

People v. Strassheim, S

COLORADO COURT OF APPEALS

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Court of Appeals No.: 08CA0320  
Arapahoe County District Court No. 06CR3584  
Honorable Marilyn L. Antrim, Judge  
Honorable Angela R. Arkin, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Sean Ray Strassheim,

Defendant-Appellant.

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JUDGMENT REVERSED AND CASE  
REMANDED WITH DIRECTIONS

Division VI  
Opinion by: JUDGE CARPARELLI  
Hawthorne and Kapelke\*, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**  
Announced: February 26, 2009

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\*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2008.

Defendant, Sean Ray Strassheim, appeals the judgment of conviction following a bench trial of one count of possession with intent to distribute a schedule II controlled substance. We reverse and remand.

I.

Sometime around midnight on December 18, 2006, Officer Jeff Prince and his partner drove behind a row of businesses looking for drug activity. As they drove past the back door of Augy's Bar, they noticed four parked vehicles, two of which were occupied. As the officers neared the vehicles, defendant exited the passenger's side of one of the vehicles. The officers stopped the patrol car and Officer Prince got out. Defendant began to walk in the direction of the patrol car. Officer Prince asked defendant what he was doing and defendant said he was going to the other occupied vehicle, which was in the same direction as the patrol car. Defendant appeared nervous and agitated.

Officer Prince asked defendant if he had any weapons on him and defendant responded in the negative. Without requesting consent, Officer Prince then conducted a pat-down search of defendant's person. During the search, Officer Prince felt a small,

soft, and pliable object in the front right pocket of defendant's pants.

After the search, Officer Prince asked defendant a few questions about what he was doing. Defendant appeared nervous and gave inconsistent statements. He repeatedly touched the pocket in which the officer had felt the soft object. The officer asked defendant if he had any drugs on his person and defendant said he did not. Defendant looked around and took two steps backwards. Officer Prince, believing that defendant had drugs in his pocket and was attempting to flee, took control of defendant by putting him in a "koga hold." He reached into defendant's front right pocket and pulled out two plastic bags containing what was later determined to be cocaine. Defendant was charged with possession with intent to distribute a controlled substance, a class two felony, possession of one gram or less of a controlled substance, and possession of drug paraphernalia.

Prior to trial, defendant filed a motion to suppress the drugs, asserting that both searches violated his Fourth Amendment rights. The trial court denied the motion, finding that the officer's pat-down

search and subsequent search for narcotics were lawful. The court then set the case for a bench trial.

Defendant pleaded not guilty to an added count of possession with intent to distribute a schedule II controlled substance, a class three felony, in exchange for dismissal of the three original felony counts. The parties submitted the case to the trial court by way of a stipulation of facts and other exhibits, explaining that they intended to preserve defendant's ability to appeal the denial of the motion to suppress. The court sentenced defendant to four years in the Department of Corrections, plus five years of mandatory parole, but stayed execution of the sentence pending the outcome of the appeal.

## II.

Defendant contends that the trial court erred when it denied his motion to suppress the results of the pat-down search because the officer did not have reasonable suspicion to believe he was armed and dangerous, and the search was not consensual. We agree.

When reviewing a trial court's denial of a motion to suppress, we generally defer to its factual findings when there is sufficient

evidence in the record to support them, but review its legal conclusions de novo. *People v. Arias*, 159 P.3d 134, 137 (Colo. 2007); *People v. Rushdoony*, 97 P.3d 338, 342 (Colo. App. 2004).

A.

Defendant contends that he was illegally seized when the officer conducted a nonconsensual pat-down search for weapons because the officer did not have reasonable suspicion that he was armed and dangerous. We agree.

An officer may conduct an investigatory stop or frisk 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 are reasonably related to its purpose. *People v. Hardrick*, 60 P.3d 264, 266 (Colo. 2002).

