

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANTE LASHAWN GAINES,

Defendant-Appellant.

UNPUBLISHED

July 9, 2009

No. 282083

Wayne Circuit Court

LC No. 06-013384-FC

Before: Borrello, P.J., and Meter and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right his guilty convictions of felon in possession of a firearm, MCL 750.224f, and carrying a concealed weapon, MCL 750.227, and his guilty but mentally ill conviction of possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to five years' probation for the felon in possession of a firearm conviction, five years' probation for the carrying a concealed weapon conviction, and five years in prison for the felony-firearm conviction. The prosecutor has filed a confession of error, conceding error regarding the prosecutor's comments during closing argument and asserting that the error requires defendant's convictions to be set aside and that defendant should receive a new trial. In light of the prosecutor's confession of error, we previously entered an order remanding this matter to the trial court for a new trial.¹ Defendant then filed a motion for reconsideration, arguing that this Court should address other issues raised in his appeal before retrial because of the potential impact of those issues on retrial. In an order dated July 1, 2009, we granted defendant's motion for reconsideration and vacated our order of May 26, 2009. In light of the prosecutor's confession of error, we reverse and remand for a new trial. This case is being decided without oral argument pursuant to MCR 7.214(E) because the panel, after reviewing the record and the parties' briefs, unanimously concludes that "the briefs and record adequately present the facts and legal arguments, and the court's deliberations would not be significantly aided by oral argument[.]" MCR 7.214(E)(1)(b).

¹ *People v Gaines*, unpublished order of the Court of Appeals, entered May 26, 2009 (Docket No. 282083).

Because resolution of defendant's remaining issues could have some bearing on his retrial, we will address them on appeal. Defendant argues that the prosecutor failed to prove beyond a reasonable doubt that defendant was sane. Before 1994, the prosecutor was required to prove beyond a reasonable doubt that the defendant was not legally insane. *People v Stephan*, 241 Mich App 482, 484-485; 616 NW2d 188 (2000). However, the insanity statute, MCL 768.21a, was amended in 1994, and the amended statute provides that "[t]he defendant has the burden of proving the defense of insanity by a preponderance of the evidence." MCL 768.21a(3). Contrary to defendant's argument on appeal, the prosecutor no longer has any burden of rebutting the insanity defense by proving defendant's sanity beyond a reasonable doubt. *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999) (The 1994 amendment "eliminated the prosecution's burden of proving sanity beyond a reasonable doubt and placed on defendant the burden of proving he was insane by a preponderance of the evidence . . ."). Thus, defendant's argument is without merit.

Defendant also argues that the trial court erred in denying his motion to suppress the weapon because the officer who performed the *Terry*² stop of defendant did not articulate specific facts to provide a reasonable basis for the stop. Thus, defendant contends, his constitutional right to be free from unreasonable searches and seizures was violated. US Const, Am IV; Const 1963, art 1, §11. A brief detention does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. *People v Custer*, 465 Mich 319, 327; 630 NW2d 870 (2001); *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001). Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of a totality of the facts and circumstances. *Oliver, supra* at 192. Once a valid investigatory stop has been made, the officer "may perform a limited patdown search for weapons if the officer has reasonable suspicion that the individual stopped for questioning is armed and thus poses a danger to the officer." *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996).

There were articulable facts to support the stop of defendant. The police officer who effectuated the stop and frisk of defendant was a nearly 13-year veteran of the Detroit Police Department. While he was patrolling the vicinity of an area that was what he described as a "bad area" with a "[l]ot of criminal activity" en route to an address that was a known narcotics location, the officer observed defendant walking with a cell phone to his ear. He further observed a flat, dark-colored object "[s]lightly protruding" from defendant's jacket pocket which, based on his experience, appeared to be the butt of a handgun. Thus, the officer personally viewed what he believed to be a gun on defendant's person in a public place. "[K]nowledge that a gun was openly displayed in public does create a reasonable suspicion of criminal activity" sufficient to justify an investigatory stop and patdown search. *People v Tooks*, 403 Mich 568, 581; 271 NW2d 503 (1978). Although in this case, the officer only observed part of the gun, and not the entire gun, the officer's belief that defendant had a gun, which was based on his nearly 13 years of experience as a police officer, was still a factor that provided articulable suspicion of criminal activity. Furthermore, the fact that the officer observed defendant with what his experience told him was a gun in an area known to be an area with high criminal

² *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

activity further justified the stop and patdown of defendant. Police officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000). The fact that a stop occurred in a high crime area is a relevant consideration in a *Terry* analysis. *Id.* Thus, it was reasonable for the officer to suspect that criminal activity was afoot and to effectuate the investigatory stop and patdown search of defendant. The trial court did not err in denying defendant's motion to suppress.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ Patrick M. Meter

/s/ Cynthia Diane Stephens