IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01107 COA

CHRISTOPHER B. LOFTON **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	10/13/95
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	SCOTT COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PAT DONALD
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	KEN TURNER
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	POSSESSION OF COCAINE: SENTENCED TO SERVE A TERM OF 2 YRS IN THE MDOC & PAY A FINE OF $1,000, SAID FINE TO BE PAID IN MONTHLY INSTALLMENTS OF$150, WITH THE FIRST INSTALLMENT DUE 90 DAYS FROM HIS RELEASE FROM CONFINEMENT
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	12/31/97
CERTIORARI FILED:	
MANDATE ISSUED:	10/20/98

EN BANC.

THOMAS, P.J., FOR THE COURT:

Christopher B. Lofton appeals his conviction of possession of cocaine raising the following issue as error:

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN ADMITTING INTO EVIDENCE, OVER THE TIMELY OBJECTION OF DEFENDANT, CRACK COCAINE, WHICH DEFENDANT ALLEGES WAS SEIZED FROM HIM AS A DIRECT RESULT OF HIS ILLEGAL ARREST?

Finding no error, we affirm.

FACTS

Officers Roncali and Lee of the Forest Police Department were on routine patrol in a high crime area known as "The End." The officers, driving in a clearly marked police car, saw three males standing near a bench. When the officers drove past the males, all three men quickly sat down on the bench. Officer Roncali observed that Lofton had an unidentifiable object in his right hand which he then placed underneath his leg. The officers then approached Lofton and Officer Roncali asked Lofton to stand up, which Lofton declined to do. Officer Roncali then asked Lofton a second time to stand. Lofton again refused. At this point, the officers lifted Lofton from his seated position and saw a bag of crack cocaine underneath Lofton's leg.

ANALYSIS

I.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN ADMITTING INTO EVIDENCE, OVER THE TIMELY OBJECTION OF DEFENDANT, CRACK COCAINE, WHICH DEFENDANT ALLEGES WAS SEIZED FROM HIM AS A DIRECT RESULT OF HIS ILLEGAL ARREST?

Lofton contends that the trial court erred by admitting into evidence a bag of crack cocaine seized as a result of a warrantless arrest and illegal search. Lofton contends that the officers effected an arrest by grabbing his arms, lifting him from the bench, and restraining his freedom to walk away. Lofton argues that the officers acted without legal authority because the facts and circumstances within the officers' knowledge did not create the probable cause necessary for a valid warrantless arrest. Ultimately, Lofton argues that the bag of crack cocaine seized was the fruit of an illegal arrest and should have been suppressed by the trial court. The State contends that the seizure of the bag of crack cocaine was the product of an investigatory detention that only required reasonable articulable suspicion.

Lofton and the dissent contend that the officers' demands for Lofton to stand up and the officers' grabbing of Lofton by the arms and lifting him from the bench amounted to "an unauthorized search and exceeded the scope of a valid investigative stop." Therefore, the dissent concludes that the seizure of the cocaine "was improper and should have been suppressed whether it was the product of an invalid warrantless arrest or an invalid investigative stop." However, we hold that the seizure of the cocaine was the result of a valid investigative stop only requiring reasonable suspicion that

criminal activity was afoot or about to take place. ***See Neely v. State ex rel. Tate County*, 628 So. 2d 1376, 1379 (Miss. 1993); *Floyd v. State*, 500 So. 2d 989, 992 (Miss. 1986).**

We agree with the State in that the issue to be decided is whether the officers had sufficient reasonable suspicion to justify a brief investigatory stop, not whether the officers had probable cause to justify what amounts to an arrest as Lofton and the dissent contends.

> Police activity in preventing crime, detecting violations, making identifications, and in apprehending criminals may be divided into three types of action: (1) Voluntary conversation: An officer may approach a person for the purpose of engaging in a voluntary conversation no matter what facts are known to the officer since it involves no force and no detention of the person interviewed; (2) Investigative stop and temporary detention: To stop and temporarily detain is not an arrest, and the cases hold that given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest; (3) Arrest: An arrest may be made only when the officer has probable cause.

***Singletary v. State*, 318 So. 2d 873, 876 (Miss. 1975).**

The situation in the case *sub judice* falls either under the first or second type of action. Here, the two police officers were patrolling in a high crime area known as "The End." The officers, driving a clearly marked police car, pulled up beside Lofton and two of his acquaintances. At this time, all three men quickly sat down on the park bench. Officer Roncali then clearly saw an unidentifiable object in Lofton's right hand which Lofton then placed underneath his leg. At this point, the situation clearly became ambiguous to the officers based on the suspicious activity by Lofton and his acquaintances. The officers had the necessary reasonable suspicion at this instant to get out of the car and approach the men. The officers and Lofton engaged in a voluntary conversation. Officer Roncali asked Lofton to stand up. Lofton refused. Officer Roncali then asked Lofton to stand again. Lofton again refused. The officers then lifted Lofton from his seated position and saw the bag of crack cocaine underneath Lofton's leg.

We recognize that Lofton was detained when he was lifted by the officers and that he was not free to leave. However, we are not persuaded that this amounted to an arrest. The supreme court has stated that "during certain investigative stops, the detainee is not free to leave, and thus is temporarily arrested; however, he cannot be said to be 'under arrest,' in the more permanent sense of the term." ***Haddox v. State*, 636 So. 2d 1229, 1234 (Miss. 1994).** Police officers have the authority to detain a person without actually arresting him for investigatory purposes. ***Id.***"[G]iven reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest." ***Estes v. State*, 533 So. 2d 437, 441 (Miss. 1988)** (quoting *Griffin v. State*, 339 So. 2d 550, 553 (Miss. 1976)).

The supreme court has stated that "what is an unreasonable seizure should be determined on a balancing of the scope of the intrusion upon the person's liberty with the governmental interest." ***Haddox*, 636 So. 2d at 1237.** Here, the government has a substantial interest in keeping the already high crime area free from drug use and drug transactions. In comparison, the intrusion of Lofton was minimal in that Lofton was not formally under arrest at the time of the seizure and that his detainment lasted only a couple of seconds.

Therefore, we hold that the trial court did not err in admitting into evidence the crack cocaine found underneath Lofton's leg. The seized cocaine was not the fruit of an illegal arrest. The seized cocaine resulted from the officers trying to resolve an ambiguous situation. What emerged was a temporary investigatory stop that was reasonable under the circumstances and involved a minimal intrusion into Lofton's personal liberty.

THE JUDGMENT OF THE SCOTT COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF COCAINE AND SENTENCE OF TWO (2) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY FINE OF $1,000 IS AFFIRMED. ALL COSTS ARE TAXED TO SCOTT COUNTY.

McMILLIN, P.J., HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, C.J., COLEMAN AND DIAZ, JJ.

KING, J., DISSENTING:

On November 4, 1994, at approximately 2:00 p.m., Officers Roncali and Lee were patrolling in the area of East First and South Sixth Street, commonly known as "The End," when they saw three black males standing near a bench. According to Roncali, the men sat down on the bench when they saw the patrol car approaching. The officers saw one of the three men, Christopher Lofton, put his hand under his leg. The officers approached the three men on the bench and asked Lofton to stand up. Lofton did not stand. Roncali and Lee each took Lofton by an arm and raised him from the bench. They saw what turned out to be crack cocaine on the bench where he had been sitting. Roncali placed Lofton under arrest. Christopher B. Lofton was indicted for the possession of cocaine.

On June 14, 1995, Lofton was tried for the possession of cocaine. At trial, Lofton moved to suppress the crack cocaine seized as fruit of an illegal arrest and search that violated his Fourth Amendment rights under the United States Constitution and Article 3, Section 23 of the Mississippi Constitution. After hearing testimony from Officer Roncali, the trial judge denied Lofton's motion to suppress. The trial ended in a mistrial, when the jury could not reach a unanimous verdict.

