

IN THE COURT OF APPEALS OF IOWA

No. 1-940 / 11-0529
Filed February 1, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH ALLEN SORICK,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Craig M. Dreismeier, District Associate Judge.

Defendant appeals the district court's ruling on a motion to suppress evidence seized pursuant to a stop and frisk. **CONVICTION AND SENTENCE VACATED, REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, for appellee,

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Marti Heinicke, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

While we recognize that late night encounters with citizens traveling on dark streets in neighborhoods plagued by criminal activity may pose a safety threat to peace officers, we cannot find in this case that the officer's "better-safe-than-sorry" explanation for patting down bicyclist Keith Sorick qualified as a reasonable belief that the officer was dealing with an armed and dangerous individual. We reverse the district court's suppression ruling, vacate the defendant's conviction and sentence for possession of marijuana, and remand for further proceedings consistent with this decision.

I. Background Facts and Procedures

During his patrol on October 11, 2010 at 12:35 a.m., Council Bluffs Police Officer Joshua Hughes saw defendant Sorick riding his bicycle west on 33rd Street and 10th Avenue without lights, in violation of a city ordinance. Officer Hughes pulled alongside Sorick, asked why he did not have any lights on his bicycle, and instructed him to pull over. Sorick complied, stopping at the 3400 block of 10th Avenue. Officer Hughes left his patrol car and continued his conversation with Sorick about his lack of bicycle lights. Officer Hughes asked Sorick if he was carrying any weapons. The officer then patted down Sorick's outer clothing, focusing on his waistband and pockets.

While frisking Sorick, Officer Hughes felt what he believed to be a baggie containing a hard substance in Sorick's left front pocket. When Officer Hughes asked him to identify the substance, Sorick answered it was marijuana, and

removed the baggie from his pocket. Officer Hughes issued Sorick a citation for possession of marijuana before allowing him to proceed on his way.

On November 19, 2010, the county attorney charged Sorick with possession of marijuana in violation of Iowa Code section 124.401(5) (2009). He pleaded not guilty on December 3, 2010. On January 19, 2011, Sorick filed a motion to suppress all evidence seized during the October 11 stop, alleging that both the stop and the pat down violated his constitutional rights. The district court denied the motion on February 22, 2011. The court ruled that the defendant “was not challenging the basis for the stop,” but the basis to search. The court concluded that the officer had reason to fear for his safety based on “the fact it was late at night, the street was not lit and coupled with the close proximity of the defendant to the officer by virtue of the defendant being on a bicycle.”

After a trial on the minutes of testimony, the district court found Sorick guilty of possession of marijuana. The court fined Sorick \$315 and revoked his driver’s license for 180 days.

II. Scope and Standard of Review

Because Sorick contends the search violated his rights under the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution, we review his claim de novo. *State v. Fleming*, 790 N.W.2d 560, 563 (Iowa 2010). This review requires “an independent evaluation of the totality of the circumstances as shown by the entire record.” *State v. Pals*, 805 N.W.2d 767, 771 (2011). Although we defer to the factual findings of the district court

because of its greater ability to evaluate the credibility of witnesses, we are not bound by that court's findings. *Fleming*, 790 N.W.2d at 563.

III. Analysis

On appeal, Sorick contends that neither the investigatory stop nor the subsequent frisk was lawful. He asserts the State did not properly introduce into the record the municipal ordinance relied upon by the officer for the stop. Sorick further argues the State failed to show that the officer reasonably believed he was armed and dangerous to justify the frisk.

We decline to address the legality of the stop because Sorick failed to preserve error when he did not seek a ruling on that ground from the district court. *See State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995) (refusing to review issue raised in motion to suppress when the district court did not rule on it, and the defendant failed to request such a ruling).

Assuming the stop was justified by Sorick's violation of a city ordinance, we nevertheless find that the prosecution failed to show that the officer acted reasonably in patting down the suspect for weapons. In *Terry v. Ohio*, 392 U.S. 1, 17, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889, 903 (1968), "the Supreme Court emphasized that even a frisk for weapons, which takes only a few seconds, is 'a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.'" *Pals*, 805 N.W.2d at 775. But the *Terry* court also recognized the weighty interest of a police officer in "taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that

could unexpectedly and fatally be used against him.” *Terry*, 392 U.S. at 23, 88 S. Ct. at 1881, 20 L. Ed. 2d at 907.

The *Terry* court explained:

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 24, 88 S. Ct. at 1881, 20 L. Ed. 2d at 908.

On the other hand, it is clear from *Terry*'s companion case, *Sibron v. New York*, that “[t]he police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries.” 392 U.S. 40, 64, 88 S. Ct. 1889, 1903, 20 L. Ed. 2d 917, 935 (1968). Before an officer “places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so.” *Id.* The *Sibron* court went on to say: “In the case of the self-protective search for weapons, [the officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.” *Id.*

We find the present record wanting for such particular facts about the individual searched. At the outset, we note that the only offense Officer Hughes was investigating was Sorick’s act of riding his bicycle after dark without a light.