When a police officer has reasonable and articulable suspicion that an individual is armed and dangerous, he or she may conduct a limited pat-down search of the person's outer clothing for the purpose of protection of the police officer and of others in the vicinity. *Terry v. Ohio*, 392 U.S. 1, 24 (1968); *Rushdoony*, 97 P.3d at 342. The purpose of the limited *Terry* search is not to discover

evidence, but to allow an officer to pursue an investigation without fear of violence. *People v. Corpany*, 859 P.2d 865, 869 (Colo. 1993). The officer's suspicion that an individual poses a potential danger must be objectively reasonable, and the intrusion must be reasonably related to the purpose of neutralizing the risk of physical harm. *Rushdoony*, 97 P.3d at 344.

To justify a pat-down search, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts," create a reasonable suspicion that the suspect poses a potential danger. *People v. Padgett*, 932 P.2d 810, 815 (Colo. 1997) (quoting *Terry*, 392 U.S. at 21); *see also* *People v. Ratcliff*, 778 P.2d 1371, 1377 (Colo. 1989). In determining whether a pat-down search is valid, a trial court must consider the facts and circumstances known to the officer at the time of the encounter, not those uncovered after the seizure begins. *People v. Greer*, 860 P.2d 528, 530 (Colo. 1993); *People v. Rahming*, 795 P.2d 1338, 1341 (Colo. 1990).

The supreme court has determined that a history of past criminal activity in a locality is insufficient alone to create a reasonable suspicion that a crime is being, has been, or will be

committed. *Outlaw v. People*, 17 P.3d 150, 157 (Colo. 2001); *Rahming*, 795 P.2d at 1343 (citing *People v. Aldridge*, 674 P.2d 240, 242 (Cal. 1984)). In addition, the court has concluded that nervousness alone is of limited significance in determining reasonable suspicion. *People v. Haley*, 41 P.3d 666, 675 (Colo. 2001) (citing *United States v. Fernandez*, 18 F.3d 874, 879-80 (10th Cir. 1994)); *People v. Goessl*, 186 Colo. 208, 211, 526 P.2d 664, 665 (1974) (holding that it is normal for a law-abiding citizen to be nervous when stopped by a policeman).

In *Outlaw v. People*, the supreme court reversed the trial court's denial of a motion to suppress evidence found during an investigatory stop. The court determined that (1) the defendant's presence in a high crime area known for narcotics transactions, (2) the group of four people huddled together on a sidewalk, (3) the group's movement away from the patrol car after noticing its presence, and (4) the defendant's left hand closed in a fist, taken together, were insufficient to create reasonable suspicion that the defendant was involved in a drug transaction. *Outlaw*, 17 P.3d at 158. The *Outlaw* court cited with approval a Tenth Circuit Court of Appeals case in which that court found no reasonable suspicion

where (1) the defendant was parked in a vehicle in front of a building known to be associated with criminal activity, (2) the defendant exited the car with his hands in his pockets when the officers arrived, (3) the officers recognized the defendant as a gang member and seller of narcotics, and (4) the defendant continued to walk after the officers told him to stop and take his hands out of his pockets. *Outlaw*, 17 P.3d at 158 (citing *United States v. Davis*, 94 F.3d 1465, 1467 (10th Cir. 1996)).

Here, the trial court concluded that Officer Prince had reasonable suspicion to search defendant for weapons. The court relied on the officer's testimony that defendant (1) was wearing bulky clothing, (2) approached the officer in the middle of the night, (3) acted nervous, and (4) gave inconsistent statements about what he was doing. The trial court acknowledged that the suppression issue was very close to the line.

We conclude that the trial court's findings of fact are supported by the record, but reject the court's legal conclusion that the officer had reasonable suspicion to search defendant. At the suppression hearing, Officer Prince testified that he based his decision to search defendant on the locality and had no specific and

articulable basis to suspect that defendant was armed and dangerous:

Q: What made you concerned for your safety?

