OFFICIAL ARKANSAS COURT OF APPEALS OPINION

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ARKANSAS COURT OF APPEALS

DIVISIONS III & IV
No. CR-17-306

Opinion Delivered: February 7, 2018

MO SHAY APPELLANT	APPEAL FROM THE JOHNSON COUNTY CIRCUIT COURT [NO. 36CR-16-196]
V.	HONORABLE BILL PEARSON, JUDGE
STATE OF ARKANSAS APPELLEE	REVERSED AND REMANDED

KENNETH S. HIXSON, Judge

Appellant Mo Shay was convicted by the trial court of possession of methamphetamine and was sentenced to six years' probation. On appeal, Mr. Shay argues that the trial court erred in denying his motion to suppress the methamphetamine because its discovery was the result of an illegal search and seizure. We agree that the trial court erred in denying appellant's motion to suppress, and we therefore reverse and remand.

After Mr. Shay was charged with possession of methamphetamine, he filed a written motion to suppress the contraband. Thereafter, the trial court held a suppression hearing. Officer Kenneth Kennedy of the Clarksville Police Department was the only witness to testify at the suppression hearing. Officer Kennedy testified that he was patrolling Clarksville at around 5:00 a.m. when he observed a car parked at a city park that had been closed since 10:00 p.m. Officer Kennedy was returning to the park after making a drug arrest at the park an hour earlier. Officer Kennedy characterized the criminal activity in the park as

"medium-high," and stated that he routinely patrolled the area because of complaints from citizens and his previous after-hours encounters in the park.

Officer Kennedy pulled in behind the parked car, but did not activate his blue lights. He shined a light inside the car and saw Mr. Shay sitting in the front passenger's seat and a female seated in the backseat on the driver's side. Officer Kennedy made contact with the individuals and asked for identification. Mr. Shay advised that he did not have his wallet or any identification, but both Mr. Shay and the female identified themselves to the officer. Officer Kennedy stated that he was familiar with Mr. Shay from previous encounters with him, and that he "ran their information" and confirmed the identity of both occupants.

Officer Kennedy asked the female to exit the vehicle, which she did. Officer Kennedy advised the female that she could not drive the car because she did not have a driver's license, and she replied that she could walk home from that location.

Officer Kennedy then turned his attention to Mr. Shay, who was still seated in the front passenger's seat. Officer Kennedy testified:

> I asked him to exit the vehicle because of the way he was acting, fidgeting around with his pockets, I figured there may be something illegal. I asked him if he had any weapons or drugs. I asked because he kept reaching for his pockets and acting nervous. I asked him to step out of the vehicle and he immediately began grabbing for his pockets again, and I advised him to keep his hands up.
>
> I then patted him down and was immediately able to feel in his front right pocket a wallet. He had previously told me he did not have identification. I then opened the wallet to see if there was any identification in it. Also, sometimes small packets of drugs are stored in wallets. Since he had previously denied having a wallet, I was suspicious that it might contain something illegal. I opened the wallet and in the first pleat of it found his identification. I couldn't read it because of the way the wallet surrounded it, so I slid it out to verify who he was and observed a small brown bag of methamphetamine [behind the identification card].

On cross-examination, Officer Kennedy stated that Mr. Shay had "handed the wallet to me after I felt it in his pocket." Officer Kennedy was wearing a camera that night, and a video/audio recording of the incident was admitted into evidence.

At the conclusion of the suppression hearing, Mr. Shay argued that the search was illegal because there was no reasonable suspicion that he was armed and dangerous when Officer Kennedy conducted the pat-down search. Mr. Shay also argued that, even if a pat-down for weapons was lawful, it was illegal for Officer Kennedy to look inside the wallet because there was no reasonable suspicion that the wallet contained a weapon or probable cause that the wallet contained drugs. The trial court verbally denied Mr. Shay's motion to suppress. After the motion to suppress was denied, the parties agreed to submit the case to the trial court for determination of guilt or innocence based on the testimony at the suppression hearing. The trial court then found Mr. Shay guilty of possession of methamphetamine.

In this appeal, Mr. Shay argues that the trial court erred in denying his motion to suppress the methamphetamine seized by the police. The relevant provisions under the Arkansas Rules of Criminal Procedure are as follows. Rule 3.1 provides:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

Rule 3.4 provides:

> If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others.

Mr. Shay does not argue on appeal that the officer's detention of him pursuant to Rule 3.1 was unlawful. Rather, Mr. Shay contends that the search conducted by the officer under Rule 3.4 was unlawful because the officer lacked reasonable suspicion that he was armed and presently dangerous. Mr. Shay alternatively argues that, even if a pat-down search for weapons was permissible under Rule 3.4, the search of the contents of his wallet exceeded the scope of the search because the wallet did not pose a threat and the search was more extensive than was reasonably necessary to ensure the safety of the officer or others.

Our standard of review for a suppression challenge requires us to conduct a de novo review based on the totality of the circumstances. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). We review findings of historical facts for clear error and determine whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Id.*

We first address the issue of whether, under Rule 3.4, Officer Kennedy had reasonable suspicion to search Mr. Shay for weapons to ensure the officer's safety. Rule 3.4 is basically the embodiment of the standard set by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), which involved a "stop and frisk" situation. Once there is a reasonable stop under the Fourth Amendment, the governmental interest that permits the

greater intrusion of the frisk is not the prevention or detection of crime, but rather the protection of the officer making the stop. *Terry*, *supra*; *Hill v. State*, 89 Ark. App. 126, 206 S.W.3d 300 (2005). The frisk must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer. *Id.* Essentially, the question is whether a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger. *Leopold v. State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985). The officer's reasonable belief that the suspect is dangerous must be based on specific and articulable facts. *Terry*, *supra*.

We conclude that, based on the facts known to Officer Kennedy at the time of the encounter, the pat-down *Terry* search under Rule 3.4 was justified. Officer Kennedy testified that it was very early in the morning and that he was patrolling in a park that had been the subject of complaints and was known for criminal activity. Further, Officer Kennedy had just returned to the park from a prior drug arrest in the vicinity. Upon being confronted by the officer, Mr. Shay was "fidgeting around with his pockets" and appeared to be nervous. According to the officer, Mr. Shay repeatedly attempted to reach for his pockets, eventually prompting Officer Kennedy to order Mr. Shay to put his hands up. Under these circumstances, Officer Kennedy had a reasonable suspicion, based on specific and articulable facts, that the suspect was armed and dangerous. *See Davis*, *supra* (holding that a search for weapons under Rule 3.4 was lawful when, among other things, the suspect was in an area known for drug activity, was visibly shaking and nervous, was fidgety, and had reached his hand toward his pocket).

In arguing that there was no reasonable suspicion to search him for weapons, Mr. Shay contends that this case is similar to *Pettigrew v. State*, 64 Ark. App. 339, 984 S.W.2d 822 (1998), where we held that the weapons frisk was illegal because the officer had no reason to believe the appellant was armed and dangerous. However, we find *Pettigrew* to be distinguishable. In *Pettigrew*, the officers found open containers of alcohol in a car, directed all five occupants out of the car, and immediately conducted a frisk without any indication that the occupants might be armed or dangerous. Unlike *Pettigrew*, the officer in the instant case had articulable facts to support the officer's suspicion that the suspect was dangerous and that a frisk was necessary for the officer's protection.

Having concluded that Officer Kennedy was authorized to conduct a pat-down search for weapons, we next turn to Mr. Shay's argument that the search of his wallet exceeded the scope of the search. Rule 3.4 provides that the search cannot be more extensive than is reasonably necessary to ensure the safety of the officer or others. According to the supreme court's holding in *Terry*, *supra*, the frisk must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

We agree with appellant's argument that the search of his wallet exceeded the scope of what is permissible under Rule 3.4. Officer Kennedy testified that he immediately identified the wallet when he patted down Mr. Shay's pockets, and that he opened the wallet to check for identification. Officer Kennedy also stated that small packets of drugs are sometimes stored in wallets. However, Officer Kennedy did not say that he had any suspicion that the wallet contained some sort of weapon that might be used to assault him

or compromise his safety. Moreover, in its ruling from the bench, the trial court found that the officer knew the wallet was not anything that would affect his safety. Because we hold that the search of appellant's wallet exceeded the purposes of Rule 3.4, we hold that the trial court clearly erred in denying the motion to suppress the methamphetamine found in the wallet.

We observe that, in the State's brief, the State offers three alternative reasons to affirm the legality of the search. However, we disagree with each of these arguments.

The State first argues that the search of the wallet was legal because Mr. Shay consented to the search. Arkansas Rule of Criminal Procedure 11.1 provides, in relevant part:

> (a) An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search.
>
> (b) The state has the burden of proving by clear and positive evidence that consent to a search was freely and voluntarily given and that there was no actual or implied duress or coercion.

The State posits that nothing in the video/audio recording or in the testimony suggests that appellant's consent was not freely or voluntarily given or that the search of his wallet exceeded the scope of the consent given.

We cannot agree, under the circumstances presented, that Mr. Shay consented to the search or to the officer's opening of his wallet such to justify the search of the wallet under Rule 11.1. A careful review of the officer's video/audio recording is instrumental. After the officer ordered Mr. Shay out of the car, the officer told Mr. Shay not to reach in his pockets and ordered him to put his hands up. The officer then announced a "safety check" and began to pat Mr. Shay down. Clearly, at this point, Mr. Shay had not consented to

being searched and was complying with the officer's commands under duress. During the pat down, the officer discovered the wallet and asked, "What's that right there?" Mr. Shay never spoke during the search. It is evident from the context of the recording and from the officer's testimony that the officer took the wallet, looked inside, found Mr. Shay's identification card, and removed the card, which revealed the methamphetamine underneath.

There was no evidence that Mr. Shay expressly invited the officer to look through his wallet, nor can we infer a voluntary consent to search from the totality of the circumstances. The officer testified that it was only after he had detected the wallet during the weapons pat-down that Mr. Shay handed it to him. However, the trial court did not specifically find that Mr. Shay handed the wallet to the officer, but rather found that "I assume when he pulled it out it was for the officer to have it" and "so he voluntarily gave him the evidence." Upon review by this court, the video/audio recording does not confirm that Mr. Shay removed his wallet from his pocket or handed the wallet to the officer. The video was taken from a body-cam on the officer and is trained on the upper body and face of Mr. Shay, but the video does not cover the specific area around Mr. Shay's pockets. The recording shows that while Mr. Shay had his hands away from his pockets as ordered by the police, the wallet was discovered and the officer exclaimed, "What's that right there," obviously referring to the wallet. Therefore, we disagree with the trial court's finding that Mr. Shay voluntary gave the officer the evidence. Nevertheless, even assuming that Mr. Shay removed his wallet at this point of the search, as found by the trial court, we cannot agree that this amounted to his voluntary implied consent to search the wallet. Upon

discovery of the wallet, the recording confirms that the officer asked Mr. Shay, "What's that right there?"; so even if Mr. Shay removed his wallet from his pocket at that point, he was doing so at the officer's direction. Moreover, the act of taking a wallet from his pocket at the direction of a police officer is insufficient to infer from a totality of the circumstances that Mr. Shay voluntarily consented to the search.

Under Rule 11.1(b), it is the State's burden to prove by clear and positive evidence that consent to the search was freely and voluntarily given and was free from actual or implied duress or coercion. We hold that the State did not meet its burden of voluntary consent because there was no evidence that Mr. Shay actually consented to the officer searching him, the wallet was removed from Mr. Shay's pocket only after it was detected by the officer in the involuntary frisk, and there was no testimony or inference that Mr. Shay gave the officer permission to open his wallet and search the contents.

The State next argues that when Officer Kennedy discovered the wallet in the pat-down search he had probable cause to believe the wallet contained something subject to seizure under Arkansas Rule of Criminal Procedure 14.1, which pertains to vehicle searches and provides in relevant part:

> (a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:
>
> (i) on a public way or waters or other area open to the public[.]
>
> . . . .
>
> (b) If the officer does not find the things subject to seizure by his search of the vehicle, and if:

> (i) the things subject to seizure are of such a size and nature that they could be concealed on the person; and
>
> (ii) the officer has reason to suspect that one (1) or more of the occupants of the vehicle may have the things subject to seizure so concealed; the officer may search the suspected occupants[.]

In arguing that officer Kennedy had probable cause to search the wallet under Rule 14.1, the State points to Officer Kennedy's testimony that "sometimes males carry a small amount of drugs in their wallet." The State further notes that Mr. Shay had previously denied having any identification on him.

In assessing whether Officer Kennedy had probable cause to search for contraband under Rule 14.1, we must examine the differences between reasonable suspicion and probable cause. Reasonable suspicion is defined as "a suspicion based on facts or circumstances which of themselves do not give rise to justify a lawful arrest, but give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to imaginary or purely conjectural suspicion." Ark. R. Crim. P. 2.1. Probable cause is defined as "facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected." *Laime v. State*, 347 Ark. 142, 153, 60 S.W.3d 464, 472 (2001). The same standards govern reasonable (that is to say, probable) cause determinations, whether the question is the validity of an arrest or the validity of a search and seizure. *Hudson v. State*, 316 Ark. 360, 872 S.W.2d 68 (1994).

In the present case, although we have determined the officer had reasonable suspicion to search Mr. Shay for weapons to ensure his safety, we conclude that there was no probable cause to search Mr. Shay's vehicle for contraband under Rule 14.1 or probable cause to

believe that Mr. Shay's wallet contained illegal drugs. Nor did the trial court find that any such probable cause existed. Although Officer Kennedy testified that males sometimes carry drugs in their wallets, this supposition was insufficient to rise to the level of probable cause to believe that Mr. Shay's wallet contained drugs. And while the State suggests that Officer Kennedy was also checking Mr. Shay's wallet for identification, the testimony showed that Mr. Shay had already been positively identified by Officer Kennedy, and at any rate an identification card is not subject to seizure. For these reasons, we do not agree with the State's claim that the officer had the authority to search more extensively than was necessary to ensure the officer's safety.

Finally, the State argues that the search of appellant's person and wallet was legal because Mr. Shay was violating a city ordinance by being present in the park after closing time. The State claims that Mr. Shay could have been arrested for violation of the ordinance, and thus that the search was authorized by Arkansas Rule of Criminal Procedure 12.1, which provides:

> An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused for the following purposes only:
> (a) to protect the officer, the accused, or others;
> (b) to prevent the escape of the accused;
> (c) to furnish appropriate custodial care if the accused is jailed; or
> (d) to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense.

Rule 4.1(a)(iii) provides that a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe the person has committed any violation of law in the officer's presence.

We do not agree that the officer's search of the appellant in this case can be legitimized based on a violation of a city ordinance. During the State's direct examination of Officer Kennedy, wherein Officer Kennedy explained his reasons for searching Mr. Shay, Officer Kennedy did not mention anything about Mr. Shay violating a city ordinance. Nor did the trial court base its decision to deny Mr. Shay's suppression motion on any ordinance. On cross-examination, Officer Kennedy stated that being in the park after hours violated an unspecified city ordinance, but he did not arrest or even cite either of the occupants for any such violation. In fact, Officer Kennedy stated that the female passenger, who was also in the park after hours, was free to go at any time.

The primary case relied on by the State in making this argument is *State v. Earle*, 333 Ark. 489, 970 S.W.2d 789 (1997). In that case, a police officer stopped the appellant's truck for running a stop sign, and during the stop the officer searched the truck and found drugs. Although the officer did not arrest the appellant for running the stop sign, the supreme court nonetheless upheld the legality of the search pursuant to Arkansas Rule of Criminal Procedure 5.5, which provided:

> The issuance of a citation in lieu of arrest or continued custody does not affect the authority of a law enforcement officer to conduct an otherwise lawful search or any other investigative procedure incident to an arrest.

The supreme court held that where an officer has probable cause to arrest pursuant to Rule 4.1, he may validly conduct a search incident to arrest of either the person or the area within his immediate control under Rule 5.5. The supreme court stated that simply because a police officer's decision is to issue a citation in lieu of a custodial arrest, that does not affect

the officer's right to conduct a search of the same scope as a search incident to arrest, as a citation is equivalent to custodial arrest for authority-to-search purposes under Rule 5.5.

We conclude that this case is distinguishable from *Earle*, *supra*, in that not only did Officer Kennedy not arrest anyone for violation of a city ordinance, he gave no indication that he ever even considered issuing a citation. Moreover, Rule 5.5, upon which the search was validated in *Earle*, was repealed in 1999. The repeal of the rule was in response to the United States Supreme Court's decision in *Knowles v. Iowa*, 525 U.S. 113 (1998). In *Knowles*, the Supreme Court held that the search of a vehicle, with neither the driver's consent nor probable cause to conduct the search, by a police officer who stops the driver for speeding and issues a citation rather than arresting the driver, as authorized by an Iowa statute *that was the equivalent to our Rule 5.5*, violated the United States Constitution's Fourth Amendment. The Supreme Court in *Knowles* declared the Iowa statute unconstitutional, and Arkansas' Rule 5.5 was repealed soon thereafter and no longer exists.

Finally, we find guidance from our supreme court's holding in *State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215 (2002). In *Sullivan*, the supreme court held that pretextual arrests, i.e., arrests that would not have occurred but for an ulterior investigative motive, are unreasonable police conduct warranting the application of the exclusionary rule under article 2, section 15 of the Arkansas Constitution. In *Sullivan*, the police officer arrested the appellant for speeding, illegal window tinting, driving an unsafe vehicle, failure to produce registration and insurance, and possession of a roofing hatchet. But because the officer's arrest was pretextual and would not have been effected but for the officer's suspicion that

the appellant was involved in narcotics, the *Sullivan* court suppressed the fruits of the search incident to the pretextual arrest and accompanying search.

In the present case, we do not agree with the State's position that because Mr. Shay *could have been arrested* for violating a city ordinance, the search of his person was authorized. Even assuming that Mr. Shay could have been arrested for violating some ordinance, Officer Kennedy made no such arrest. Because a pretextual arrest is unreasonable police conduct giving rise to the suppression of evidence, as our supreme court squarely held in *Sullivan*, we cannot uphold a search made incident to no arrest at all.

For these reasons, we hold that the trial court erred in denying appellant's motion to suppress the contraband. Therefore, we reverse and remand.

Reversed and remanded.

GRUBER, C.J., and VIRDEN, GLADWIN, and HARRISON, JJ., agree.

GLOVER, J., dissents.

DAVID M. GLOVER, Judge, dissenting. The majority is correct in finding Corporal Kennedy had reasonable suspicion to search Shay for weapons to ensure Corporal Kennedy's safety. I dissent, however, because we should also affirm the circuit court's denial of Shay's motion to suppress based on Shay's consent to the search.

When reviewing the circuit court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to the inferences drawn by the circuit court. *Williams v. State*, 2017 Ark. App. 291, 524 S.W.3d 13. We defer to the superior position

of the trial court to evaluate the credibility of witnesses who testify at a suppression hearing. *Id.* An officer may conduct a search of an individual's person without a search warrant or other color of authority if the individual consents to the search; such consent must be freely and voluntarily given, with no actual or implied duress or coercion, and the State bears the burden of proving such. Ark. R. Crim. P. 11.1 (2017). Valid consent to search must be voluntary, and voluntariness is a question of fact to be determined from all the circumstances. *Franklin v. State*, 2010 Ark. App. 792, 378 S.W.3d 296.

Corporal Kenneth Kennedy of the Clarksville Police Department was the sole witness at the suppression hearing. The stop/search/arrest event was audio/video recorded. At the hearing, the recording of the event was played and was paused repeatedly for Corporal Kennedy to explain what was occurring. During Corporal Kennedy's initial encounter with Shay, he asked for identification. Shay told him he did not have his wallet and had no identification. During the officer-safety pat down (approved by the majority), Corporal Kennedy felt what he eventually identified as Shay's wallet in Shay's front right pocket. The majority sets forth only Corporal Kennedy's initial testimony on direct examination, but Corporal Kennedy further stated on direct, "And the wallet is in [Shay's] right side pocket right there. And he does—after I feel that that's what it is and nothing else—no weapons—he pulled it out and gave it to me." He repeated this testimony during cross-examination, stating Shay "handed his wallet to me."

Obviously, my review of the audio/video differs from the majority's version. While it is a given the video is dark and simply does not show who pulled the wallet out of Shay's pocket, the simultaneous audio supports Corporal Kennedy's testimony. The audio appears

to confirm that Corporal Kennedy voiced his surprise at something *after* the wallet was passed to him. He then immediately pitched the wallet onto the top of the vehicle with instructions to his fellow officer to look at it. At the close of the evidence, the circuit court found, "He pulls it out. I didn't hear he handed it to him, but I assume when he pulled it out, he meant for the officer to have it."

Here the suppression determination turns on consent. There was no other testimony given at the suppression hearing. There was no evidence to contradict Corporal Kennedy's testimony. It was the circuit court's decision to determine whether Corporal Kennedy was a credible witness; the audio/video did not contradict Corporal Kennedy's testimony; and the circuit court found that when Shay pulled his wallet out of his pocket, he meant for Corporal Kennedy to have it. On this record, I will not go behind the circuit court and second-guess its findings. Shay makes no argument to our court on the issue of consent, even though that was the sole basis on which the circuit court upheld the search of his wallet. Based on our standard of review and the totality of the evidence (considering the fact Shay has made no argument on appeal about consent), I would affirm.

I, therefore, dissent.

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