During the suppression hearing, Officer Hughes testified that the concern for his safety did not stem from any personal threat posed by Sorick, but rather the circumstances surrounding the encounter. The officer recalled Sorick was

cooperative and did not appear to be under the influence of narcotics, nor did the officer suspect Sorick of any other criminal conduct.

Officer Hughes conducted the pat down based only on the time of the stop, the place where he detained Sorick, and the fact Sorick's bicycle did not offer the same barrier between them as a motor vehicle. According to the officer, the 3400 block of 10th Avenue was not well lit and residents of that part of town have been known to carry weapons. The officer testified: "I figured better safe than sorry." During his testimony, the officer mentioned a stabbing in the general area where he pulled Sorick over which occurred after October 11, 2010, and before the suppression hearing. But Officer Hughes could not point to a specific act of violence that had taken place in the vicinity before his confrontation with Sorick. The officer also noted a person "riding around on a bike, walking, even driving a car" at 12:45 a.m. could pose a potential risk.

On redirect examination, Officer Hughes compared the danger of interacting with a motorist still inside the vehicle as opposed to a bicyclist or pedestrian. He stated he would not have frisked Sorick had the defendant been in a vehicle. Officer Hughes reasoned that because a car provides a barrier between the suspect and the officer, if the suspect were to threaten his safety, he would be able to protect himself. But because he and Sorick were standing a couple feet away from each other, Sorick could more easily brandish a weapon or attack him. While Officer Hughes admits he did not feel nervous around Sorick, throughout his testimony, he reiterated "there's always a possibility" of danger under the facts at hand.

In its order denying Sorick's motion to suppress, the district court reasoned that based on all the circumstances presented to the officer during the stop—the time of evening, lack of street lighting, and the close proximity of the officer to the Sorick—"the officer had reason to believe he may be in danger and/or otherwise fear for his safety." In our de novo review, we disagree with the district court's determination. Our examination of the totality of circumstances leads us to conclude the State failed to prove by a preponderance of the evidence that Officer Hughes reasonably suspected Sorick was armed and dangerous. We concede the circumstances surrounding the incident give rise to a premonition of possible danger. But the early morning hour, the lack of street lighting, and the suspect's close proximity to Officer Hughes—without more—generate only a suspicion, not particular to Sorick.

Officer Hughes's safety concern was not caused by Sorick's behavior or information about his prior dealings; rather it arose from the circumstances surrounding the stop. Although the officer testified that the area of the stop was known for individuals who carry weapons, he was unable to cite any incident occurring before the stop which would lead him to believe the neighborhood would be dangerous. Officer Hughes's testimony regarding the stabbing which occurred nearby, an event transpiring after October 11, 2010, cannot factor into his reasonable suspicion. The court is allowed to consider only the information available to the officer at the time he decided to stop and frisk Sorick. See *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002).

Moreover, an individual's presence in an area known for violence does not, on its own, give police a reasonable suspicion of wrongdoing to conduct a pat down. *Cf. State v. Bergmann*, 633 N.W.2d 328, 333 (Iowa 2001) (explaining a "mere presence in a known narcotics-dealing area does not give police reasonable suspicion of wrongdoing to conduct a pat down" unless coupled with other factors such as nervousness, flight from police, past experience, suspect lying); *see also Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570, 576 (2000) ("[P]resence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.").

Fatal to the State's argument is the lack of any objective facts connecting Sorick to Officer Hughes's misgivings about the encounter. Sorick had no bulge in his pocket from which the officer could have inferred he was carrying a weapon. *See Pennsylvania v. Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 334, 54 L. Ed. 2d 331, 338 (1977) (finding an officer's observation of such bulge to be sufficient justification for a pat down). Nor did the officer have any report of Sorick carrying a concealed weapon or an illicit substance. *See Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 1924, 32 L. Ed. 2d 612, 612 (1972). Officer Hughes was not aware of any previous crimes committed by Sorick, and Sorick was cooperative during the seizure. *See Bergmann*, 633 N.W.2d at 333 (holding an officer's recognition of individual for previous weapons arrest, the suspect's evasive answers, nervousness, and noncompliance generated reasonable suspicion). Officer Hughes was not confronting a person he

reasonably believed to be armed and dangerous. He was merely approaching a bicyclist who was violating a city ordinance.

The purpose of the *Terry* frisk is to protect officers or bystanders from harm by defusing situations which have the potential to cause unreasonable risk. But such concern for safety is not an open invitation to groundless intrusions upon an individual's constitutional rights. See *Sibron*, 392 U.S. at 64, 88 S. Ct. at 1903, 20 L. Ed. 2d at 935. Because the officer did not possess sufficient specific and articulable facts combined with rational inferences arising from those facts to create a reasonable suspicion that Sorick was armed and dangerous, he was not justified in intruding upon Sorick's constitutionally protected interests. The district court should have suppressed the evidence discovered as a result of the frisk.

CONVICTION AND SENTENCE VACATED, REVERSED AND REMANDED.