On October 11, 1995, Lofton went to trial for the second time on the same indictment. He moved the court to suppress the cocaine and supported this motion with the entire record of his first trial. The court overruled the motion to suppress the evidence, and the trial went forward. Lofton was convicted of the possession of cocaine and sentenced to serve two years in the custody of the Mississippi Department of Corrections. The court also ordered him to pay a fine of $1,000.

Lofton has perfected an appeal alleging that the trial court erred by denying the motion to suppress the cocaine as fruit of an illegal arrest and search. In support of his appeal, Lofton has placed before this Court the full record of both trials. Because Lofton's assignment of error is a question of law, our standard of review is de novo. ***Peterson v. State*, 671 So. 2d 647, 652 (Miss. 1996).**

I.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY ADMITTING INTO

EVIDENCE COCAINE SEIZED FROM LOFTON DURING AN ILLEGAL ARREST?

Lofton contends that the trial court erred by admitting into evidence a small bag of crack cocaine seized as a result of a warrantless arrest and illegal search conducted by Officers Roncali and Lee. He contends that the officers effected an arrest by grabbing his arms, lifting him from the bench, and restraining his freedom to walk away. Lofton argues that the officers acted without legal authority because the facts and circumstances within the officers knowledge did not create the probable cause necessary for a valid warrantless arrest. He contends that under Mississippi law a warrantless arrest is authorized when a felony has been committed and the investigating officer has reasonable grounds to suspect and believe the person proposed to be arrested committed the felony. Lofton contends that the officers did not have reasonable grounds to suspect or believe that he had committed a felony. Thus, Lofton contends that the cocaine seized was the fruit of an illegal arrest and should have been suppressed by the trial court.

Section 99-3-7 of the Mississippi Code describes the circumstances under which a warrantless arrest may be made:

> (1) An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, *and* he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. (emphasis added) . . .
>
> (2) Any law enforcement officer may arrest any person on a misdemeanor charge without having a warrant in his possession when a warrant is in fact outstanding for that person's arrest and the officer has knowledge through official channels that the warrant is outstanding for that person's arrest. . . .

See also *Haddox v. State,* 636 So. 2d 1229, 1243 (Miss. 1994); *Thomas,* 645 So. 2d at 1347 (quoting *Shell v. State,* 554 So. 2d 887, 896 (Miss. 1989)). While the statute provides when a warrantless arrest may be made, our supreme court has described that police action which constitutes an arrest. According to the court, "a person is under arrest when by means of physical force or a show of authority his or her freedom of movement is effectively restricted." ***Thomas v. State,* 645 So. 2d 1345, 1347 (Miss. 1994)** (quoting *Nicholson v. State,* 523 So. 2d 68 (Miss. 1988)); ***Haddox,* 636 So. 2d at 1234** (citing *Magee v. State,* 542 So. 2d 228, 233 (Miss. 1989)).

In the present case, the police officers testified that while on patrol they observed at least three black males first standing near, then sitting on a public bench. According to the officers, they did not recognize any one in the group as having been involved with any prior criminal activity, including drug trafficking or abuse. The officers stated that they observed one of the men, Lofton, place his hand underneath himself. These are the facts that prompted the officers to confront Lofton and demand that he standup. When Lofton failed to stand on the first command, the officers each grabbed an arm and lifted him from the bench. These facts were established through the initial testimony of Officer Roncali during Lofton's motion to suppress held out of the jury's presence and through the testimony of Officer Mike Lee before the jury.[(1)] On direct-examination, Officer Roncali testified:

Q. Now, as you approached the area of the bench you had testified about, describe what actions you actually saw this Defendant take.

A. As we approached, like I said there were three black males standing. As we approached, they all sat down.

Q. How quick were they seated?

A. Quickly.

Q. Were you in a patrol car?

A. Yes.

Q. Was it marked?

A. Yes.

Q. Then, describe what happened.

A. Chris was sitting down. He had something in his hand. I saw him put it up under him.

. . .

Q. What happened at that point, please?

A. At that point, Officer Lee and I saw what happened. We went to him first. I asked Christopher to stand up.

Q. What did he do, when you asked him to stand up?

A. He wouldn't stand up.

Q. What happened then?

A. In a second, I asked him to stand up. I had him by the arm. Officer Lee had the other side. We got him up. He was sitting on it. I picked it up, and it appeared to be crack cocaine. At this time, I placed him in the patrol car.

Officer Roncali on cross-examination:

Q. It was you that raised Chris Lofton up, and it was not him standing up; is that correct?

A. I had my hands on his arm, and Officer Lee grabbed the other side.

Q. Both of them had your hands on him raising him up?

A. Yes, sir.

. . .

Q. Now, you didn't actually see him put anything under him, did you?

A. All I seen was him put his hand up under his leg before he sat down.

Officer Lee gave similar testimony on direct examination:

Q. What happened as you approached?

A. As we got probably ten or fifteen yards away from them, everybody immediately sat down real quick.

Q. Was the Defendant Christopher Lofton one of these persons?

A. Yes, sir.

Q. What, if anything, did you observe about him as he sat down?

A. As he sat down, he placed his hand up under him. It would have been his right hand. At that time,Officer Roncali asked me if I saw that.

On cross-examination Officer Lee stated:

Q. You didn't see if he put anything under him or not, did you?

A. I saw him place his right hand underneath him, as he sat down.

Q. Let me get you to answer my question. The question is did you see him put anything under him other than his hand?

A. No, sir. I didn't.

Based upon the these facts, I cannot find that the officers acted with sufficient probable cause to effect what was an arrest. The officers did not have knowledge or reasonable cause to believe that a felony had been committed upon observing Lofton. They did not have reasonable cause to believe that Lofton had committed a felony. Nor had Lofton committed any misdemeanor offense in the officers' presence. Yet, the officers proceeded to physically restrict Lofton's freedom by grabbing his arms and lifting him from a public bench. This warrantless arrest was made without probable cause. Accordingly the fruits of this invalid arrest should have been excluded from the trial.

On the other hand, the State contends that the trial court did not error because the cocaine was the product of an investigatory detention that was supported by specific and articulable facts. However, even if the officers were attempting to make an investigatory stop or detention of Lofton they exceeded the limitations of this tool and what resulted was an improper seizure.***McCray v. State,* 486 So. 2d 1247, 1249 (Miss. 1986).**

In ***Terry v. Ohio*, 392 U.S. 1, 20-2 (1968),** the Supreme Court determined that the Fourth Amendment's "general proscription against unreasonable searches and seizures" applied to law enforcement's intrusion upon the constitutionally protected interests of private citizens when based upon the policeman's on-the-spot observations. Under *Terry*, to make an investigative stop of citizens, police officers "must be able to point to specific and articularly facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion." ***Id.* at 21.**The Court has

indicated that it will not sanction intrusions based only on the "inarticulate hunches" of police. ***Id.* at 22.** Additionally, during an investigative stop, the police must confine any intrusion upon an individual's person to that reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." ***Ellis v. State*, 573 So. 2d 724, 725 (Miss. 1990)** (quoting *Terry*, 392 U.S. at 29).

The Mississippi Supreme Court has reviewed several cases involving investigative stops and subsequent search and seizures. ***See Haddox v. State* 636 So. 2d 1229 (Miss. 1994); *Ellis*, 573 So. 2d 724; *Estes v. State*, 533 So. 2d 437 (Miss. 1988); *McCray v. State*, 486 So. 2d 1247 (Miss. 1986); *Green v. State*, 348 So. 2d 428 (Miss. 1977); *Singletary v. State*, 318 So. 2d 873 (Miss. 1975).** Acknowledging that neither it nor the United States Supreme Court had articulated a steadfast rule to ascertain the specific circumstances that could justify an investigatory stop, the court indicated that such cases would be determined on a case-by-case basis. ***Green*, 348 So. 2d at 429**. "However, the scope of an investigative stop must be limited, and where officers go beyond this scope, the detention tends toward an actual arrest, or seizure requiring the probable cause for arrest." ***Haddox*, 636 So. 2d at 1234** (citing *Floyd v. State*, 500 So. 2d 989, 992 (Miss. 1986)).

