IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KERRY WAYNE TURNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87396-COA

ORDER OF AFFIRMANCE

Kerry Wayne Turner appeals from a judgment of conviction, entered pursuant to a jury verdict, of trafficking in a schedule II controlled substance or substance containing specific substances, 100 grams or more but less than 400 grams, and ownership or possession of a firearm by a prohibited person. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Sufficiency of the Evidence

Turner contends there was insufficient evidence to support his trafficking conviction. Specifically, Turner claims there was insufficient evidence that he possessed 100 grams or more of fentanyl or a mixture with fentanyl because the substances in the 4 baggies found on his person were commingled by the time they reached a lab for testing. Turner does not appear to dispute that the substances found on his person cumulatively weighed more than 100 grams. Rather, he argues there was no proof that each baggie contained fentanyl or a mixture with fentanyl such that he had 100 grams or more of fentanyl or a mixture with fentanyl on him and that,

because of the commingling, the State presented only a single, contaminated sample as evidence to the jury.

Evidence is sufficient to support a jury verdict if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). As relevant to this matter, to obtain a conviction for low-level trafficking in a controlled substance, the State had to prove that (1) Turner was knowingly or intentionally in actual or constructive possession of any Schedule I or II controlled substance or any mixture which contained any such controlled substance, and (2) the quantity involved was 100 grams or more but less than 400 grams. NRS 453.3385(1)(a).

The evidence presented at trial was as follows. Detective Thomas Williams received information that Turner was dealing fentanyl in the area and would be in possession of fentanyl, so he devised a plan to contact Turner at a Motel 6. Turner arrived at the Motel 6 after midnight, where he was subsequently arrested and searched. Detective Andrew Hernandez conducted the search of Turner's person in the presence of Detectives Williams and Julian Castro.

Detective Hernandez identified and retrieved several baggies from Turner's underwear: three baggies contained a white powdery substance, and one baggie contained a pink powdery substance. Detective Williams testified that different colors were more closely associated with fentanyl than other types of narcotics, and Detective Hernandez testified

that fentanyl had a different appearance than other narcotics, such as cocaine or methamphetamine. Both Detectives Williams and Hernandez testified that, based on their training and experience, the four baggies appeared to be pressed fentanyl powder. Detective Castro also testified that Narcan, a blocker for fentanyl that is used in the event of an overdose, was found inside Turner's vehicle.

Brad Taylor, a criminalist, testified that when he opened the envelope containing the substances to test them, he saw that the baggies had torn and the substances were commingled. Taylor testified that the combined net weight of the substances was 100.9 grams[1] and that, because the substances had been commingled, only one sample was tested. Taylor testified that he could not say whether each individual baggie would have tested positive for fentanyl because the substances had been commingled but that a gas chromatograph test confirmed the sample contained fentanyl and ANPP.[2] Taylor testified that he saw ANPP mixed with fentanyl "quite often" and that he had never analyzed a sample and found ANPP without fentanyl. Taylor also testified that he visually examined the substances and that they were all compressed powders that did not appear to be cocaine or methamphetamine. Finally, in a recorded video visit, Turner acknowledged

---

[1]Taylor also testified that the combined net weight was still over 100 grams even when the margin of error was accounted for.

[2]Taylor testified that ANPP is an immediate precursor to fentanyl, and that ANPP mixed with "some kind of fluoride [ ] creates fentanyl."

that the officers "pull[ed] out [his] bundle," and he asked, "What happens if I get my dope washed and they go all the way down to 99 grams?"

Viewing this evidence in the light most favorable to the State, we conclude there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Turner possessed 100 grams or more of fentanyl or a mixture containing fentanyl. Therefore, we conclude that there was sufficient evidence to support Turner's conviction for low-level trafficking in a controlled substance.

Motion to Suppress

Before trial, Turner filed a motion to suppress the baggies found on his person, arguing the search violated his Fourth Amendment rights. The State opposed the motion, and the district court held an evidentiary hearing, during which Detectives Williams, Hernandez, and Castro testified. At this hearing, Detective Williams testified that, approximately two to three weeks prior to Turner's arrest, he arrested another person (hereinafter, first source of information or SOI) who was in possession of a large amount of fentanyl. The first SOI informed Detective Williams that they had previously purchased fentanyl from Turner. The night of Turner's arrest, Detective Williams arrested a second person (hereinafter, second source of information or SOI) who relayed that Turner was in possession of and trafficking large amounts of fentanyl and that Turner had provided him with fentanyl very recently.

