Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-521

OCTOBER TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windham Circuit
	}	
Nathan E. Hazlett	}	DOCKET NO. 448-5-05 WmCr
		Trial Judge: Katherine A. Hayes

In the above-entitled cause, the Clerk will enter:

Defendant appeals his convictions of burglary and grand larceny after entering into a conditional plea agreement that allows him to challenge the district court's denial of his motion to suppress. We affirm.

According to the district court's unchallenged findings of fact, at 9:20 p.m. on the evening of March 20, 2005, the Brattleboro Police Department received an alarm of a possible break-in at a downtown jewelry shop. An officer in a patrol car only three blocks from the shop responded immediately. Within three minutes of receiving notice of the alarm, the officer observed defendant walking away less than a block from the shop on the same side of the street. No other pedestrians were in the area. The officer continued on to the shop, observed signs of a break-in, and radioed for backup. Another officer responding to the break-in interviewed the shopkeeper, who informed the officer that he had been warned that a person named "Nate" had stolen items from a nearby store and had been in the jewelry shop recently acting in a suspicious manner. A short while later, police observed defendant walking downtown, and several officers approached him. After questioning defendant regarding his whereabouts that evening, one of the officers asked him if they could search him. Defendant agreed and placed his hands on a nearby wall. One of the officers held his hands over defendant's hands as a security measure while another officer patted defendant down. The officer felt a hard lump in defendant's crotch area and asked him what the object was. Defendant responded that it was his genitalia. The officer did not believe defendant, but defendant refused the officer's request that he remove the object from his pants. The officer then decided to hold defendant and seek a warrant to authorize a full search of defendant's person. At that point, police took defendant to the station and handcuffed him pending the request for a warrant. Apparently, while at the station, defendant produced jewelry from his clothing which was seized by police.

Defendant moved to suppress the evidence obtained as the result of his stop, arguing that he was subjected to an unlawful seizure when the police approached and frisked him against his will. The district court denied the motion, ruling that (1) the police had a reasonable suspicion that defendant was involved in the break-in and thus were justified in conducting a brief stop to discuss the matter with him; (2) defendant voluntarily and willingly consented to the pat-down search; and (3) when the search revealed a suspicious bulge in defendant's pants, the police were justified in holding defendant while they sought a warrant, given the other circumstances indicating that defendant may have been involved in the burglary. After entering into a conditional plea agreement, defendant appeals, arguing that he was subjected to a de facto arrest without probable cause and an illegal search in violation of the federal and Vermont constitutions. Upon review of the denial of a motion to suppress, we defer to the district court's findings of fact, but review the legal issues de novo. State v. Rheaume, 2005 VT 106, ¶ 6, 179 Vt. 39.

Defendant concedes that, at the time he was confronted by police, there existed a reasonable suspicion that he was involved in the burglary of the jewelry shop. He argues, however, that his investigatory detention was so intrusive that it was the functional equivalent of a custodial arrest, and yet there was no probable cause to arrest him. We find this argument unavailing. As defendant concedes, the police had reasonable suspicion to conduct a brief stop. See State v. Hollister, 165 Vt. 553, 553 (1996) (mem.) ("[S]uspicion that a person has committed or is about to commit a crime allows for a limited investigatory seizure under Terry v. Ohio, 392 U.S. 1 (1968)." (parallel citations omitted)). Further, the police did not violate defendant's rights by asking him to consent to a pat-down search after briefly questioning him regarding his whereabouts that evening. See id. at 553-54 ("During the Terry seizure, the officer may seek consent for a search related to the suspected crime.").

Courts have recognized that an investigatory detention may be so intrusive that it becomes the functional equivalent of a formal arrest. State v. Chapman, 173 Vt. 400, 403 (2002). In assessing whether the degree of restraint is too intrusive to be considered merely an investigatory stop, courts consider a number of factors, including the amount of force used, the need for such force, the number of agents involved, the degree of restraint, the physical treatment of the suspect, and the level of reasonable suspicion that the suspect committed a crime. Id. In Chapman, a police officer confronted the defendant in an isolated area, displayed his weapon, ordered the defendant to his knees, and frisked him. We concluded that there was a de facto arrest, given the amount of force employed and the lack of evidence that the defendant was armed or suspected of serious criminal activity. Id. at 405-06. In contrast, here, given the justified high level of suspicion that defendant had committed a crime and the relatively restrained use of force, the police did not effectuate a de facto arrest by stopping defendant, asking him where he had been, and obtaining his permission to search him.

Defendant argues, however, that his search cannot be considered consensual, given that (1) no person confronted in the manner that he was would feel that he had any choice other than to cooperate with police; and (2) he could have consented only to what the law allows, which is a frisk for weapons. Defendant's second point has no merit insofar as neither this Court nor any court that we know of has restricted consensual searches to searches for weapons. Indeed, we have held that "[p]olice officers may conduct a warrantless pat-down search with the driver's consent, or if they reasonably believe that the driver may be armed and dangerous." State v. Chicoine, 2007 VT 43, ¶ 5 (mem.) (emphasis added) (citation omitted). In this case, the police did not restrict their request to a search for weapons, and defendant did not condition his consent to such a search.

Regarding defendant's second point, the search of his person can be considered consensual irrespective of whether he felt free to leave the scene, a fact which concerns the question of whether one is in custody such that Miranda warnings are required. See State v. Willis, 145 Vt. 459, 475 (1985) (holding that in determining whether a suspect has been taken into custody such that Miranda warnings were required to guard against coerced self-incrimination, courts must consider the totality of the circumstances, including whether the suspect felt free to leave or refuse to answer police questioning). As far as we can tell, defendant has not argued that he was coerced into consenting to a pat-down search, and nothing in the record suggests that he was. In fact, the record indicates the contrary in that defendant refused to produce the object that police discovered in his pants. Plainly, defendant did not feel compelled to succumb to the requests made by the police. An inquiry into the lawfulness of a search that has been consented to is restricted to whether the consent was voluntary and does not require a finding that there was an intelligent waiver of a known right. State v. Stevens, 2004 VT 23, ¶ 11, 176 Vt. 613. In this case, nothing in the record suggests that defendant's consent was involuntary.

Finally, to the extent that defendant is arguing that the police did not have probable cause to hold him at the police station until they obtained a warrant to search him, we disagree. Although the presence of a hard object concealed in a suspect's pants would not, in isolation, necessarily provide probable cause to arrest or seize the suspect, the totality of the circumstances in this case established probable cause. Defendant was the only person observed in the vicinity of a store that had just been robbed a couple of minutes earlier. Defendant was reported to have acted suspiciously inside the store in recent days. A search revealed a hard object in defendant's pants that could not have been what defendant claimed it to be. If defendant had been allowed to leave the scene, police would have lost the opportunity to determine if he was concealing evidence of the crime. Given these circumstances and defendant's refusal to remove the hard object concealed in his pants, the police were justified in holding defendant until they could obtain a warrant to search him. Cf. State v. Platt, 154 Vt. 179, 185, 188 (1990) (stating that the key inquiry in determining the existence of probable cause is whether the circumstances would lead a reasonable person to conclude that a search would reveal evidence of a crime, and concluding that police acted reasonably in seizing the defendant's vehicle pending the issuance of a search warrant).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice