

2012 IL App (2d) 110990-U  
No. 2-11-0990  
Order filed September 17, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Boone County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 06-CF-261
	)	
WILLIAM S. HESS,	)	Honorable
	)	John H. Young,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices McLaren and Birkett concurred in the judgment.

**ORDER**

*Held:* (1) The trial court properly denied defendant's motion to suppress evidence resulting from a traffic stop, as the officer testified that he had learned that defendant was the registered owner of the vehicle and had had his license revoked; although defendant's wife testified at trial that she was another registered owner, defendant did not at trial renew his motion so as to incorporate that testimony (and his attorneys were not ineffective for failing to do so, as the case law supporting reliance on it did not yet exist); (2) the trial court erred in imposing a public defender reimbursement fee when the court had not provided the required hearing on defendant's ability to pay, and this court would vacate the fee and remand for such hearing despite the expiration of the 90-day period in which by statute such hearing was required; (3) defendant was entitled to full credit against his \$2,000 in fines, reflecting the 439 days he spent in presentencing custody.

¶ 1 Following a bench trial, defendant, William S. Hess, was found guilty of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(c-1)(4) (West 2006)) and aggravated driving while his license was revoked (DWLR) (625 ILCS 5/6-303(d) (West 2006)). The trial court sentenced defendant to concurrent prison terms of seven years for aggravated DUI and one year for aggravated DWLR. The trial court also imposed a \$1,000 fine, as well as a \$1,000 “equipment fine” (see 625 ILCS 5/11-501(j) (West 2006)). On appeal defendant argues that (1) the trial court erred in failing to suppress evidence that was discovered as the result of an unlawful traffic stop; (2) the trial court erred in ordering him to reimburse the public defender; and (3) as a result of time spent in custody before sentencing, he is entitled to a monetary credit toward the two \$1,000 fines imposed by the trial court. We affirm defendant’s conviction, but modify the mittimus to reflect a monetary credit toward defendant’s fines. We also vacate the order that defendant reimburse the public defender and we remand for further proceedings.

¶ 2 Prior to trial, defendant filed a motion to suppress statements he made to police. In the motion, he argued both that he had not been informed of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and that he was questioned during a period when his detention was unlawful because no warrant had been issued for his arrest and the police lacked probable cause to believe that he had committed a crime. At the hearing on defendant’s motion, the arresting officer, Boone County sheriff’s deputy Christian Leonard, testified that, on August 1, 2006, at 11:30 p.m., he was “running license plates” on Candlewick Boulevard west of Lamplighter Loop. Leonard checked the license plate on a vehicle that he observed making a sharp right turn. He learned that defendant was the registered owner of the vehicle and that defendant’s driver’s license had been revoked. Leonard followed the vehicle north on Lamplighter Loop and activated his squad car’s emergency lights. The

vehicle stopped at a residence. Leonard identified defendant as the driver of the vehicle. Defendant stepped out of the vehicle and approached the entrance to the house. Leonard told him to stop. Defendant identified himself to Leonard, and Leonard advised defendant that he was under arrest for DWLR. Defendant asked if he could speak with his wife. Leonard said that he could, but that he could not enter the residence. While Leonard and defendant were speaking, Leonard smelled alcohol on defendant's breath and asked him how much he had had to drink. Defendant responded that he had had one beer. Leonard asked defendant to submit to field sobriety tests, but defendant refused. Leonard then advised defendant that he was under arrest for DUI as well as DWLR.

¶ 3 After the close of evidence at the suppression hearing, defendant's attorney argued that defendant's statement that he had consumed one beer should be suppressed because the statement occurred while the defendant was in custody and Leonard had not advised defendant of his rights under *Miranda*. Defendant's attorney did not challenge the lawfulness of the arrest itself or of the traffic stop that preceded it. The trial court denied the motion.

¶ 4 Evidence presented at defendant's bench trial established that, following his arrest for DUI, defendant submitted to a Breathalyzer test that revealed that his blood alcohol level exceeded the legal limit. Defendant unsuccessfully attempted to establish that it was his wife, Sharon Hess, who had been driving the vehicle when Leonard conducted the traffic stop.

¶ 5 Defendant argues on appeal that the initial traffic stop that led to his arrest violated the fourth amendment's prohibition of unreasonable searches and seizures. The resolution of defendant's argument hinges on the applicability of *Terry v. Ohio*, 392 U.S. 1 (1968), in which "the United States Supreme Court held that the public interest in effective law enforcement makes it reasonable in some situations for law enforcement officers to temporarily detain and question individuals even though

probable cause for an arrest is lacking.” *People v. Galvez*, 401 Ill. App. 3d 716, 718 (2010). “Under *Terry*, a police officer may briefly stop a person for temporary questioning if the officer has knowledge of sufficient articulable facts at the time of the encounter to create a reasonable suspicion that the person in question has committed or is about to commit a crime.” *People v. Lee*, 214 Ill. 2d 476, 487 (2005). In *Galvez*, we cited *Village of Lake in the Hills v. Lloyd*, 227 Ill. App. 3d 351 (1992), and *People v. Barnes*, 152 Ill. App. 3d 1004 (1987), as authority that *Terry* allows a police officer to pull over a vehicle upon learning that the license of the vehicle’s registered owner had been suspended or revoked. *Galvez*, 401 Ill. App. 3d at 718. However, we refused to extend the reasoning of *Lloyd* and *Barnes* to cases where (1) a vehicle has two registered owners, only one of whom has a suspended or revoked license, and (2) the officer is unable to exclude the validly licensed owner as a possible driver. *Id.* at 719.

¶ 6 Defendant argues that *Galvez* applies here. He insists that both he and his wife were registered owners of the vehicle in question. At the suppression hearing, the only evidence bearing on ownership of the vehicle was Leonard’s testimony that when he ran the vehicle’s license plate he learned that defendant was the registered owner. No evidence was presented that there were any additional registered owners. Apparently, defendant’s argument is premised on the following testimony given by his wife *at trial*:

“Q. Okay. Now, the car that was being driven, whose car is that that you drove that night?

A. It’s my car but it wasn’t—it’s registered under [defendant] and I’s [*sic*] name because I needed [defendant] for the loan.

Q. But it’s your car?

A. It's my car.”

¶ 7 Defendant's apparent reliance on this trial testimony is misplaced. It is true that a reviewing court may rely on evidence presented at trial to *uphold* the trial court's ruling on a motion to suppress. *People v. Centeno*, 333 Ill. App. 3d 604, 620 (2002). In contrast, however, a defendant who seeks *reversal* of the trial court's ruling denying a motion to suppress may not rely on evidence adduced at trial unless he or she renewed the suppression motion at trial and requested reconsideration of the trial court's ruling. *Id.* Here, defendant did not renew his suppression motion at trial, so his wife's trial testimony has no bearing on our review of the trial court's ruling. Absent that testimony, *Lloyd* and *Barnes*—not *Galvez*—are controlling, and Leonard was entitled to conduct a traffic stop by dint of the holdings of those cases.

¶ 8 Defendant also argues that, because his trial attorneys (several appeared for him during the course of the proceedings below) failed to challenge the propriety of the traffic stop, he did not receive the effective assistance of counsel. Under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant claiming a deprivation of the right to the effective assistance of counsel must establish that counsel's performance “fell below an objective standard of reasonableness” and that the deficient performance was prejudicial in that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 688, 694. With respect to the attorneys who represented defendant prior to and at his bench trial, defendant cannot establish deficient performance. Defendant was found guilty in 2009. *Galvez* was not decided until 2010. The constitution requires reasonable performance by defense counsel, not prescience.

