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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
El Paso County District Court Honorable J. Patrick Kelly, Judge Case No. 06CR6026	▲ **COURT USE ONLY** ▲
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. ANTHONY THOMAS, Defendant-Appellant.	Case No.: 07CA2367
JOHN W. SUTHERS, Attorney General KATHERINE A. HANSEN, Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5785 Registration Number: 25464 *Counsel of Record	

PEOPLE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

This is a direct appeal of the defendant's conviction for possession of a schedule II controlled substance.

On December 15, 2006, the defendant was contacted by the police and found to be in possession of cocaine and a hollowed-out pen used to smoke cocaine (8/14/07, pp19-23,46,64). He was charged with possession of a controlled substance – cocaine (one gram or less) (F6), and possession of drug paraphernalia (PO2) (File, p10). He was subsequently convicted, following a jury trial, of possession of cocaine, but acquitted of possession of drug paraphernalia (File, pp33-34; 8/15/07, p7). He was thereafter sentenced to 2 years in the Department of Corrections (File, p38; 10/19/07, p6). This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court properly denied the defendant's motion to suppress as the defendant was not subjected to an unlawful detention or pat-down search.

ARGUMENT

I. The trial court properly denied the defendant's motion to suppress.

The defendant contends that the trial court erred in denying his motion to suppress as the officers did not have reasonable suspicion to detain him, and there was insufficient information to justify the pat-down search.

A. Factual background.

The defendant filed a motion to suppress evidence, arguing that his detention was unlawful (File, pp24-28). At a hearing, the following evidence was received.

On December 15, 2006, at approximately 1:45 p.m., Detective Fox and Detective Chaney were patrolling the area of East Platte Avenue in Colorado Springs (4/20/07, pp8,29). This was an area well known for prostitution, as well as for narcotics (4/20/07, pp23,32).[1] The officers were assigned to the "PASS Team," a Police Accountability Service Standards Team assigned to three high-crime areas to reduce crime and improve the quality of life in those areas (4/20/07, pp9,27).

As they were driving in separate vehicles through the area, Detective Chaney observed a woman and two men walking down the street, and noted that

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[1] In Detective Fox's four years working that area, hundreds of arrests for prostitution have been made, as well as "hundreds of arrests for drug paraphernalia, and ... possibly 50 arrests for actual narcotics" (4/20/07, p24).

the woman was Jennifer Evans, an individual known to be a prostitute and a drug user (4/20/07, pp9,14,31). Both detectives were personally familiar with Evans, having had arrested her on numerous occasions for prostitution and for possession of crack and crack pipes, specifically in that area (4/20/07, pp10,14-15,31).

Detective Chaney ran Evans' name for warrants, and discovered that she had an active warrant for her arrest (4/20/07, p10). Both detectives stopped their vehicles near the three individuals and approached Evans (4/20/07, p10). At this point, one of the two males that was with her went and sat on a wall that was close by, and the other male, later identified as the defendant, started to walk off (4/20/07, pp10,18,36).

Detective Chaney asked the defendant to step over to where he was and asked him what was going on (4/20/07, p38,52). Detective Chaney explained why he contacted the defendant:

> 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 that 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.

(p36).[2]

Because of the warrant, Evans was immediately taken into custody (4/20/07, p11). During a search incident to that arrest, Detective Fox removed a crack pipe from Evans' person, as well as a container that had white residue in it (4/20/07, p11). She was then placed in a patrol car (4/20/07, p11).

Meanwhile, Detective Chaney advised the defendant that he was going to pat him down for any weapons due to the nature of the area and who he was with, i.e., for officer safety (4/20/07, p38). As he began, he asked the defendant if he had "anything on him that [he] should be concerned with," and the defendant replied that he had a crack pipe (4/20/07, pp39-40). Detective Chaney then felt a round tube in the defendant's right coat pocket, retrieved it, and discovered it was a pen (4/20/07, p42). Detective Chaney asked where the crack pipe was, and the defendant said it was in his other pocket; Detective Chaney then checked the other jacket pocket and found a crack pipe (4/20/07, p42).

At this point, the defendant was placed into custody for possession of drug paraphernalia (4/20/07, p42). Detective Chaney then conducted a search of the

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[2] Detective Chaney also stated that, based on his training and experience, when he has seen people that he intends to contact split up, it is usually because they were involved with something criminal or had a warrant and they were warned to leave before he made contact (4/20/07, p39).

defendant's person incident to that arrest, and uncovered other items of drug paraphernalia and crack cocaine (4/20/07, pp42,44-45).

At the conclusion of the evidence, the defendant argued that there was no reasonable suspicion of criminal activity to justify stopping him (4/20/07, pp59-61). The court disagreed:

> 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.

(4/20/07, p67). The court, for similar reasons, also concluded that the purpose of the intrusion was reasonable (4/20/07, p68).

The court then noted that the pat-down was done for officer safety reasons, and 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." (4/20/07, pp68-69). The court ultimately denied the motion to suppress (4/20/07, p69).

B. Standard of review.

In reviewing a suppression order, this Court defers to the trial court's findings of fact, which shall not be overturned if supported by competent evidence in the record. This Court then applies a *de novo* standard of review to ascertain whether the trial court has applied the correct legal standard and whether its legal conclusions are supported by sufficient evidence. People v. Kazmierski, 25 P.3d 1207, 1210 (Colo. 2001).

On appeal, the defendant raises two claims: 1) there was no reasonable suspicion of criminal activity to detain him; and 2) there was insufficient information suggesting that officer safety was at risk to justify the pat-down search. The People do not dispute that the first claim is preserved by the defendant's motion and arguments at the hearing, as set forth above.

However, neither in the motion nor the oral argument did the defendant

argue that the pat-down search was not justified for officer safety reasons.[3] As such, this claim is not properly before this Court. People v. Valencia, 169 P.3d 212, 217 (Colo. App. 2007); People v. White, 64 P.3d 864, 871 (Colo. App. 2002) (Fourth Amendment suppression claim not raised below will not considered on appeal); People v. Young, 987 P.2d 889 (Colo. App. 1999) (same).

C. Analysis.

The Fourth Amendment to the United States Constitution and Article II, Section 7 of the Colorado Constitution hold that the people shall be secure in their persons from "unreasonable searches and seizures." An investigatory stop does not violate this "reasonableness" standard where the stop is justified by reasonable, articulable suspicion that the individual has or is engaged in criminal activity. People v. Johnson, 865 P.2d 836, 838 (Colo. 1994); Stone v. People, 485 P.2d 495

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[3] In a conclusory statement at the end of his argument, defense counsel stated: 'I'd ask the Court to find that they had no reason to contact him, they had no reason to seize him and arrest him the way that they did, and they had no reason to pat him down or to search him, and I'd ask the Court to suppress all of the evidence that was obtained in ... this case"(4/20/07, p61). This was the only comment made by defense counsel as to the pat-down itself, and is certainly not sufficient to preserve a claim that there was insufficient grounds to justify that procedure. See People v. McNeely, 68 P.3d 540, 545 (Colo. App. 2002) ("For a defendant to fairly present a constitutional claim, the court must "surely be alerted" to the constitutional argument.").

(Colo. 1971). An officer's suspicion has an "articulable and specific basis" when he knows particular facts, as well as the rational inferences from these facts, which support a reasonable belief that a person is involved in criminal activity. People v. Garcia, 789 P.2d 190 (Colo. 1990).

In reviewing the propriety of a given stop, the court looks at the totality of the circumstances, and views the facts and reasonable inferences therefrom in light of common sense, human experience, and the officer's training. United States v. Sharpe, 470 U.S. 675 (1985); People v. Hughes, 767 P.2d 1201 (Colo. 1989). Objective standards of reasonableness guide any inquiry as to the propriety of an officer's actions. People v. Ramos, 13 P.3d 295, 297 (Colo. 2000).

It is well recognized that an investigatory stop may be employed when an officer has less than probable cause. See e.g., Terry v. Ohio, 392 U.S. 1, 25-26 (1968). "Reasonable suspicion" is all that is required to stop and question a suspect or to pat him down in a search for weapons. People v. Smith, 13 P.3d 300, 304 (Colo. 2000). The level of suspicion required for an investigative stop or pat-down is less than that needed for an arrest, and it is judged against the reasonableness standard of the Fourth Amendment. Terry, supra. "In order to assess reasonableness, a court must identify the government interest allegedly justifying the frisk and balance this against the level of intrusion." Id., at 21.

An officer may conduct an investigatory stop if: (1) there is an articulable and specific basis in fact for suspecting that criminal activity has occurred, is taking place, or is about to occur; (2) the purpose of the intrusion is reasonable; and (3) the scope and character of the intrusion is reasonably related to its purpose. Smith, supra; People v. Hardrick, 60 P.3d 264, 266-267 (Colo. 2002).

At the outset, the defendant has the burden of establishing that he was "seized" within the meaning of the Fourth Amendment, and that the seizure was unconstitutional. People v. Jackson, 39 P.3d 1174, 1180 (Colo. 2002). Here, the defendant claims that he was "seized when Detective Chaney summoned him and subsequently detained him." Opening Brief, p9. The People do not agree.

"[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). Law enforcement officers do not implicate the protections afforded by the Fourth Amendment by merely approaching an individual on the street or in another public place. See People v. Milligan, 77 P.3d 771, 775 (Colo. App. 2003) (an officer's act of approaching an individual in a public place or asking for identification does not, in itself, constitute a seizure within the meaning of the Fourth Amendment).

A consensual encounter is a contact in which the voluntary cooperation of the citizen is elicited through non-coercive questioning. See Milligan, supra. The test for determining if the encounter is a consensual one is whether a reasonable person under the circumstances would believe he was free to leave and/or to disregard the official's request for information. Milligan, supra; see also People v. Paynter, 955 P.2d 68 (Colo. 1998) (unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would believe he is not free to leave if he does not comply, one cannot say that questioning results in a seizure protected by the Fourth Amendment).

Here, the detectives merely approached the group of three as they walked on the sidewalk. They did not block the defendant's path with their vehicles, or otherwise restrict his movements. Upon seeing the police, the defendant began to walk away, and Detective Chaney merely asked if he could talk with him about what he was doing with Evans, a known prostitute. No evidence was presented that demonstrated that compliance with this request was required, i.e., he asked, not demanded to talk, he did not use an intimidating tone of voice, he did not use any show of force. As such, at least up to the point at which the detective indicated that he was going to conduct a pat-down search of the defendant, the encounter between the defendant and Detective Chaney was consensual.

While the People do not assert that the pat-down search was volunteered, or that it was not a police intrusion, it was nevertheless a reasonable intrusion and therefore did not violate the Fourth Amendment.

To justify a police intrusion, an officer must establish that "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." Terry, supra. "It is well established in Colorado that when an officer believes someone may be armed and potentially dangerous, a pat-down search for weapons is appropriate." Hardrick, supra at 267. Absolute proof that weapons are present is not necessary: "All that is required is a reasonable, articulable suspicion that officer safety may be compromised." Id. And, Colorado courts "have repeatedly stressed that a police intrusion based on officer safety concerns is reasonable." Hardrick, supra, *citing* People v. Martinez, 801 P.2d 542, 544 (Colo. 1990); Smith, supra; People v. Melgosa, 753 P.2d 221, 225-26 (Colo. 1988); see also Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (finding it "too plain for argument" that concern for officer safety is "both legitimate and weighty").

Here, Detective Fox indicated that in her capacity as a PASS team member working in the assigned areas, it is common to encounter people who have weapons, including "a lot of knives," "some guns," and "other things that may cut:

Box cutters, Exacto knives" (p12). Detective Cheney testified that in his "contact with criminals in that area," he had "found them to have weapons on them … [t]ypically it's been knives more than anything else" (p32). In fact, they "almost always [work that area] as a team … primarily for officer safety reasons" because they "commonly encounter weapons on [] suspects" (pp34,38).

In this case, the detectives were contacting a known prostitute and drug user who had an active warrant for her arrest. This was occurring in a high crime area where weapons were often present and involved. Because the two men were clearly with Evans, the officers had a reasonable basis to fear for their safety from Evans herself, and those who were with her and might attempt to protect her or prevent her arrest. See e.g., People v. Sutherland, 886 P.2d 681, 687 (Colo. 1994) (where the initial intrusion and inquiry of the driver was permissible in order to secure the safety of the officers at the scene, the officer's conduct was similarly justified in subsequently ordering the passenger out of the automobile, patting her down for weapons, and separating the passengers during the investigatory stop of the driver); People v. Mascarenas, 972 P.2d 717, 721 (Colo. App. 1998) ("the 'reasonable suspicion' standard may in certain circumstances apply to pat-down weapons searches in situations other than an investigative stop on the street or in another public place"); People v. Mack, 33 P.3d 1211, 1215 (Colo. App. 2001)

(because the area was known for criminal activity, and one of the officers had previously taken weapons from others in the same area, it was reasonable for the officers, for their own safety and that of the public, to be concerned about whether defendant had a weapon).

In light of the totality of the circumstances, the officers were justified in ensuring their safety by conducting a pat-down search of the defendant. Cf. Hardrick, supra (where officers were conducting a search of a home and arresting individuals inside and the defendant arrived at the scene, it was reasonable to frisk the defendant for officer safety reasons); Martinez, supra (where police were in a house executing a warrant and the defendant approaching the house, even though the police had no suspicion that the defendant was involved in any crime, it was reasonable to conduct a pat-down search of the defendant for officer safety reasons).

Furthermore, the scope of the search did not exceed that necessary to ensure officer safety; indeed, the defendant does not argue as such. Detective Chaney had just begun to pat-down the defendant when he volunteered that he had a crack pipe on him. This justified the seizure of the pipe, and his subsequent arrest for possession of drug paraphernalia. Then, the search for and seizure of the cocaine was authorized as a search incident to arrest.

Although officer-safety reasons were sufficient to conduct the pat-down search in this case, the facts also establish that, even if the encounter with the defendant constituted a seizure from the moment of first contact, it was justified upon reasonable suspicion of criminal activity. As noted above, the defendant was walking with a prostitute and drug user in an area known for prostitution and drug use. Cf. People v. Canton, 951 P.2d 907, 911 (Colo. 1998) ("although a history of criminal activity in a locality does not justify suspension of the constitutional rights of anyone who may subsequently be at that locality, the fact that an area is reputed to be the site of drug trafficking can provide support for an officer's decision to stop an individual) (citation omitted).

Detective Chaney testified that "many times we follow the prostitutes, or we also witness them get in vehicles or we'll follow them walking with people to houses and attempt to make contact trying to determine whether or not there's been some type of deal that was making reference to prostitution." He also stated that prostitutes have been known to provide services outside of vehicles, including in alleys and behind businesses (4/20/07, p32).

While Detective Chaney acknowledged that based on his experiences with Evans she "typically would get in vehicles," the encounters usually began on Platte

Avenue (where the defendant was seen with Evans) (4/20/07, p32). He also testified that:

> [W]e've known her to do her act in different places. I don't know if we've ever caught her outdoors. But we've learned throughout all the prostitutes that we know that they go anywhere and everywhere. We don't always catch them.

(4/20/07, p49).

Indeed, Detective Chaney later testified that the direction that the three individuals were traveling when he first saw them included motels and hotels (4/20/07, p57). Detective Chaney further testified that based on his experience, "almost always when we contact somebody with prostitutes, they are involved in one way or another." (4/20/07, p50).

As the trial court found, based on the location where the defendant was observed, the fact that he was walking and talking with a known prostitute, the officers' general knowledge about how prostitution is conducted in this area and with this particular individual (i.e., Evans), and the fact that the defendant began to walk away upon seeing the police, it was reasonable for the officers to believe that the defendant was in the process of negotiating an act of prostitution with Evans, which would constitute criminal activity. As such, contacting the defendant to investigate was reasonable. And, as noted above, the pat-down search was

justified for officer safety reasons, and did not exceed its proper scope. The motion to suppress was properly denied.

CONCLUSION

For the foregoing reasons and authorities, the People respectfully request that this Court affirm the defendant's judgment of conviction.

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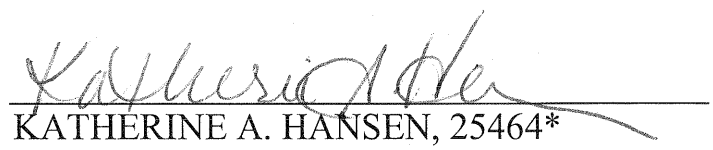

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon LYNN M. NOESNER, Deputy State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this 31st day of December 2008.