DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

GARY TODD DYDEK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-1275

October 26, 2022

Appeal from the Circuit Court for Pasco County; Kimberly Campbell, Judge.

Howard L. Dimmig, II, Public Defender, and Kevin Briggs, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Katherine Coombs Cline, Assistant Attorney General, Tampa, for Appellee.

NORTHCUTT, Judge.

Gary Todd Dydek was convicted of drug possession charges after he pleaded no contest while reserving the right to appeal the denial of his dispositive motion to suppress contraband found in a

warrantless search of his person. We conclude that the arresting officers' encounter with Dydek was not consensual and that their seizure and search of him were not justified by a reasonable suspicion that Dydek had committed a crime. Therefore, the circuit court should have granted Dydek's motion to suppress. We reverse his convictions and sentences and remand for dismissal of the charges.

Testimony at the suppression hearing reflected that a housekeeper at a Rodeway Inn in New Port Richey came across a handgun under a pillow in a vacant room. A call was made to the New Port Richey Police Department. When officers arrived to investigate, the gun had already been removed from the room, and the hotel manager handed it to them. The manager told the officers that the room in which the gun was discovered was previously registered to a man and woman who had since moved into another room in the hotel.

The State offered no evidence to show how long the man and woman had occupied the first room, when they had left it, how many beds were in either room, or when either room had been last

cleaned. No evidence suggested that the officers examined the room in which the gun was found.

The officers did search a database for the serial number on the firearm and learned that it had been stolen in Pinellas County in an incident that involved several other firearms. The record before the circuit court was silent about any other details of the Pinellas case—no evidence was offered about the circumstances, location or date of the theft, or the identity of any suspects.

The hotel staff showed the officers photos or photocopies of the driver licenses that had been presented by the people who had rented the first room and moved to the second. The man, Keith Vandawalker, was described as white, middle-aged, and of average build and height. A records search for his name disclosed that he was a convicted felon. This, officers claimed, gave them "a little more reasonable suspicion that there was possibly a convicted felon armed with multiple firearms in that [second] hotel room."

One officer then staked out the second room "to get a better vantage point" in order to keep "eyes on the room until [he] had enough officers arrive on the scene and set up in a position where [they] could tactically advance to the room in a safe manner." The

officers conceded that there was nothing distinctive about the description of Vandawalker taken from his driver license. There was "nothing that stood out."

> Q: So when you were looking for the person, you were just looking for a middle-aged white man?
> A: Roughly, yes, ma'am.

An officer testified that eventually a

> white male, average build, average height, similar description to Mr. Vandawalker, exit[ed] the room, kind of look[ed] around a little bit, only stay[ed] out of the room, near the front door of the room for maybe 30 seconds to a minute, if I could guess and then re-enter[ed] [sic] the room.

The officers thought this was suspicious. Still, they knew they lacked probable cause to support the issuance of a search or arrest warrant, so they made no attempt to obtain one. They opted instead to "knock on the door and try to make contact – peaceful contact." But their idea of "peaceful contact" was anything but.

The officers recounted that once they were "set up . . . with enough officers"—five, to be precise—they got "into position" so that they could "approach safely and tactically." One officer positioned himself on the other side of the hotel pool and trained a rifle on the hotel room. The four others, at least three with drawn handguns,

loudly knocked and announced themselves as New Port Richey police. Dydek later testified that he opened the door and saw both the rifle and at least one handgun drawn and at the ready.

The foregoing facts were undisputed. At this point in the scenario the testimony began to vary slightly, but the differences are immaterial for the purpose of our analysis. Either the officers grabbed Dydek and pulled him out of the hotel room, or he hesitantly stepped from the room when they directed him out of it while brandishing firearms. The officers testified that they then "funneled" Dydek down the hallway away from the room and patted him down for weapons, finding none. While this was happening, some officers searched through the room to perform a "protective sweep." They found no other person, no guns, and no contraband.

Meanwhile, Dydek was being physically held a few feet down the hall and was told to put his hands behind his back to be handcuffed. The officer who held Dydek testified that he meant to handcuff him for officer safety. According to the officer, Dydek then turned toward him and pulled one of his hands away. In the officer's words, he "didn't know [Dydek's] intentions," so the officer "took him down to the ground." At that point, the officer testified,

Dydek was under arrest for "resisting, obstructing the investigation." Dydek landed on his face, and the officer handcuffed him.

With Dydek restrained, the officers removed his jewelry and searched his pockets. They found and opened a pouch that was belted around his waist. Inside were the illicit drugs that ultimately resulted in the convictions on appeal here.

The State charged Dydek with six counts of possession: of methamphetamine, of cocaine, of fentanyl, of oxycodone, of methylenedioxymethamphetamine, and of marijuana. Initially, Dydek was also charged with obstructing or resisting an officer without violence, but the State later dropped that charge.

As it does on appeal, the State argued at the suppression hearing that Dydek's encounter with the officers was consensual or, alternatively, that the officers had reasonable suspicion sufficient to support a brief investigatory stop under the Florida's Stop and Frisk Law, section 901.151, Florida Statutes (2019) (enacted shortly after the decision in *Terry v. Ohio*, 392 U.S. 1 (1968)). When denying the motion, the court made very few factual findings, instead choosing to summarize the testimony before simply announcing that "at this

time the motion will be denied." The court did, however, correctly determine that the motion was dispositive. Dydek then pleaded no contest to the possession charges while reserving the right to appeal the denial of the motion to suppress.

On appeal, our review of the circuit court's application of the law to the facts is de novo. *Bautista v. State*, 902 So. 2d 312, 313-14 (Fla. 2d DCA 2005). However, we must view the evidence in a manner most favorable to sustaining the court's ruling on the motion to suppress. *Id.* at 314.

It is well-recognized that "[t]here are essentially three levels of police-citizen encounters." *Popple v. State*, 626 So. 2d 185, 186 (Fla. 1993). The first is a "consensual encounter." *Id.* This "involves only minimal police contact," wherein the "citizen may either voluntarily comply with a police officer's requests or choose to ignore them." *Id.* The second type of encounter is an "investigatory stop," in which police may detain someone temporarily "if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime." *Id.* The third level of encounter is an arrest, "which must be supported by probable cause that a crime has been or is being committed." *Id.*

Certainly, the encounter in this case was not consensual. To qualify as consensual, an encounter must be one in which the officer does not "hinder or restrict the person's freedom to leave or freedom to refuse to answer inquiries." *Id.* at 187. Also, an encounter is not consensual if the officer's "show of authority" would lead "a reasonable person [to] conclude that he or she is not free to end the encounter and depart." *Id.* at 188.

As the Supreme Court of the United States held in *United States v. Mendenhall*, 446 U.S. 544 (1980):

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be 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.

Mendenhall, 446 U.S. at 554 (footnote omitted). The officer's subjective intent "is irrelevant except insofar as that may have been conveyed to the [defendant]." *Id.* at 544 n.6.

The officers in this case asserted that their "tactical[] advance" to perform a knock-and-talk at Dydek's hotel room door was simply

a consensual encounter. Generally, a knock-and-talk may be consensual if certain guidelines are followed. *Luna-Martinez v. State*, 984 So. 2d 592, 598 (Fla. 2d DCA 2008). "In employing this procedure, 'police officers knock on the door, try to make contact with persons inside, and talk to them about the subject of the complaints' underlying the investigation." *Id.* (quoting *Murphy v. State*, 898 So. 2d 1031, 1032 n.4 (Fla. 5th DCA 2005)). However,

> [t]he key to the legitimacy of the knock-and-talk technique—as well as any other technique employed to obtain consent to search—is the absence of coercive police conduct, including any express or implied assertion of authority to enter or authority to search. In properly initiating a knock-and-talk encounter, the police should not "deploy overbearing tactics that essentially force the individual out of the home." Nor should "overbearing tactics" be employed in gaining entry to a dwelling or in obtaining consent to search.

Luna-Martinez, 984 So. 2d at 598-99 (citation omitted). Manifestly, in this case the officers' extreme display of authority and their "overbearing tactics" negated any possibility that their encounter with Dydek was consensual.

It makes no difference that, as the State notes, there was conflicting testimony as to whether Dydek stepped out of his hotel room or was grabbed and pulled out. Under no reasonable view of

either version was Dydek's exit from his hotel room voluntary. No reasonable person would feel unrestricted and free to leave upon opening his door to be confronted by multiple officers with firearms drawn and with a rifle trained at the room from a few dozen yards away. And Dydek was definitively *not* free to leave when the officers laid hands on him, hauled him down the hall, attempted to handcuff him, and smashed his face into the ground.

Neither could the encounter be characterized as an investigatory stop. "At this level, a police officer may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime." *Popple*, 626 So. 2d at 186. "In order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. Mere suspicion is not enough to support a stop." *Id.* Importantly, "[i]t is the State's burden to establish that police had the necessary reasonable suspicion to detain . . . an individual." *K.W. v. State*, 328 So. 3d 1022, 1025 (Fla. 2d DCA 2021).

