FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-67 / 88-1528 and 88-1874

STATE OF IOWA,

Appellee,

vs.

276

LARRY DARNELL GLADFELTER,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Terry L. Huitink and Philip S. Dandos, Judges.

In a combined appeal the defendant appeals his conviction of carrying a concealed weapon and possession of a firearm by a felon. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender; James F. Whalen and B. John Burns, Assistant Appellate Defenders; for appellant.

Thomas J. Miller, Attorney General; Amy M. Anderson, Assistant Attorney General; Thomas S. Mullin, County Attorney; Mark Campbell, Assistant County Attorney; for appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

In the early morning hours of May 24, 1988, Officer Martin Pottebaum, a Sioux City police officer, received a radio dispatch advising him there might be a man with a gun behind 214 Kansas Street. The report also advised the man with the gun might be wearing something white on his head and was accompanied by two or three native American males. Pottebaum proceeded to the area, and discovered three men in the dark alley behind the building. Pottebaum identified himself as a police officer, and told them he wanted to see their hands at all times. All three men raised their hands above shoulder level.

While waiting, Pottebaum asked if any of the men was carrying a weapon. All three replied no. The three men were formed in a semi-circle in front of the officer. Pottebaum noticed Larry Gladfelter, the defendant, had turned and taken his right hand off his head and was lowering his hand towards the left side of his down vest. Pottebaum approached Gladfelter with his gun, reached around him and felt what he thought to be a barrel of a gun. Pottebaum said he wanted to see Gladfelter's hand "come up empty." Gladfelter responded that he wasn't doing anything. Pottebaum repeated his warning, and Gladfelter released the gun, which had been concealed in the lining of his down vest. After seizing the gun, Pottebaum ordered all three men to get down on their knees and fall forward on their stomachs with their hands out, palms up.

When the other officers arrived, Gladfelter was advised of his Miranda rights, handcuffed, and told he was being charged with going armed with intent. At the jail Gladfelter was searched and officers found some unspent .22 caliber casings, and a woman's knee-high stocking.

Gladfelter was charged with: (1) going armed with intent; (2) carrying a dangerous weapon; and (3) possession of a firearm as a felon. Gladfelter's motion to suppress, challenging the constitutional validity of his initial seizure, was overruled by the court. Following a change of defense counsel, Gladfelter renewed his motion to suppress and filed a motion in limine seeking to exclude evidence a nylon stocking was found on his person. Both motions were overruled.

Gladfelter then filed a motion to sever count III from counts I and II, which the trial court granted. Trial commenced on counts I and II. The jury returned a verdict acquitting Gladfelter of count I, going armed with intent, but returned a verdict of guilty on count II, carrying a concealed weapon. Gladfelter filed posttrial motions, which the trial court denied. Defendant was sentenced to a prison term of two years.

Count III, by agreement of the parties, was tried to the court by stipulation. On October 28, 1988, the trial court found Gladfelter guilty and sentenced Gladfelter to a term of two years, to run concurrently with his sentence on count II. Gladfelter has appealed.

Gladfelter argues the initial stop was unconstitutional because it was based on an anonymous tip which lacked sufficient indicia of reliability. Gladfelter also asserts because it is not necessarily a crime to carry a gun, Officer Pottebaum lacked reasonable cause to suspect criminal activity was afoot. He contends the officer saw no gun and observed no violent behavior when he initially approached the men. Gladfelter believes the trial court erred in admitting into evidence a nylon stocking found on Gladfelter on the grounds the evidence was irrelevant and prejudicial.

1. **THE INVESTIGATORY STOP.**

Defendant contends the stop by Officer Pottebaum violated his right to be free from unreasonable searches and seizures, guaranteed by the fourth amendment, and therefore the trial court's overruling of his motion to suppress was in error. We do not agree.

A seizure occurs, for fourth amendment protections to arise, when an officer has in some way restrained the liberty of an individual by means of physical force or a show of authority. State v. McGee, 381 N.W.2d 630, 631 (Iowa 1986). In some circumstances, a person may be detained briefly without violating fourth amendment rights. Id. In Terry v. Ohio, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906-07 (1968), the United States Supreme Court recognized a police officer may, in appropriate circumstances and in an appropriate manner,

approach a person for the purpose of investigating possible criminal behavior even without probable cause for arrest. Id. During this investigatory stop a limited protective search may be conducted "when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." Id. at 24, 88 S. Ct. at 1881, 20 L. Ed. 2d at 908.

Reasonable belief, like probable cause necessary for an arrest, may be based on a tip from an informer. See Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972); State v McGee, 381 N.W.2d 630, 632 (Iowa 1986). The Iowa Supreme Court quoted Adams with approval in McGee. "[T]hus, while the Court's decision indicates that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, the information carried enough indicia of respect of reliability to justify the officer's forcible stop of Williams."

When the tip is anonymous, the tip must be judged on its own merits to determine whether it contains indicia of reliability sufficient to support the investigatory stop. United States v. McClinnhan, 660 F.2d 500, 502 (D.C. Cir. 1981).

Our de novo review leads us to the conclusion there was sufficient indicia of reliability to support the investigatory stop at issue in this case. The Sioux City Police Department's communications supervisor testified at

the suppression hearing. She stated the tape recording of the call revealed the tipster said there was a man with a gun behind 214 Kansas Street. The caller said the man might be wearing something white on his head.

Officer Pottebaum testified the dispatch reported "there were two or three Indian males, believed the party with the gun was wearing something white on his head, thought a hat, and that a possible name was Wabshaw [sic]." On his way to 214 Kansas Street, the officer was informed over the radio by another officer a call had come in the previous evening about someone shooting a gun at that address. Additionally, Officer Pottebaum had personal knowledge of gunfire previously occurring in the 200 block of Kansas Street because he had responded to a similar call at that address within the past few months.

When Pottebaum arrived he walked towards the back of the building. From the side of the apartment house he saw three people standing in the back of the building by the bluffs. One of the three men had on a white hat as described by the dispatcher. Pottebaum determined the man in the hat was, as the caller stated, an "Indian male."

The situation described by the anonymous caller was almost exactly the same as that encountered by Officer Pottebaum. He was aware, personally and from other officers, there had been a number of reports of gunfire at that address. There is sufficient indicia of reliability to support this investigatory stop.

Based on the Terry analysis, if Pottebaum was justified in believing Gladfelter was armed and presently dangerous, a limited protective search may be conducted. The caller's statement one of the men had a gun coupled with Gladfelter's potentially dangerous conduct in refusing to keep his hands above his head is justification for the officer's belief the individual was armed and presently dangerous.

2. THE NYLON STOCKING.

The trial court admitted into evidence a woman's nylon knee-high stocking which was found in the defendant's pocket when he was searched at the jail. Defendant challenges the admissibility of this evidence contending it was not relevant. He further claims the probative value of the stocking is outweighed by the potential of unfair prejudice to the defendant.

On appeal, the trial court's ruling on admissibility of evidence will not be disturbed unless it constitutes an abuse of discretion. State v. Spargo, 363 N.W.2d 203, 209 (Iowa 1985). Nothing in the record discloses an abuse of discretion. Defendant was charged with going armed with intent and was acquitted of this charge. The existence of a woman's nylon knee-high stocking in Gladfelter's pocket is relevant of his intent to use the gun against someone in some manner. State v. Buchanan, 207 N.W.2d 784, 786 (Iowa 1973). It is also relevant to refute Gladfelter's defense the gun was planted on him by the police officer.

AFFIRMED.