Contrary to the State's argument, the facts of this case do not support a valid investigative stop. Based upon the facts, the officers' investigative stop of Lofton resulted from nothing more than an "inarticulate hunch". As far back as *Terry* the Supreme Court has said that this is not enough to warrant an intrusion upon the protected interest of a citizen to be free from unreasonable searches and seizures. ***Terry*, 392 U.S. at 21.**

Officer Roncali testified that he did not suspect Lofton of carrying a weapon. The record indicates the following testimony by Officer Roncali on cross-examination:[(2)]

> Q. You didn't know anything about any of the three that would lead you, from your knowledge of them, to believe they were in possession of or selling crack cocaine?
>
> A. I did not.
>
> Q. All right . When you drove up there, you didn't see anything, like an actual buy, did you?
>
> A. No, sir.
>
> Q. And you didn't have any reason to believe any of the three were armed at that point and time, did you?
>
> A. Did not.
>
> Q. You saw nothing that would indicate any of them had any weapons?
>
> A. No, sir.

From this testimony, it is clear that the officers did not fear for their lives nor did they approach Lofton with the intent to frisk him for weapons in order to protect themselves during an investigation of his preceding actions. Therefore, the officers' demand for Lofton to "stand up" and their grabbing him by the arms and lifting him from the bench was an unauthorized search and exceeded the scope

of a valid investigative stop. As a result, the officers' seizure of the cocaine laying on the bench underneath Lofton was improper and should have been suppressed whether it was a product of an invalid warrantless arrest or an invalid investigative stop.

The majority has either misunderstood or mischaracterized the officers' testimony as to whether an object was observed in Lofton's hand. While the officers initially indicated the observance of an object in Lofton's hand, upon cross-examination they clarified their responses indicating that they did not see an object in Lofton's hand. Relevant testimony has been replicated in this opinion on pages five and six. Emphasis has been added to that replication to show the question and the officer's response to this issue.

The majority seems to have viewed this issue as being only whether there was a detention sufficient to be identified as an arrest. However that is not the sole issue or focus of this case. Even were we to determine that this detention was not an arrest, we must address the question of whether the search was lawful.

The action of lifting Lofton from the bench, to determine on what he was sitting, is a search.

The **American Heritage Dictionary page 1627 (3d ed. 1992)**, provides two relevant definitions of the word "search." They are: (1) To examine in order to find something lost or concealed, (2) To examine the person or personal effects of in order to find something lost or concealed.

The actions of the police officer in lifting Lofton to determine what, if anything, he might be concealing, was by definition a search, the question becomes, was it a permissible search?

For an actual warrantless search to be legal, the officer must have probable cause to believe that the defendant is in possession of contraband. ***Jackson v. State,* 689 So. 2d 760, 765 (Miss. 1997).**In the present case, the officer did not have probable cause, but merely suspicion. Without probable cause, the search was illegal, and the seized evidence should have been suppressed.

I would hold that the police officers did not have the requisite specific and articularly facts necessary to affect the arrest or the search of Lofton.

Since the facts of this case indicate that absent admitting the fruit of the illegal seizure Lofton would not have been convicted of a crime, I would reverse and render.

BRIDGES, C.J., COLEMAN AND DIAZ, JJ., JOIN THIS SEPARATE OPINION.

1. Officer Roncali offered this testimony out of the jury's presence in the June 14, 1995 trial. This testimony was made apart of the record of the second trial on October 11, 1995, as support for the motion to suppress the cocaine as fruit of an illegal search and seizure.

2. This testimony by Officer Roncali was also made in the June 14, 1995, trial and made a part of the record during the October 11, 1995 trial.