People v. Thomas, A.

COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA2367
El Paso County District Court No. 06CR6026
Honorable J. Patrick Kelly, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Anthony Thomas,

Defendant-Appellant.

JUDGMENT REVERSED

Division IV
Opinion by: JUDGE FURMAN
Webb and Richman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: April 16, 2009

John W. Suthers, Attorney General, Katherine A. Hansen, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Lynn M. Noesner, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Defendant, Anthony Thomas, appeals the judgment of conviction entered upon a jury verdict finding him guilty of possession of a schedule II controlled substance. Because we conclude that police officers were not justified in detaining and searching defendant, we reverse.

I. Background

Evidence at the suppression hearing revealed the following facts.

Defendant's conviction arose out of a neighborhood safety program conducted in an area of town known for prostitution and narcotics. Police officers traveling in unmarked cars recognized a woman known to be a prostitute walking down the street with two men. The officers did not observe any criminal activity, but determined that the woman had an active misdemeanor warrant for her arrest.

Although one of the officers testified that they would often follow known prostitutes to determine if a transaction involving prostitution was in progress, no such investigation occurred here.

The officers stopped their cars to arrest the woman. When the first officer approached her, one of the men sat on a nearby wall. However, defendant, the second man, began to walk away.

When the second officer saw that defendant was walking away, he decided to contact him because he found it a "little suspicious" that he was hanging around a prostitute who was known to be involved with narcotics. However, the officer did not suspect defendant had committed or was about to commit a crime. And, the officer testified that it would be a "rare occasion" for a prostitute to be walking in the area with a client or potential "john."

The officer asked defendant to "step over here for a moment," and subsequently conducted a pat-down search that revealed a crack pipe. A further search incident to arrest uncovered additional drug paraphernalia and crack cocaine.

The trial court denied defendant's motion to suppress the items recovered from defendant. At trial, defendant denied having possession or knowledge of the drugs.

II. Analysis

Defendant contends the trial court should have suppressed the drug paraphernalia and crack cocaine as the fruit of an illegal search and seizure. Based on supreme court precedent, we agree.

When reviewing a trial court's suppression order, we defer to its findings of fact, but review de novo its conclusions of law. *People v. Garcia*, 11 P.3d 449, 453 (Colo. 2000); *see also People v. Romero*, 953 P.2d 550, 555 (Colo. 1998).

A. Consensual Encounter

Initially, we decline to address the People's assertion, made for the first time on appeal, that the encounter between defendant and the police officer was consensual up to the point when the officer conducted the pat-down search.

It is axiomatic that a reviewing court will decline to address an issue when the trial court did not have an adequate opportunity to make factual findings and legal conclusions. *See People v. Syrie*, 101 P.3d 219, 223 (Colo. 2004); *see also Moody v. People*, 159 P.3d 611, 616 (Colo. 2007)(it is fundamentally unfair to entrap an unwary defendant by raising issue for the first time on appeal).

The People acknowledge they did not claim in the trial court that the encounter with defendant was consensual. Nevertheless, they assert that they did not waive such an argument, and that an adequate factual record exists for review of the matter on appeal.

In determining whether an encounter was consensual, the court must determine whether a reasonable person, under the totality of the circumstances, would believe that he or she was free to disregard the officer's request or leave. *See Outlaw v. People*, 17 P.3d 150, 155-56 (Colo. 2001)(court may consider such facts as the threatening presence of several officers, the display of a weapon by an officer, physical touching, the use of language or tone of voice, or if police required a defendant to alter his direction of travel and walk back to officer).

Defendant notes certain factual questions were not resolved at the suppression hearing. For example, although the record indicates that the police were armed, there was no record concerning whether the officers' weapons were visible. Further, at oral argument before this court, the People argued defendant's path was not blocked by the officers. However, defendant claims

otherwise. And, because the issue was not presented by the prosecution, defendant was not given an adequate opportunity to develop a record in opposition to such a claim.

Accordingly, we conclude the prosecutor waived the issue at trial. *See People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998) (consensual contact issue could not be raised by People for the first time on appeal).

B. Investigatory Stop

An investigatory stop by a police officer is a seizure and therefore implicates the Fourth Amendment and the Colorado constitution. *Outlaw*, 17 P.3d 154. A police officer may temporarily detain an individual for an investigatory stop without violating constitutional law if three conditions are present: (1) there is 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 the purpose. § 16-3-103, C.R.S. 2008; *Outlaw*, 17 P.3d at 156.

A police officer's assessment must center on whether the facts and circumstances known to the officer immediately prior to the stop establish an "an articulable and specific basis in fact" to believe a person is engaged in criminal activity. *People v. Arias*, 159 P.3d 134, 138 (Colo. 2007); *see also Terry v. Ohio*, 392 U.S. 1, 27 (1968). In making this determination, the police must have more than an "unparticularized suspicion or 'hunch.'" *People v. Rahming*, 795 P.2d 1338, 1341 (Colo.1990)(quoting *Terry*, 392 U.S. at 27).

Defendant contends the officers did not have an articulable suspicion that defendant had committed or was about to commit a crime. We agree.

The officers acknowledged that defendant was "simply walking" on the sidewalk; that he was near legitimate businesses in the afternoon hours; that no criminal activity appeared to be occurring; and that it would be rare for a prostitute to walk in that manner with a "john." Defendant did not flee the scene when officers approached, but merely walked in a different direction.

The prosecution's argument relied heavily on the fact defendant was present in an area known for drugs and prostitution.

However, the supreme court has held that "[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." *People v. Greer,* 860 P.2d 528, 531 (Colo. 1993)(quoting *People v. Aldridge*, 35 Cal.3d 473, 198 Cal.Rptr. 538, 540, 674 P.2d 240, 242 (1984)). Further, defendant's decision to walk away in order to avoid coming in contact with police does not, without more, justify an investigative detention of the individual. *See Rahming*, 795 P.2d at 1342.

Therefore, we need not decide whether the protective frisk was reasonable.

C. Conclusion

Accordingly, we conclude that the officers subjected defendant to an investigatory stop; that the stop was not based on a reasonable suspicion of criminal activity; and therefore that the investigatory stop constituted an unconstitutional seizure of defendant.

Because the drug paraphernalia and crack cocaine were derived from defendant's illegal seizure, this evidence was

inadmissible. *See People v. Martinez*, 200 P.3d 1053, 1059 (Colo. 2009).

The judgment is reversed.

JUDGE WEBB and JUDGE RICHMAN concur.