

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

K.Y.,
Appellant-Respondent,

v.

State of Indiana,
Appellee-Petitioner.

September 23, 2022

Court of Appeals Case No.
22A-JV-1014

Appeal from the Marion Superior
Court

The Honorable Danielle P.
Gaughan, Judge

The Honorable Peter Haughan,
Magistrate

Trial Court Cause No.
49D15-2111-JD-9375

Altice, Judge.

Case Summary

- [1] K.Y. was adjudicated a delinquent child for being in dangerous possession of a firearm in violation of Ind. Code § 35-47-10-5. On appeal, he contends that the trial court abused its discretion by admitting evidence of the handgun recovered from his person during an alleged unconstitutional investigatory stop.
- [2] We affirm.

Facts & Procedural History

- [3] Just before noon on November 1, 2021, Indianapolis Metropolitan Police Department (IMPD) Officer Andrew Marr was dispatched to about the 900 block of Gray Street based on an anonymous 911 call. According to Officer Marr: “The specific description for the armed person run ... was two black males, with long clips, brandishing weapons. One was in a yellow hoodie, and one was in a gray hoodie.” *Transcript* at 8. Officer Marr also portrayed the dispatch description as being “two males carrying guns with long clips walking down Gray street in bright hoodies.” *Id.*
- [4] About an hour earlier, Officer Marr had heard a shots fired run over the radio that involved three teenage males, one white and two black, all wearing “bright colored hoodies.” *Id.* at 6. Officer Marr had not been dispatched to that earlier run near Brookside Park, and he did not testify to knowing anything more about that run other than that the caller was not anonymous.

- [5] Upon being dispatched to the armed persons run, which was about one-half mile from Brookside Park, Officer Marr thought that the run might be related to the earlier one based on the descriptions of the suspects. He then observed K.Y., a young black male, walking down the middle of Gray Street “wearing a bright yellow hoodie.” *Id.* Quante Bailey, another young black male, was walking with K.Y. Bailey had a handgun in his waistband, which was immediately apparent to Officer Marr.
- [6] Based on his observations, Officer Marr pulled his marked patrol car up to K.Y. and Bailey and directed them to stop. K.Y. moved to the side of the street and was compliant. Officer Marr and another officer then exited the police vehicle and approached. After removing the handgun from Bailey’s waistband, Officer Marr patted down Bailey and K.Y. Officer Marr discovered “a Glock twenty-three handgun within [K.Y.’s] underwear.” *Id.* at 18. K.Y., who was sixteen years old, was arrested for carrying a handgun without a permit; Bailey was not arrested because he was an adult with a valid handgun permit.
- [7] At his delinquency hearing on February 7, 2022, K.Y. objected to evidence obtained as a result of the stop, which he argued was unsupported by reasonable suspicion and, therefore, unconstitutional. The trial court, however, admitted the evidence related to the handgun recovered from K.Y.’s person. Based on this evidence, the trial court adjudicated K.Y. a delinquent for having committed dangerous possession of a firearm.

[8] At the dispositional hearing on April 11, 2022, the trial court placed K.Y. on formal probation with a suspended commitment to the Indiana Department of Correction. K.Y. now appeals.

Discussion & Decision

[9] K.Y. argues, as he did below, that he was stopped by Officer Marr without reasonable suspicion of criminal activity and that the resulting search of his person violated the Fourth Amendment of the United States Constitution.¹ Asserting that the detention was illegal, K.Y. contends that the handgun discovered during the search should have been suppressed.

[10] K.Y. appeals from a completed trial, and, thus, our standard of review is whether the trial court abused its discretion by admitting the challenged evidence at trial. *See Segar v. State*, 937 N.E.2d 917, 920 (Ind. Ct. App. 2010); *see also Tinker v. State*, 129 N.E.3d 251, 255 (Ind. Ct. App. 2019), *trans. denied*. In making such a determination, we will not reweigh the evidence but, rather, will consider conflicting evidence in a light most favorable to the trial court's ruling. *Segar*, 937 N.E.2d at 920. Where, as here, however, a challenge is based on the constitutionality of a search or seizure of evidence, it raises a

¹ K.Y. also asserts that the stop violated Article 1, Section 11 of the Indiana Constitution, but he does not present a distinct analysis under our state constitution. Consequently, he has waived his claim based on the Indiana Constitution, and we consider only the Fourth Amendment challenge to the stop. *See Membres v. State*, 889 N.E.2d 265, 275 n.1 (Ind. 2008); *Francis v. State*, 764 N.E.2d 641, 647 (Ind. Ct. App. 2002).

question of law that we review de novo. See *Thomas v. State*, 81 N.E.3d 621, 624 (Ind. 2017); *Segar*, 937 N.E.2d at 92.