At the hearing, the State argued that the officers had a reasonable suspicion that there were people inside the second hotel

room that "were engaged, at the very least, in a potential felon in possession of a firearm case as well as potentially stolen firearm case." The officers testified that their concern was that there were "multiple occupants and multiple firearms in that new room." But the State's evidence of the facts possessed by the officers when they undertook the encounter established neither that any crime had taken place nor that Dydek was reasonably suspected of committing one.

First, the officers had no more than a hunch that *anyone* had committed the crime of felon in possession of a firearm. Hotel staff found the handgun in a *vacant* room. And the officers had only established that one of the two prior occupants of that room had a felony conviction. Further, they did not know how long those two people had been in the room, how much time had passed between their departure from the room and the hotel staff's discovery of the firearm, or whether anyone had entered the room in the interim.

Nor was there any reasonable suspicion that there was a felon possessing a firearm in the second room. The handgun at issue was possessed by the officers when they engaged with the room's occupant, so he could not have possessed it. To be sure, the

officers had also learned at some point that this firearm had been stolen along with some others at some undisclosed time in the past in a different county. But that scant information barely even supported a hunch, let alone a reasonable suspicion, that there were other stolen firearms anywhere at the hotel.

There was also no evidence linking *Dydek* to any purported offense. The officers testified that they were simply looking for a middle-aged white man as reflected on the renter's driver license. They knocked on the door and directed or pulled a man matching that general description out of the room at gunpoint just because they felt it was suspicious that he had stepped out of the room for a few moments. *See Price v. State*, 120 So. 3d 198, 202 (Fla. 5th DCA 2013) (holding that police had only a "forbidden hunch" of a hand-to-hand exchange of drugs based upon observing a person walking out of a pharmacy with a white bag and his "mannerisms" of head and arm movements in a vehicle with another person).

The State also argues on appeal that the search of the pouch was lawful because it was after Dydek's arrest for resisting without violence, for which the State asserts there was probable cause. But if officers detain an individual without lawful authority to do so,

they are not acting in the lawful execution of their duties; therefore the individual's nonviolent effort to oppose or avoid the detention is not unlawful. *See A.R. v. State*, 127 So. 3d 650, 654 (Fla. 4th DCA 2013); *see also* § 843.02, Fla. Stat. (2019) (defining the offense of resisting an officer without violence as resisting an officer who is engaged in "the lawful execution of any legal duty"). Thus, "[i]n resisting cases involving an investigatory detention, the state must prove that the officer had a reasonable suspicion of criminal activity." *A.R.*, 127 So. 3d at 654. As discussed above, the State failed to do so in this case.

Evidence seized as a direct result of an unlawful search is inadmissible. *Rodriguez v. State*, 187 So. 3d 841, 845 (Fla. 2015). For this reason, the circuit court was obliged to grant Dydek's dispositive motion to suppress. We reverse Dydek's convictions and sentences. On remand, the court shall dismiss the charges against him.

SLEET, J., Concurs.
ATKINSON, J., Dissents with opinion.

ATKINSON, Judge, Dissenting.

I respectfully dissent because the evidence Dydek sought to exclude was not obtained in violation of Dydek's constitutional right against unreasonable searches and seizures. The officers who detained Dydek had a reasonable suspicion that an occupant of Room 142 was a felon who had left a stolen firearm under a pillow in the previous room he had occupied. When, in the doorway of Room 142, they came upon Dydek, who met the general description of the felon who had vacated the room in which the gun had been found, they had a reasonable suspicion to believe he had committed the crime of theft of a handgun and had possibly been a felon in criminal possession of a firearm.

Hotel staff found a stolen handgun under a pillow in a hotel room. After contacting law enforcement officials, hotel staff informed the officers that the last occupants of the room with the gun had moved from that room to Room 142 in the same hotel. Officers were able to ascertain a general description of one of those occupants, who they learned was a convicted felon. When the officers encountered an individual who met that general description open the door to Room 142, they had reason to suspect that individual had recently committed one of at least two crimes—i.e.,

that he was a convicted felon who had been in possession of a stolen firearm, *see* § 790.23(1)(a), (c), (e), Fla. Stat. (2016), or that he had committed grand theft of a firearm, *see* § 812.014(1), (2)(c)5, .022 (providing that proof of possession of recently stolen property gives rise to an inference that the person in possession stole the property). The officers therefore had reason to detain that person to investigate whether he was indeed the specific individual they suspected him to be—the convicted felon ex-occupant of the room with the stolen firearm—or was some other theretofore unidentified ex-occupant of that room (or his or her possibly complicit compatriot), who could also have been involved in the known theft of several firearms of which the firearm recovered from that room was one.

The officers' suspicion of criminal activity was "well-founded and articulable." *See Allenbrand v. State*, 283 So. 3d 969, 971 (Fla. 2d DCA 2019). The officers were informed that both of the prior occupants of the room with the gun were now the occupants of the room in which they encountered Dydek. So, there was reason to suspect that the individuals in that room were also the *most recent*

occupants of a room in which someone left a stolen firearm under a pillow.

The majority points out the obvious when it notes that Dydek could not have been in possession of the firearm found in the prior room at the time the officers encountered him in Room 142 because the officers themselves had already taken possession of the firearm after having been notified by hotel staff. But officers need not catch a suspect in flagrante delicto in order to detain him. *See Cooks v. State*, 28 So. 3d 147, 149 (Fla. 1st DCA 2010) ("To justify an investigatory stop, the deputy had to have a reasonable suspicion that Appellant *had committed*, was committing, or was about to commit a crime." (emphasis added) (citing *King v. State*, 17 So. 3d 728, 730–31 (Fla. 1st DCA 2009))). In order to justify their detention of Dydek, they need not have had a reasonable suspicion to believe that he was *currently* in the act of committing a crime at the precise moment they came upon him. They need only have reasonably suspected that he "had committed" a crime. *See id.* Of that, their suspicion was eminently reasonable. According to people who run the hotel, the folks in Room 142 were the most recent occupants of the room in which the stolen firearm had been

discovered. And Dydek's appearance did not differ materially from a description they received of an ex-occupant of the room with the gun. Thus, the officers had reason to suspect he had committed theft of a firearm, possession of a stolen firearm, or possession of a firearm by a convicted felon. As such, they had lawful authority to detain Dydek at the time he resisted their efforts.

The majority confuses *suspicion* with certainty; however, officers need not be certain—nor even eliminate all reasonable doubts—that the suspect has committed a criminal act to justify an investigatory stop. *Kansas v. Glover*, 140 S. Ct. 1183, 1188 (2020) (explaining that in determining whether an officer has reasonable suspicion, "[c]ourts 'cannot reasonably demand scientific certainty . . . where none exists' " (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000))); *Wardlow*, 528 U.S. at 123 ("While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop."); *Glover*, 140 S. Ct. at 1188 ("Because it is a 'less demanding' standard, 'reasonable suspicion can be established with information that is different in

quantity or content than that required to establish probable cause.' " (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990))). Further, officers may have a reasonable suspicion sufficient to justify an investigatory stop even if alternative theories exist to explain the suspect's conduct that do not involve criminal activity. *See, e.g.*, *Navarette v. California*, 572 U.S. 393, 403 (2014) ("[W]e have consistently recognized that reasonable suspicion 'need not rule out the possibility of innocent conduct.' " (quoting *United States v. Arvizu*, 534 U.S. 266, 277 (2002))). Rather, determining whether an officer has reasonable suspicion to conduct an investigatory stop is "based on commonsense judgments and inferences about human behavior." *Wardlow*, 528 U.S. at 125; *see also Glover*, 140 S. Ct. at 1188 ("The [reasonable suspicion] standard 'depends on the factual and practical considerations of everyday life on which *reasonable and prudent men*, not legal technicians, act.' " (emphasis in original) (quoting *Navarette*, 572 U.S. at 402)); *State v. Bell*, 19 So. 3d 374, 376 (Fla. 2d DCA 2009); *McGee v. State*, 818 So. 2d 558, 559 (Fla. 2d DCA 2002).

The officers suspected he was recently in possession of a stolen firearm—and a convicted felon besides—because he emerged

from the hotel room into which the former occupants of the hotel room with the firearm had relocated. The hotel staff informed the officers that the immediate prior occupants of the now vacant room in which the handgun was stashed under a pillow had not left the hotel altogether but had moved into a different room in the establishment; common sense would suggest that one of the individuals now occupying the new room was one of the individuals who abandoned the gun or forgot to bring it along when he relocated. That the firearm in the vacated room was one of several that had been stolen in a robbery would make the suspicion that at least one of the individuals now in Room 142 had been in possession of a stolen firearm (and was possibly currently in possession of additional weapons) all the more reasonable. Under the totality of the circumstances, *see Glover*, 140 S. Ct. at 1191 ("The [reasonable suspicion] standard takes into account the totality of the circumstances—the whole picture." (quoting *Navarette*, 572 U.S. at 397)), the officers had a reasonable suspicion to stop Dydek. Therefore, I would affirm Dydek's convictions and sentences.
