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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR09-1211

Opinion Delivered June 23, 2010

DURON CANADA APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CR-07-4512]
V.	HONORABLE HERBERT THOMAS WRIGHT, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

LARRY D. VAUGHT, Chief Judge

Appellant Duron Canada appeals his conviction from the Pulaski County Circuit Court on a charge of possession of cocaine with intent to deliver and his sentence of ten years' imprisonment in the Arkansas Department of Correction. On appeal, he argues that the circuit court erred by denying his motion to suppress evidence obtained through an unlawful search and seizure. We affirm.

The facts of this case mirror those we discussed in its companion case. *Jackson v. State*, 2010 Ark. App. 359. Following an anonymous complaint that narcotics were being sold in the 2300 block of West 11th Street, the Street Narcotics Detail of the Little Rock Police Department began an investigation. The complaint indicated that an African-American male named Corey Jackson or Johnson had been released from prison and was hanging around with other threatening individuals in the Dennison and Thayer streets area. The tipster also noted that the

suspects had previously hidden narcotics in "the cracks of their butts" and guns under the hood of a car.

Detective Ryan Hudson and other officers initiated an undercover investigation pursuant to the complaint. Upon their arrival to the area described in the anonymous tip, officers observed multiple suspects blocking the street in a manner that was consistent with the complaint. The undercover officers called in additional officers in marked patrol cars for reinforcement, rounded up the suspects, questioned them, and patted them down for weapons. According to Detective Hudson's testimony, one of the "first people" questioned was a man named Corey Jackson. Hudson further stated that "probably two or three minutes after we got there" Corey Jackson was taken aside, and the officers

> [t]alked to him, patted him down. Took him between houses, talked to him, asked him if he had any narcotics on him. He said no. Asked him if he had any in his buttocks, and he said no. We asked him if he minded if we checked. He said no. So we had narcotic guys get around him and get between the houses so he's out of the view of the public, searched him. He said he didn't. Then that's —Corey Jackson gave, told detectives that Duron Canada and Derric Jackson both had dope in the cracks of their butt.

According to the trial testimony, the officers returned to the street area where Canada and Derric Jackson were waiting. In Derric Jackson's own words,

> they grabbed Corey. Like he said, took him on the side of the house and talked to him, whatever they did. So when they [sic] come back, they ran our names in. So when they ran our names in, we came back with no warrants. The next thing I know, they went to talking. They come back, and put me, myself, Duron [Canada] and another person that [sic] were there, put us, told us to wait in the police car.

After the officers conferred, Canada and Derric Jackson were more pointedly questioned; both stated that they did not have dope on them and had already been checked. Officers specifically

asked if they had dope in their buttocks, and they both responded "no." Testimony from officers indicated that they asked for, and received, verbal consent from Canada and Derric Jackson to search their persons. Officers then pulled patrol cars around the two suspects, opened the doors to block the view of bystanders, and searched them again. Officers discovered—and retrieved—one gram of crack cocaine from Canada's buttocks area and fifteen grams of crack cocaine from Derric Jackson's buttocks area.

A felony information was filed on November 15, 2007, charging Canada with one count of possession of a controlled substance with intent to deliver, in violation of Arkansas Code Annotated section 5-64-401 (Repl. 2006), subject to habitual-offender-sentence enhancement pursuant to Arkansas Code Annotated section 5-4-501(b) (Repl. 2006), for four or more prior felony convictions. Canada entered a conditional plea of guilty to possession of a controlled substance with intent to deliver, reserving the right to appeal the trial court's denial of his motion to suppress physical evidence discovered during the search of his person.

On appeal, Canada argues that the circuit court erred in denying his motion to suppress physical evidence. He contends that his consent to search was invalid because it was requested and provided while he was being unlawfully detained. He specifically argues that, after completing the pat-down search, warrant check, and search of the area, officers no longer had reasonable suspicion to further detain him, and the fruit of the subsequent "butt crack" search—the narcotics—should have been suppressed.

In reviewing a trial 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 inferences drawn by the trial court and proper deference to the trial court's findings. *Mann v. State*, 357 Ark. 159, 166, 161 S.W.3d 826, 830 (2004). Furthermore, we will defer to the trial court in assessing the credibility of witnesses and will reverse only if the trial court's ruling is clearly against the preponderance of the evidence. *Bogard v. State*, 88 Ark. App 214, 219, 197 S.W.3d 1, 3 (2004).

The fact that a police officer may detain a person without violating the Fourth Amendment—if the officer has a reasonable suspicion that "criminal activity may be afoot"—is well-established law. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Additionally, under Arkansas law,

> [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 that 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.

Ark. R. Crim. P. 3.1 (2009).

Here, the record shows that Canada was subjected first to a pat-down search (where no contraband was discovered) then to a second, more invasive, search. The pat-down search followed the officer's initial detention of Canada based on the anonymous tip they received. The validity of this initial police encounter was not challenged by Canada below, and thus is excepted from appellate review. If an issue is not brought to the attention of the trial court and the trial

court does not rule on it, it will not be considered on appeal. *Fouse v. State*, 73 Ark. App. 134, 144, 43 S.W.3d 158, 165 (2001). As such, our review is limited to Canada's argument that after completing the pat-down search, warrant check, and search of the area, officers *no longer* had reasonable suspicion to *further* detain him, and accordingly, his subsequent consent was invalid.

We agree with Canada that an anonymous tip, alone, may not have provided officers with the requisite reasonable suspicion to detain him beyond the initial pat-down search. However, Canada's argument omits another source of the officers' mounting suspicion. The record shows that "two or three minutes" after arriving at the scene officers received information from Corey Jackson that Canada was hiding "dope" between his buttocks—information that corroborated the allegation of illegal activity provided in the anonymous tip. This "new information" gave officers a specific, particularized, and articulable reason to believe that Canada was involved in illegal activity. *Alabama v. White*, 496 U.S. 325, 330 (1990). The anonymous tip, in conjunction with the reliability of the contemporaneous statement by Jackson provided the officers with the requisite reasonable suspicion to continue the detention after the "initial" background check was completed. *Brook v. State*, 40 Ark. App. 208, 845 S.W.2d 530 (1993) (stating that a face-to-face encounter with an informant has greater reliability than an anonymous tip).

Therefore, because officers had reasonable suspicion to further detain Canada despite the negative pat-down search and warrant check, his subsequent consent was not the "invalid fruit of an illegal detention," and the trial court correctly denied his motion to suppress.

Affirmed.

BROWN, J., agrees.

HART, J., concurs.

HART, J., concurring. I agree that this case should be affirmed, but I write separately to disclose my reasoning for affirming. As I noted in the companion case, *Jackson v. State*, 2010 Ark. App. 359, 374 S.W.3d 857, the manner and extent of the State's intrusion into Mr. Canada's person is certainly disturbing—the police pulled down his pants and to some degree exposed his private parts in the middle of a public street so that they could search for contraband in his "butt cheeks." Suffice it to say, it goes well beyond the standard of reasonableness as contemplated by *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the Supreme Court created the "reasonable suspicion" justification for brief, investigatory seizures that fell short of actual arrest to be undertaken when the police had somewhat less information than would constitute probable cause. Here, the restraint on Mr. Canada's liberty was essentially an arrest—he was surrounded by at least a dozen police officers, not free to leave, and actually placed in the back of a marked police car. Under these facts, without even considering the search of Mr. Canada's "butt cheeks," I cannot agree that the police performed a valid investigatory stop. Arkansas Rule of Criminal Procedure 3.1 governs this type of seizure. It states:

> 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, 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.

I agree with Mr. Canada, that the permissible scope of the investigatory stop was the frisk, establishing his identity, and checking for outstanding warrants. Certainly it did not extend to fishing in his anus for narcotics, with or without "consent."

Nonetheless, I believe that we are obligated to affirm this case, because shortly after Mr. Canada's seizure, Corey Jackson told the police that Mr. Canada had narcotics in his anus. At this point, the police had probable cause to arrest. *See Moore v. State*, 323 Ark. 529, 539, 915 S.W .2d 284, 290 (1996). Accordingly, the narcotics were discovered not during an investigation, but rather pursuant to a search incident to arrest. *See Blockman v. State*, 69 Ark. App. 192, 11 S.W.3d 562 (2000)(finding a valid search incident to arrest, even though the search preceded the suspect's formal arrest, where the police had probable cause to arrest the suspect based on a known informant's information regarding the suspect's drug possession, and where the police arrested the suspect after conducting a Terry frisk). Obviously, the Constitution allows a greater level of intrusion and restraint on a person's liberty when he or she has been validly arrested. For this reason only, I voted to affirm.