Based on this information, Detective Williams setup the aforementioned contact with Turner at a Motel 6 by asking another detective and the second SOI to reach out to Turner and request a large

amount of fentanyl. The second SOI informed the police that Turner would be driving a Silver Mercedes SUV, and Turner in fact arrived at the Motel 6 in a Silver Mercedes SUV. Detective Williams also testified that, before Turner's arrest, he was informed Turner had an active arrest warrant and that he asked Detective Castro to confirm the warrant was still active and valid. Detective Castro testified that he confirmed the arrest warrant was still valid, and Detective Hernandez testified as to the nature of the search. The district court denied Turner's motion, determining that the police had probable cause to arrest Turner and that the search was reasonable and justified both as a search incident to arrest and as a *Terry*[3] frisk to ensure officer safety. On appeal, Turner argues the district court erred by denying his motion to suppress.

The United States and Nevada Constitutions proscribe all unreasonable searches and seizures. U.S. Const. amend. IV; Nev. Const. art. 1, § 18. Under these constitutional provisions, "warrantless searches are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions," such as a search incident to arrest or a *Terry* frisk. *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013) (internal quotation marks omitted); *see United States v. Robinson*, 414 U.S. 218, 227-29 (1973) (discussing the differences between a *Terry* frisk and a search incident to arrest). A district court's resolution of a motion to suppress evidence presents a mixed question of law and fact. *State v. Beckman*, 129 Nev. 481, 485, 305 P.3d 912, 916 (2013). The district court's findings of fact

---

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

are reviewed for clear error, but the legal consequences of those factual findings are reviewed de novo. *Id.* at 486, 305 P.3d at 916.

Turner contends the district court erred by finding the search was justified as a search incident to arrest because Detective Hernandez testified the search was a *Terry* frisk. An officer's reason for conducting a search will "not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Whren v. United States*, 517 U.S. 806, 813 (1996) (quotation marks omitted); *cf. Florida v. Royer*, 460 U.S. 491, 507 (1983) (stating the fact that the officers "proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying [the defendant's] custody by proving probable cause"). Therefore, we consider whether the search was lawful as a search incident to arrest.

In making this determination, we must first determine whether Turner's arrest was lawful. *Scott v. State*, 110 Nev. 622, 629, 877 P.2d 503, 508 (1994) (stating such a search is permitted "only when the search is performed incident to the lawful custodial arrest of the individual being searched"). "Probable cause to conduct a warrantless arrest exists when police have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed by the person to be arrested." *Doleman v. State*, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991). Probable cause "is not a high bar" and "requires only a probability or substantial chance of criminal activity." *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018) (quotation marks omitted). We consider the totality of the circumstances in determining whether an officer had probable cause

to make an arrest. *See Deutscher v. State*, 95 Nev. 669, 681, 601 P.2d 407, 415 (1979).

The district court found that Detective Castro confirmed Turner's active arrest warrant was still valid, and this finding is not clearly erroneous. Thus, we conclude that Turner's arrest was lawful pursuant to the active arrest warrant.

Additionally, the district court found that (1) Detective Williams had been independently advised by both SOIs that Turner had supplied them with drugs and was in possession of a weapon; (2) the first SOI was shown a photo of Turner and confirmed Turner was the person who supplied them with fentanyl; (3) Detective Williams had the second SOI lure Turner to the Motel 6 parking lot under a ruse to sell more fentanyl; and (4) the veracity of the information provided by both SOIs was corroborated by the fact that Turner arrived at the designated time and location established for the fentanyl sale in a vehicle identified by the second SOI. The district court's findings are not clearly erroneous, and we conclude that the information provided by the SOIs was sufficiently trustworthy so as to permit a person of reasonable caution to believe that Turner possessed or was attempting to sell fentanyl. Therefore, the police had probable cause to arrest Turner on this basis as well.[4] *See* NRS 453.321(1)(c); NRS 453.336(1); NAC 453.520(3) (listing fentanyl as a schedule II controlled substance).

---

[4]To the extent Turner suggests the State was required to establish the first and second SOI's veracity, reliability, or basis of knowledge, we reject this claim. *See Illinois v. Gates*, 462 U.S. 213, 230, 233 (1983) (stating these factors should not be "understood as entirely separate and

Turner contends that, even if his arrest was lawful, the search exceeded the permissible scope of a search incident to arrest. The United States Supreme Court has held that, in the case of a lawful custodial arrest, a "full search" of the arrestee's person is reasonable regardless of whether the arresting officer believed the arrestee had weapons or evidence on their person. *Robinson*, 414 U.S at 235 ("It is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."); *see also Scott*, 110 Nev. at 629, 877 P.2d at 508 (recognizing that *Robinson* "permits a more complete and intrusive search of a person than that allowed by *Terry*"). Nevertheless, Turner contends that he was subjected to a strip search and that the "full search" contemplated by *Robinson* does not include a strip search.

We find *Robinson* analogous to the present matter. In that case, a police officer effectuated a lawful arrest and conducted a pat-down search of the defendant's person, including the defendant's breast, "waist[,] and trouser legs." *Robinson*, 414 U.S at 220-23. The officer felt an object in the defendant's breast pocket but could not tell what it was, so he reached into the pocket and pulled out the object, which ultimately revealed 14 gelatin

---

independent requirements to be rigidly exacted in every case," but rather, "are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable cause determinations"). Regardless, even assuming the police officers did not have probable cause to arrest Turner on a new drug charge, Turner's arrest was lawful pursuant to the active arrest warrant.

capsules of heroin. *Id.* at 223. The Supreme Court held that the search of the defendant's person and the seizure of the heroin were permissible under the Fourth Amendment. *Id.* at 236.

Similarly, here, the district court found that Detective Hernandez used a "bladed" hand motion over Turner's clothing and felt a compressed ball of narcotics in the front of Turner's pants and that body camera footage showed Detective Hernandez clearly announcing when he felt the large ball of what he believed to be compressed drugs on Turner's thigh. The district court also found that Detective Hernandez did not pull Turner's pants or underwear down but rather attempted to pull the fentanyl away from Turner's body and manipulate it out of his underwear. The district court's findings are not clearly erroneous.[5] Thus, both *Robinson* and the present matter involve over-the-clothing searches that revealed drugs on the arrestee's person and the subsequent retrieval of said drugs from inside the arrestee's clothing.

Although the drugs were located in Turner's underwear in this case and in the defendant's breast pocket in *Robinson*, we conclude that Detective Hernandez's actions in retrieving the drugs from Turner's

---

[5]To the extent the district court considered and relied upon body camera footage in resolving the motion, Turner failed to provide this court with any such video on appeal. Therefore, we presume this video supports the district court's decision. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); *cf. Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (concluding that if materials are not included in the record on appeal, the missing materials "are presumed to support the district court's decision"), *rev'd on other grounds by Riggins v. Nevada*, 504 U.S. 127 (1992).

underwear were reasonable and consistent with the purposes to be served from a search incident to arrest.[6] *See Arizona v. Gant*, 556 U.S. 332, 339 (2009) (recognizing the scope of a search incident to arrest should be "commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy"); *see also Robinson*, 414 U.S. at 234 (recognizing the justification for permitting an officer to search an arrestee's person is based not only on the need to disarm the suspect but also "on the need to preserve evidence on [the arrestee's] person for later use at trial").

Detective Hernandez testified that he never intentionally pulled Turner's pants or underwear down and he never did anything to intentionally expose Turner's private area to public view. He also testified that he immediately took steps to raise Turner's pants and underwear back up after he retrieved the fentanyl. Moreover, the district court found that (1) Turner was very near to and facing a police vehicle when he was searched, and he was surrounded by three to four officers who shielded his body from view; (2) the search occurred late at night; (3) no members of the public were visible in any body camera footage; (4) when Turner's pants

---

[6]The district court found that the search was not a strip search because Detective Hernandez did not pull down Turner's pants or underwear. Whether the search may be labeled a "strip search" is of no importance in determining the reasonableness of the search. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374 (2009) (stating the "exact label" for a request of a student to "'pull out' her bra and the elastic band on her underpants" was "not important, though strip search is a fair way to speak of it").

were down, none of his private area was visible; (5) Turner's pants were down for the limited purpose of removing several bundles of fentanyl from his upper thigh and crotch area; and (6) the search was only as long and as extensive as necessary to retrieve this evidence and to ensure the safety of Turner and the officers. The district court also found that when Turner exited the vehicle, he was wearing his pants so low that the waistband was around the top of his thighs and the top of his buttocks was visible above his underwear's waistband. The district court's findings as to the reasonableness of the search are not clearly erroneous.

In light of the foregoing, we conclude that the search conducted in this matter was a lawful search incident to arrest and, thus, the district court did not err by denying Turner's motion to suppress evidence obtained from the search.[7]

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

---

[7]Having so concluded, we need not address Turner's argument that the search exceeded the scope of a *Terry* frisk.

cc: Hon. Kathleen M. Drakulich, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk