. At the time of the intrusion, the police knew the following facts: (1) it was the middle of the day; (2) East Platte Avenue was a high crime area; (3) two men were walking with a woman previously arrested for prostitution; and (4) the woman had an outstanding arrest warrant.(2007-04-20, p8-10, 14-15, 50-51)

The police did not recognize Mr. Thomas as a known criminal or client of Ms. Evans.(2007-04-20, p15, 26, 37) They did not indicate that anything about Mr.

Thomas' appearance was suspicious. They did not observe any exchange of money or any behavior consistent with Ms. Evans' pattern of taking her clients into vehicles.(2007-04-20, p15, 47-50; 2007-08-14, p37) They did not know how long Mr. Thomas and Ms. Evans had been talking or whether Mr. Thomas bore any relationship to Ms. Evans. They knew only that Mr. Thomas had been walking on the sidewalk in the middle of the day with a known criminal, (2007-04-20, p15, 36, 50-51) and therefore, Mr. Thomas must also be a criminal. As a matter of law, these facts objectively do not furnish an articulable and specific basis in fact for suspecting that Mr. Thomas was engaging in criminal activity and cannot support the intrusion into Mr. Thomas' personal privacy. *See Arias*, 159 P.3d at 138; *Rahming*, 795 P.2d at 1340-41 ("The circumstances under which an officer may detain an individual are limited because the individual interest at stake is far from insignificant: it is the right of every person to enjoy the use of public streets and other conveniences without unwarranted interference or harassment by agents of the law.") (internal citations omitted).

Both detectives repeatedly stated that they did not observe any criminal activity between Ms. Evans and Mr. Thomas.(2007-04-20, p15, 18-19, 36, 50; 2007-08-14, p19, 39, 41) When asked about the basis for the stop of Mr. Thomas, Detective Fox testified as follows:

Q Did you see any kind of money change hands?
A I did not.

Q Was — did it appear that they were simply walking down the street together?

A Yes.

Q And they were on the sidewalk?

A Yes.

Q At that time, did you observe any criminal activity between Mr. Thomas or Mr. Stewart or Ms. Evans?

A No.

Q The only contact with Ms. Evans was because you were aware — or Detective Chaney was aware that she had a warrant?

A Yes, sir.

Q Okay. Did you know Mr. Thomas?

A No, I did not.

. . .

Q And you had not observed — at that point when you made contact with Ms. Evans, did you observe Mr. Thomas engage in any illegal activity?

A No, sir.

(2007-04-20, p15, 18-19)

Detective Chaney also provided similar testimony:

Q And so did you see any criminal activity between Mr. Thomas and Ms. Evans?

A I did not see any kind of criminal activity between the two. No, sir.

Q Ms. Evans didn't advise you or Off — or Detective Fox of any criminal activity that may have been taking place between her and Mr. Thomas?

A Detective Fox primarily handled Ms. Evans, and I don't believe there was anything to indicate from her.

Q So at the time that you contact Mr. Thomas, the only reason you contacted him is because he was

walking with someone whom you described as a known prostitute?

A Yes, sir.

(2007-04-20, p50-51)

In fact, Detective Chaney even admitted during his testimony that they did not have a reasonable suspicion for stopping Mr. Thomas:

Q Why do you contact Mr. Thomas?

A Well, at this time, again, we know that Ms. Evans is a known prostitute. We also know that she's involved with narcotics, and we also know that the area is known for it. Both of those. And so I wanted to contact Mr. Thomas to get a little information, as well, about what Ms. Evans was doing out there, why he was contacting Ms. Evans, knowing that she is a prostitute.

Q Did you suspect that [Mr. Thomas] had committed, or was about to commit, a crime?