¶ 9 It has been stated that, “[w]ith respect to the reasonableness of counsel’s conduct, ‘[o]nly in a rare case can an attorney’s performance be considered unreasonable under prevailing professional standards when she does not make an [argument] which could not be sustained on the basis of the existing law as there is no general duty on the part of defense counsel to anticipate changes in the law.’ ” *United States v. Davies*, 394 F.3d 182, 189 (3d Cir. 2005) (quoting *Gov’t of Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989)). That principle applies here. Under existing precedent at the time of trial—*Lloyd* and *Barnes*—a police officer was permitted to stop a vehicle registered to a driver with a suspended or revoked license. No Illinois decision had, at that point, limited that rule to cases in which a vehicle has only one registered owner. Indeed, in *Lloyd*, we suggested in *dicta* that a stop would be proper even in cases where a driver with a revoked or suspended license *co-owned* the vehicle observed by the officer conducting the stop. We stated that “[a]lthough many vehicles in our society are co-owned, such co-ownership merely makes it equally reasonable to believe that either one owner or the other may in fact be driving a car.” *Lloyd*, 227 Ill. App. 3d at 353-54. In *Galvez* we identified the logical error underlying this *dicta*: it assumes that, where two individuals own a vehicle, the suspension or revocation of the license of one owner will have absolutely no effect on the two owners’ relative usage of the vehicle. *Galvez*, 401 Ill. App. 3d at 719. However, we cannot fault attorneys who, prior to our decision in *Galvez*, read the *Lloyd dicta* as persuasive authority that *Lloyd* would apply regardless of the number of registered owners of a vehicle.

¶ 10 It is true that *Galvez* had been decided before defendant’s posttrial motion was heard. However, because no evidence was presented at the suppression hearing that anyone but defendant was a registered owner of the vehicle he was driving, and because the motion to suppress was not

renewed when such evidence was adduced at trial, there is no reasonable probability that the trial court would have granted any posttrial relief based on *Galvez*. Accordingly, defendant's attorney's failure to raise *Galvez* at the hearing on defendant's posttrial motion resulted in no prejudice within the meaning of *Strickland*. Similarly, we need not address the substance of the *Galvez* decision because it is not applicable under the facts of this case.

¶ 11 We next consider defendant's argument that the trial court erred in ordering him to pay \$500 to reimburse the public defender for services rendered to defendant during periods when defendant was not represented by private counsel. Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2006)) authorizes the trial court to order a criminal defendant for whom counsel has been appointed to pay a reasonable amount to reimburse the county or the state. However, prior to ordering reimbursement, the trial court must conduct a hearing regarding the defendant's financial resources. *Id.*; *People v. Love*, 177 Ill. 2d 550, 559 (1997). The hearing "shall be conducted on the court's own motion or on motion of the State's Attorney \*\*\* no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a) (West 2006). No such hearing was conducted here, and the State concedes that the order requiring payment must be vacated. Accordingly, we vacate the order requiring reimbursement of the public defender.

¶ 12 Although the parties agree that the reimbursement order must be vacated, they differ on the question of whether it is permissible to remand for a proper hearing. Not surprisingly, the State argues that it is, while defendant insists that it is not. Defendant maintains that the time for conducting the hearing has passed. It is true that when the reimbursement obligation is imposed by the *clerk of the circuit court*, rather than by the court itself, the passage of time during the pendency

of an appeal may bar a reimbursement order. See *People v. Gutierrez*, 2012 IL 111590. Here, however, the trial court entered the reimbursement order at sentencing. In such cases, remand for compliance with the hearing requirement is appropriate. *People v. Somers*, 2012 IL App (4th) 110180, ¶ 45.

¶ 13 Finally, defendant argues that he is entitled to monetary credit toward his \$1,000 fine and his \$1,000 “equipment fine.” Section 110-14(a) of the Code of Criminal Procedure of 1963 provides:

“Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine.” 725 ILCS 5/110-14(a) (West 2006).

¶ 14 A defendant may apply for the credit for the first time on appeal. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008). It is undisputed that defendant spent 439 days in custody prior to sentencing and has therefore accumulated a credit of \$2,195. The State concedes that defendant is entitled to the credit he claims.

¶ 15 For the foregoing reasons, we vacate the order of the circuit court of Boone County that defendant pay reimbursement for the services of the public defender and we remand for a hearing on defendant’s financial resources. In addition, the mittimus is modified to reflect a credit of \$2,195, satisfying defendant’s \$1,000 fine and \$1,000 “equipment fine.” In all other respects, the judgment of the circuit court of Boone County is affirmed.

¶ 16 Affirmed in part as modified and vacated in part; cause remanded.