[11] It is well established that an officer can make a brief investigatory stop of a person – a *Terry* stop – if the officer “observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.” *Johnson v. State*, 157 N.E.3d 1199, 1203-04 (Ind. 2020) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)), *cert. denied*. Though a less demanding standard than probable cause, or even a preponderance of the evidence, reasonable suspicion “still requires at least a minimal level of objective justification and more than an inchoate and unparticularized suspicion or ‘hunch’ of criminal activity.” *State v. Schlechty*, 926 N.E.2d 1, 7 (Ind. 2010); see also *Johnson*, 157 N.E.3d at 1204 (observing that officer must be able to point to specific and articulable facts which, taken together with rational inferences, reasonably warrant the intrusion).

[12] When determining whether the stop was justified by some objective indication that the person stopped was, or was about to be, engaged in criminal activity, we consider the totality of the circumstances. *Clark v. State*, 994 N.E.2d 252, 263 (Ind. 2013). “In assessing the whole picture, we must examine the facts as known to the officer at the moment of the stop.” *Id.* at 264. Our de novo review of whether reasonable suspicion existed is “necessarily a fact-sensitive inquiry.” *Id.*

[13] Here, just before noon, Officer Marr was dispatched based on an anonymous 911 call indicating that two individuals were walking down the road “brandishing” or “carrying” firearms with long clips. *Transcript* at 8. They were described by the caller as black men wearing hoodies, one yellow and one gray. At the time, Officer Marr was also aware of another dispatch, about an hour earlier, that was based on the report by a non-anonymous caller concerning shots fired near Brookside Park, about one-half mile away. Officer Marr knew that this earlier report involved three teenage male suspects – two black and one white – wearing bright colored hoodies. With this knowledge, Officer Marr responded to his dispatch and observed two young black males walking together in the middle of the road. K.Y. was wearing a bright yellow hoodie, and Bailey had a handgun visible in his waistband. Officer Marr initiated an investigatory stop.

[14] K.Y. argues that Officer Marr had no reasonable suspicion that he was engaged in criminal activity at the time Officer Marr directed him to stop. He notes that two young black males walking down the street in the middle of the day wearing hoodies in November in Indiana is neither unusual nor suspicious. Moreover, the bare-bones, anonymous call provided no suggestion of illegality, as visibly carrying a handgun in public in Indiana is not necessarily unlawful.

[15] Though cited by neither party in this case, we find *Pinner v. State*, 74 N.E.3d 226 (Ind. 2017) instructive. In *Pinner*, IMPD officers were dispatched following a 911 call from a taxi driver, who reported that one of his passengers, a black male, had dropped a handgun while exiting the cab at a movie theater. The

driver reported having been afraid that he was going to be robbed and described the male as wearing a blue jacket and being accompanied by a black female with blonde hair. The responding officer subsequently called the driver from the scene and learned that there had not been a robbery. Further, the driver made no claim that the man had threatened him with the handgun. The officer then went into the establishment and located Pinner. When asked, Pinner hesitantly denied having a handgun. The officer then ordered Pinner to stand and keep his hands up. A weapon, which was now visible, was recovered from Pinner's front pocket.

[16] In concluding that the stop was unlawful, the Court observed that even a reliable 911 tip will justify a stop only if it creates reasonable suspicion that criminal activity may be afoot. *Id.* at 230. The Court refused to adopt a firearm exception to the reasonable suspicion requirement because in Indiana possession of a firearm is not per se illegal. *Id.* at 230-33. In other words, visibly displaying a firearm in public – without more – does not provide officers with individualized reasonable suspicion of criminal activity. *See id.*