A: [A]t this time, I did not know that [defendant] had any drugs on him at that time -- but it's very common for individuals to have weapons on them, and also in liquor establishments, and basically, Aurora, in general, a lot of individuals are armed, and it is -- it's been very common that guns have been found, knives have been found, and other such deadly weapons on persons that we deal with. And based on his -- the bulky nature of his jacket, his pants, he didn't have on a skin-tight outfit, so I wasn't able to observe whether or not he had weapons on him or not without doing a quick brief pat-down to make sure he didn't have anything on him.

The officer's concern that citizens of Aurora often possess weapons is insufficient to give rise to a specific and articulable suspicion that defendant was armed and dangerous. It is well settled that an officer must have more than an "unparticularized suspicion or hunch" that a suspect is engaged in criminal activity before a stop or frisk is lawfully permitted. *Arias*, 159 P.3d at 138 (citing *Terry*, 392 U.S. at 27). Moreover, defendant's bulky jacket did not create a reasonable suspicion that he possessed a weapon, but instead was consistent with the officer's observation that the

night was extremely cold. In addition, there were many possible reasons for defendant's nervousness other than possession of a weapon. Accordingly, we conclude that the facts, taken together, did not give rise to reasonable suspicion that defendant was armed and dangerous, and, therefore, the officer's pat-down search of defendant was unlawful under the Fourth Amendment.

B.

We reject the People's contention that the pat-down search was consensual.

Unlike arrests and investigatory stops, consensual encounters are not seizures and thus do not invoke Fourth Amendment protections. *People v. Martinez*, \_\_\_ P.3d \_\_\_, \_\_\_ (Colo. No. 08SA317, Jan. 20, 2009). An encounter is consensual when an officer asks for voluntary cooperation from an individual who should feel free to leave at any time during the encounter. *People v. Heilman*, 52 P.3d 224, 227 (Colo. 2002). The prosecution bears the burden of proving that an encounter is consensual, and mere acquiescence to a claim of lawful authority is insufficient. *Heilman*, 52 P.3d at 228; *People v. Santisteven*, 693 P.2d 1008, 1012 (Colo.

App. 1984) (citing *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968)).

The test for determining whether the encounter is consensual is “whether a reasonable person under the circumstances would believe that he or she [is] free to leave and/or disregard the officer’s request for information.” *Heilman*, 52 P.3d at 228 (citing *People v. Thomas*, 839 P.2d 1174, 1177-78 (Colo. 1992)). A person might believe he or she is not free to leave, and thus, be seized within the meaning of the Fourth Amendment under circumstances such as “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

Here, the trial court found, under the totality of the circumstances, that the “encounter” between defendant and Officer Prince was “initially” consensual. There is record support for a finding that defendant consented to talk with Officer Prince and answer his questions. Accordingly, we are bound by the court’s finding that the initial encounter was consensual.

However, the court did not explicitly find that defendant consented to the pat-down search, and we conclude, as a matter of law, that there is insufficient evidence of such consent. At the suppression hearing, Officer Prince testified that he told defendant he was going to check him for weapons, and defendant “didn’t resist.” The prosecution presented no evidence that Officer Prince asked defendant for consent to do a pat-down search or that defendant expressed consent to the pat-down search, either verbally or by nodding. We find no case law to support the prosecution’s theory that peaceful submission to an officer’s statement of an intention to conduct a pat-down search constitutes consent.

Because Officer Prince testified that he “told” defendant he was going to conduct the pat-down search and the prosecution presented no evidence that Officer Prince asked for defendant’s consent; and because Officer Prince testified that defendant “didn’t resist” and the prosecution presented no evidence that defendant expressed consent verbally or by gesturing, we conclude, as a matter of law, that there is insufficient evidence of consent.

Accordingly, because the pat-down search was not supported by reasonable suspicion and there is insufficient proof of consent,

because information obtained in the pat-down search served as the factual premise for the subsequent search for narcotics, and because there is no evidence of attenuation from the initial illegal search, the results of the second search must be suppressed.

*People v. Fines*, 127 P.3d 79, 81-82 (Colo. 2006).

The judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

JUDGE HAWTHORNE and JUDGE KAPELKE concur.