IN THE SUPREME COURT OF THE STATE OF NEVADA

HOWARD THOMAS ILLINGWORTH,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36970

FILED

MAR 27 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of trafficking in a controlled substance. Appellant entered a guilty plea under a plea agreement that reserved his right to appeal the conviction based on the district court's denial of appellant's motion to suppress evidence. The district court sentenced appellant to serve 12 to 30 months in the Nevada State Prison, and ordered appellant to pay a $5,000 fine.

Appellant first argues that the district court erred as a matter of law in finding there was reasonable suspicion to conduct a Terry[1] pat-down search. Preliminarily, we note that "findings of fact in a suppression hearing will not be disturbed on appeal if supported by substantial evidence. Moreover, a district court's findings of fact will be reviewed under a deferential standard."[2] Furthermore, "it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony."[3]

Terry "allows an investigatory stop by a police officer who has observed suspicious behavior, and further allows the officer to conduct a precautionary frisk of the individual stopped, if the circumstances indicate a reasonable belief that

[1]Terry v. Ohio, 392 U.S. 1 (1968).

[2]State v. Miller, 110 Nev. 690, 694, 877 P.2d 1044, 1047 (1994) (citations omitted); see also Tomarchio v. State, 99 Nev. 572, 575, 665 P.2d 804, 806 (1983).

[3]Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994); see also State v. Johnson, 116 Nev. 78, 80-81, 993 P.2d 44, 45-46 (2000).

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the individual may be armed."[4] The officer testified at the suppression hearing that appellant was extraordinarily nervous upon being stopped and that appellant's hands were shaking. The officer asked appellant to step out of the car and told him he would conduct a pat-down for weapons. According to his testimony, after appellant got out of the car appellant put his hands in his pockets, which alerted the officer to take safety precautions. The officer then grabbed appellant's hands and put them over his head and conducted a pat-down search. After hearing testimony, the district court found that appellant's excessive nervousness was enough to give rise to a reasonable belief by the police officer that further investigation and a Terry pat-down search was appropriate. Based upon our review of the record, we conclude that the district court's findings are supported by the record and that the district court did not err in concluding that the search was justified under Terry.

Second, appellant argues that the district court erred as a matter of law in finding that the officer's search of appellant did not go beyond the scope of a Terry search. The district court found that once the officer in his Terry search of appellant detected the round object in appellant's coin pocket that later turned out to be methamphetamine, consent was obtained from appellant to search his pocket. The district court acknowledged that it was an "extraordinarily close case" and gave the issue considerable thought, eventually finding that the officers' testimony was more credible. We defer to the district court's findings and conclude that the district court did not err in concluding that appellant consented to the more extensive search of his pocket.

Third, appellant argues that the district court erred in finding that the officer's search of appellant did not exceed the scope of the Dickerson[5] "plain feel" doctrine. The officer

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[4]Scott v. State, 110 Nev. 622, 629, 877 P.2d 503, 508 (1994).

[5]Minnesota v. Dickerson, 508 U.S. 366 (1993).

testified that it was not immediately apparent from his pat-down search of appellant that the lump in appellant's pocket was an illegal substance. However, in light of the district court's finding, as discussed above, that at that point the officer obtained consent from appellant to search his pocket, the district court did not err in rejecting appellant's claim that the officer exceeded the scope of the Dickerson "plain feel" doctrine.

Finally, appellant argues that the district court erred by applying the wrong burden of proof in finding that appellant gave consent for the search. "Consent for the search must be freely and voluntarily given by the individual. Proof of the voluntariness is a question of fact. The State bears the burden of proving consent by '[c]lear and persuasive evidence.'"[6] Furthermore, "'[w]hether the scope of consent has been exceeded is a factual question to be determined by examining the totality of the circumstances.'"[7]

In giving its ruling, the district court stated, "I am persuaded that Mr. Illingworth gave that consent based upon the totality of the circumstances." Thus, we conclude the district court did not err.

Having considered appellant's contentions and concluded they are without merit, we

ORDER the judgment of conviction AFFIRMED.

Shearing, J.

Agosti, J.

Rose, J.

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[6]McIntosh v. State, 86 Nev. 133, 136, 466 P.2d 656, 658 (1970) (quoting Thurlow v. State, 81 Nev. 510, 515, 406 P.2d 918, 921 (1965)) (citations omitted).

[7]Johnson, 116 Nev. at 81, .993 P.2d at 46 (quoting Canada v. State, 104 Nev. 288, 291, 756 P.2d 552, 553 (1988)).

cc: Hon. Janet J. Berry, District Judge
Attorney General
Washoe County District Attorney
Steven L. Sexton
Washoe County Clerk