[17] In *Pinner*, the Court discussed *Florida v. J.L.*, 529 U.S. 266 (2000), where police officers received an anonymous tip that “a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.” *Id.* at 268. Upon arriving at the bus stop, the officers observed three black males “just hanging out,” one of whom – J.L. – was wearing a plaid shirt. An officer immediately stopped and frisked J.L., recovering a gun from his pocket. J.L., just under the age of sixteen, was charged under Florida law with carrying a

concealed firearm without a license and possessing a firearm while under the age of eighteen. The trial court granted J.L.’s motion to suppress the gun, and the United States Supreme Court affirmed. In determining that the anonymous tip did not justify the stop, the Supreme Court explained:

An accurate description of a subject’s readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Id. at 272; *see also Navarette v. California*, 572 U.S. 393, 401 (2014) (“Even a reliable tip will justify an investigatory stop only if it creates reasonable suspicion that ‘criminal activity may be afoot.’”). The Supreme Court also concluded that “an automatic firearm exception to our established reliability analysis would rove too far” and that “bare-boned tips about guns” are insufficient for a *Terry* stop and frisk.² *J.L.*, 529 U.S. at 272-73.

[18] After discussing *J.L.*, the Court in *Pinner* stated:

In the case before us, the tip provided by the taxi driver made no “assertion of illegality,” rather it merely had a “tendency to identify a determinate person” who was in possession of a

² The Court indicated that there might be circumstances under which the danger alleged in an anonymous tip is so great as to justify a search without a showing of reliability (such as the report of an individual carrying a bomb) but that such urgent circumstances were not present in *J.L.*’s case. *Id.* at 273-74.

handgun. Even taking his tip as true and assuming that Pinner was the man the taxi driver described, the officers had no reason to suspect that Pinner did not have a valid license to carry the handgun, an illegal act in this jurisdiction. This is not a case where, through independent investigation or personal experience, the officers had reason to believe that Pinner's possession of a weapon was in violation of Indiana law. In essence, other than the taxi driver's claims of being fearful because he had seen an individual matching Pinner's description "drop a handgun" there is no evidence in the record from which an inference of criminal activity can be drawn. And a "bare-boned tip[] about guns" is insufficient.

Pinner, 74 N.E.3d at 232 (citation to *J.L.* omitted). The Court also rejected the State's assertion that the officer was permitted to briefly detain Pinner to ascertain the legality of the weapon. *Id.* at 233 ("[L]aw enforcement may not arbitrarily detain an individual to ensure compliance with licensing and registration laws without particularized facts supporting an inference of illegal conduct.").

[19] As in *Pinner*, the caller in this case made no assertion of illegality when they reported that two black males were walking down the road in the middle of the day carrying firearms. The report, even if reliable and true, merely provided general identifying information of two individuals openly possessing guns. The caller did not indicate that the males were brandishing the weapons in a threatening manner or that their possession of the weapons were in any way illegal or suspicious. The call was simply a bare-boned tip about guns and, by

itself, did not provide Officer Marr with reason to suspect that these individuals lacked a valid license to carry a handgun, which this state required at the time.³

[20] This anonymous call, however, was not the only information Officer Marr had at his disposal. He was also aware of a non-anonymous shots fired dispatch that went out about an hour earlier and involved a nearby location – a park only a short ten-minute walk – and two teenage black males wearing bright colored hoodies. Upon arriving on the scene, Officer Marr observed two young black males walking down the street. One of them, Bailey, had a handgun in his waistband that was immediately visible to Officer Marr, and the other, sixteen-year-old K.Y., was wearing a bright yellow hoodie. Based on the two dispatches, which were relatively close in time, location, and suspect descriptions, and his observations on the scene, Officer Marr stopped K.Y. and Bailey to investigate.

[21] This case certainly presents a close call. Considering the totality of the circumstances known to Officer Marr, however, we conclude that he had “at least a minimal level of objective justification” – more than simply a hunch of criminal activity – to justify the stop. *Schlechty*, 926 N.E.2d at 7. Accordingly,

³ Though recently amended, at the time of the instant stop, Ind. Code § 35-47-2-1(a) provided, with certain exceptions, that “a person shall not carry a handgun in any vehicle or on or about the person’s body without being licensed ... to carry a handgun.” A knowing or intentional violation of the section constituted a crime as set out in I.C. § 35-47-2-1(e).

the trial court did not err in admitting into evidence the handgun recovered from K.Y. as a result of the stop.

[22] Judgment affirmed.

Brown, J. and Tavitas, J., concur.