A I – I wasn't – **I wouldn't say I would suspect that.** We know that Ms. Evans is into those kind of things, so I guess there was a little suspicion on why he would be hanging around with a prostitute.(2007-04-20, p36)(emphasis added)

Thus, the reason that the police stopped Mr. Thomas was not because they suspected that he had committed a crime or was about to commit a crime, but rather because they had a “little suspicion” and wanted to get a “little information.” They were curious why Mr. Thomas would hang out with a prostitute. However, curiosity and “little suspicion” does not justify a warrantless intrusion and unlawful seizure of a person. *See Padgett*, 932 P.2d at 816 (where defendants were walking home from bar

on a cold night, officers desire to “find out what they were doing, where they were going, and where they were coming from” did not justify an investigatory stop); *CoCa*, 829 P.2d at 387 (condemning police for stopping defendant’s vehicle “merely to see if it had been involved in the commission of a[n] . . . infraction.”). Nor does a “little suspicion” equate to a reasonable and articulable basis for stopping Mr. Thomas. *See Arias*, 159 P.3d at 138 (the police must have more than an unparticularized suspicion or hunch that the suspect is engaged in criminal activity to meet the minimal level of objective justification for making the stop); *Padgett*, 932 P.2d at 816. Thus, the detectives’ testimony does not support the district court’s finding that the police had reasonable suspicion.

In reaching its legal conclusion that the police had a reasonable suspicion as to justify the stop, the district court speculated that prostitution *might* have been taking place and that the police “perhaps even interrupt[ed] the negotiations of the act of prostitution.” (2007-04-20, p67) However, as a matter of law, an unsupported speculation or hunch that criminal activity may be occurring is not sufficient to constitute a reasonable suspicion or to justify an intrusion otherwise barred by the Fourth Amendment. *Arias*, 159 P.3d at 138; *Outlaw*, 17 P.3d at 156-58; *Padgett*, 932 P.2d at 814-15; *see Rahming*, 795 P.2d at 1343 (officer’s “suggestion” that the individuals “may have been about to commit a drive-by shooting” constituted a

hunch). Although Mr. Thomas and Ms. Evans could have been negotiating an illegal matter, they could have also been talking about baseball or lunch. Here, the police lacked any basis to believe the former was occurring rather than the latter.

The record does not demonstrate that the police had reasonable and objective grounds to believe that prostitution or related negotiations were taking place between Mr. Thomas and Ms. Evans. Detective Chaney testified that Ms. Evans typically took her clients to vehicles and that prostitutes rarely walk on the streets with their clients.(2007-04-20, p32, 34) At the time of the stop, the detectives had not observed any behavior consistent with Ms. Evans' pattern or otherwise indicative of prostitution activity, nor did they see any exchange of money. *Cf. United States v. Martin*, 289 F.3d 392 (6th Cir. 2002) (grounds for reasonable suspicion existed where police observed a woman, standing in a parking lot at night, wave at vehicle in a manner recognized as a common means of hailing prospective johns, enter vehicle, and drive off).

Both detectives testified that the reason they contacted Ms. Evans and her companions was because Ms. Evans had an outstanding warrant.(2007-04-20, p15, 31, 37) They never testified that they were investigating prostitution related activity. In fact, during Ms. Evans' arrest, Detective Fox did not initially ask Ms. Evans any questions about her association with Mr. Thomas, which supports the fact that the

police were not investigating prostitution.(2007-04-20, p12, 21, 50) Thus, the district court's finding that the police had a specific, objective, articulable basis for suspecting that Mr. Thomas was in the process of committing a crime is not supported by competent evidence.

2. The Police Lacked A Reasonable And Constitutionally Permissible Purpose To Support The Seizure.

In addressing the second criteria necessary for a stop to be constitutionally permissible, the district court relied on the following facts to support its finding that the purpose of the intrusion was reasonable: the area at issue “experience[ed] a lot of narcotic and prostitution activity”; “defendant walked away from the officers”; and there was an existing warrant for Ms. Evans, Mr. Thomas’ companion.(2007-04-20, p67-68) Here, the court erroneously placed too much significance on the history of crime in the area, Mr. Thomas’ decision to walk away, and Ms. Evans’ reputation and criminal history.

While courts may consider an area’s history and incidence of crime in evaluating the legality of an investigatory stop, this factor is not dispositive. *See Brown v. Texas*, 443 U.S. 47, 52 (1979); *Davis*, 94 F.3d at 1468; *Greer*, 860 P.2d at 531-32 (affirming suppression order based, in part, on “the unwillingness of this court to justify a stop based solely on the reputation of past criminal activity in a locality). “A history of past criminal activity in a locality does not justify suspension of the

constitutional rights of everyone, or anyone, who may subsequently be in that locality.” *Rahming*, 795 P.2d at 1343 (quoting *People v. Aldridge*, 674 P.2d 240, 242 (Cal. 1984)).

The detectives testified that there were many legitimate businesses in the area where the stop occurred and legitimate patrons frequented those businesses.(2007-04-20, p25-26, 49-50) They also testified that there were other areas in the city with a higher incidence of crime.(2007-04-20, p25) Further, although East Platte Avenue may be a high crime area, Mr. Thomas was not located in a suspicious location. *See Outlaw*, 17 P.3d at 157 (gathering of individuals on a public sidewalk cannot justify investigatory stop). He was not, for example, in an alley, an empty parking lot, or in a dumpster; rather, he was walking down a sidewalk of main thoroughfare in broad daylight.(2007-04-20, p49) Cf. *People v. Rushdoony*, 97 P.3d 338, 343 (Colo. App. 2004) (defendant observed digging through dumpster at 3:30 a.m. in a high crime area not usually frequented by the public and close to scene of recent burglaries).

His decision to go for a walk in a public area and subsequently walk past police officers arresting another individual does not support a suspicion that criminal activity was afoot, or otherwise justify an intrusion into his personal privacy. *See Outlaw*, 17 P.3d at 157. The case would be different if upon seeing the police Mr. Thomas took off running. *See, e.g., People v. Pigford*, 17 P.3d 172 (Colo. App. 2000). Here, Mr.

Thomas did not flee or attempt to evade the police. Although the prosecution argued to the contrary, the district court specifically found that Mr. Thomas did not “flee in any rush” from the police or “scatter like doves.”(2007-04-20, p64, 67) Yet, the court still noted Mr. Thomas’ decision to keep walking as support for the stop. However, Mr. Thomas had a constitutional right to keep walking and even to ignore Detective Chaney’s instructions, and this exercise of his rights cannot provide reasonable suspicion. *See Davis*, 94 F.3d at 1468-69 (quoting *Florida v. Royer*, 460 U.S. 497-98 (1983) (when an officer approaches an individual in a public place, the individual may decline to answer questions and “may go on his way”); *Outlaw*, 17 P.3d at 157; *Rahming*, 795 P.2d at 1342 (“An individual’s attempt to avoid coming in contact with a police officer does not, without more, justify an investigative detention”); *People v. Wilson*, 784 P.2d 325, 327 (Colo. 1989) (defendant’s decision to run in the opposite direction from his companions did not provide a basis for the police to pursue and search him).

Finally, the district court placed too much emphasis on the fact that the police observed Mr. Thomas walking with Ms. Evans. All the police observed was three people walking together, one of whom had been previously arrested for prostitution and was known to the police as a result. When the police pulled over and approached the three individuals, it was not to investigate possible prostitution, but to enforce an

arrest warrant. The police contacted Ms. Evans, not because they suspected she was engaging in prostitution, but because she had an outstanding warrant for a misdemeanor.(2007-04-20, p31) Both detectives stated several times that they did not observe or witness any criminal activity prior to initiating the stop.(2007-04-20, p15, 18-19, 50; 2007-08-14, p19, 39, 41)

Beyond the fact that Mr. Thomas was walking with Ms. Evans, the police had no indication that he was a recent or potential client of hers. The police stopped Mr. Thomas, not because they reasonably believed he had engaged in or was about to engage in criminal activity, but because the police inferred that a law-abiding citizen would not walk down the street or associate with a known prostitute. However, Mr. Thomas' choice to speak to another individual in the broad daylight should not make him vulnerable to unreasonable seizures. Association with a person previously convicted or suspected of criminal activity should not strip away constitutional protections. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (“a person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person”).

3. The Scope And Character Of The Seizure Was Unreasonable.

At the outset, because the police did not have reasonable suspicion for initially stopping Mr. Thomas, it follows that they lacked justification for the subsequent pat-down. *See* C.R.S. § 16-3-103; *Wilson*, 784 P.2d at 327.

Setting aside the legality of the initial stop, the scope and character of the pat-down was, nevertheless, unconstitutional, because Officer Chaney did not have a reasonable suspicion that Mr. Thomas presented a danger to him. *See People v. Ratcliffe*, 778 P.2d 1371, 1376-77 (Colo. 1989) (“A protective search for weapons is only justified when the circumstances of an otherwise valid stop provide the officer with a reasonable basis to suspect that the person with whom he is dealing may be armed and dangerous.”) Here, Officer Chaney did not observe Mr. Thomas engage in any criminal activity.(2007-04-20, p50-51) Nor did he suspect Mr. Thomas had been engaging or was about to engage in criminal activity.(2007-04-20, p36) His only purpose in detaining Mr. Thomas, an innocent party, was to find out why Mr. Thomas had been walking with Ms. Evans. The only basis he articulated for the necessity of a pat-down was the nature of the area.(2007-04-20, p38) He testified “we are very familiar with many people in those areas, and many times they do carry knives.”(2007-04-20, p38) However, he was not familiar with Mr. Thomas.(2007-04-20, p37)

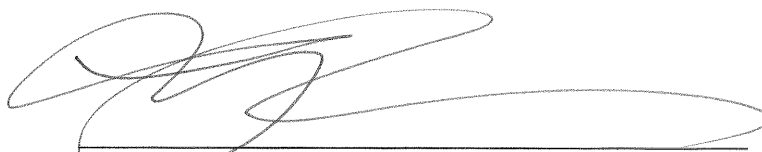
Outside of the fact that other people carry knives in that area, Officer Chaney did not have a basis for suspecting that Mr. Thomas personally carried a weapon or otherwise presented a danger to him. Contrary to the district court's finding, incidence of crime in a locality does not necessarily give an officer an automatic basis to believe that an individual must be carrying weapons or presents a danger to the police as to warrant a pat-down. *See Davis*, 94 F.3d at 1468-69; *Rahming*, 795 P.2d at 1343. Officer Chaney's nosiness concerning a perfectly legal interaction between two people walking on the sidewalk in an area, which happens to have a high incidence of crime, does not entitle him to pat-down every individual in that area. Because Officer Chaney had no evidence or specific basis for believing that Mr. Thomas was carrying a weapon or otherwise presented a danger or risk to him, his pat-down of Mr. Thomas was unreasonable and unconstitutional. *See Ratcliff*, 778 P.2d at 1376-77; *People v. Sherman*, 593 P.2d 971, 972 (Colo. 1979).

In conclusion, the district court erred in failing to suppress all evidence and statements obtained as a result of the illegal and unjustified detention of Mr. Thomas, thereby violating Mr. Thomas' state and federal constitutional rights to be free from unreasonable searches and seizure. U.S. Const. Amends. IV, XIV; Colo. Const. Art. II, § 7; *Terry*, 392 U.S. at 9; *Outlaw*, 17 P.3d at 156-57. Accordingly, this Court must vacate Mr. Thomas' conviction and remand for further proceedings.

CONCLUSION

WHEREFORE, for all the above reasons, this Court should reverse Mr. Thomas' conviction and remand with directions.

DOUGLAS K. WILSON
Colorado State Public Defender

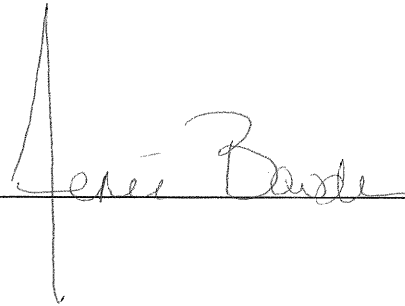
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CERTIFICATE OF SERVICE

I certify that, on October 29, 2008, a copy of this Opening Brief of Defendant-Appellant was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

Catherine P. Adkisson
Assistant Solicitor General
Appellate Division, Criminal Justice Section
1525 Sherman Street, 7th Floor
Denver, CO 80203



A handwritten signature in cursive script, appearing to read "Lewis Baxley", is written over a horizontal line. A vertical line extends downwards from the end of the signature.