

2012 IL App (2d) 111211-U
No. 2-11-1211
Order filed October 17, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 11-CF-799
)	
STEPHEN SMITH, JR.,)	Honorable
)	Theodore S. Ptokonjak,
Defendant-Appellee.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court improperly concluded that a traffic stop was impermissibly prolonged and that defendant did not voluntarily consent to the search of his vehicle. The motion to suppress was improperly granted.

¶ 2 After a traffic stop and the subsequent search of his vehicle, defendant, Stephen Smith, Jr., was arrested and charged with burglary (720 ILCS 5/19-1(a) (West 2010)), theft (720 ILCS 5/16-1(a)(4)(A) (West 2010)), and forgery (720 ILCS 5/17-3(a)(3) (West 2010)). On November 9, 2011, the trial court granted defendant's motion to suppress evidence. The State, pursuant to Supreme Court Rule 604(a)(1) (Ill. S. Ct. R. 604(a)(1) (eff. July 1, 2006)), appeals the court's suppression

order, arguing that the court erred in suppressing the evidence because defendant validly consented to the search. For the following reasons, we reverse and remand.

¶ 3

I. BACKGROUND

¶ 4

A. Officer Raciak's Testimony

¶ 5 At the hearing on defendant's motion to suppress, Officer Anthony Raciak testified that, on March 14, 2011, at around 3:30 p.m., he was conducting traffic enforcement when he observed a vehicle pulling a trailer. After running a registration check and learning that the vehicle's registration had expired, Raciak stopped the vehicle at 3:38 p.m. Defendant was driving the vehicle; defendant's son and his son's friend were passengers. Defendant was not committing a moving traffic offense and was stopped only for the expired registration.

¶ 6

Once the vehicle stopped, defendant exited and began walking toward Raciak's squad car. Raciak twice told defendant to return to his vehicle, and defendant complied. Raciak then approached the vehicle, explained the reason for the stop, and requested defendant's driver's license, insurance, and proof of registration. Raciak noted that the vehicle was registered in Texas to someone other than defendant. Defendant told Raciak that he was driving to Beloit, Wisconsin to work on his mother's house. However, defendant told also Raciak he was staying in a hotel in Chicago, but could not name the hotel in which he was staying. Given that defendant was allegedly staying in Chicago and traveling to Wisconsin, but was currently in Mundelein, Raciak became suspicious. He explained that the facts that caused him to believe there were criminal circumstances included: "Just that he was vague in his story. He had air-fresheners in the vehicle. There were multiple cell phones. The car he was driving wasn't his. Yet he had it completely across state lines for a period of four to six days." Raciak agreed that defendant told him that the vehicle was

registered to his wife, a fact Raciak confirmed to be true. Raciak explained that there were six cell phones in the center console, but three men in the car. There were “approximately” three air fresheners.

¶ 7 Raciak told defendant that he would be issuing a citation for the expired registration and that defendant and his passengers should wait inside of defendant’s vehicle. Raciak returned to his squad car to write the ticket. There, he ran a search on defendant’s name and learned that defendant had a prior arrest or conviction for narcotics trafficking. Raciak called for a backup officer. Suspecting that there might be criminal activity afoot and, to “confirm my suspicion,” Raciak planned to ask defendant for consent to search the vehicle. Specifically, Raciak suspected crime was afoot because:

“Throughout my initial encounter with defendant when he walked out of the vehicle when I spoke with him I notice he appeared nervous, his carotid artery was pulsating. This story that he provided when I asked question where he was coming from, where he was going, and what he was doing, it didn’t seem to make sense in my opinion. With the additional just the random amount [of] cell phones in there and air-fresheners I thought he may be involved with some type of drug trafficking at that point[.]”

¶ 8 Raciak returned to defendant’s vehicle and said something to the effect of “can you step out. I need you at my squad car to explain this.” Raciak stated he wanted defendant to come with him to the hood of his squad car so that he could explain the violation and have him sign the ticket. He testified that, since defendant was from another state, the easiest manner for handling the ticket was to have defendant sign it, as opposed to seizing his license, and he wanted to discuss the process with defendant. Raciak agreed, however, that, when he asked defendant to exit his car, he knew he was going to request consent to search the vehicle.

¶ 9 Defendant complied with Raciak's request to step out of the vehicle. When defendant was standing at the right, front headlight of Raciak's squad car, he was located approximately 20 feet from his own car. Raciak, who was dressed in full uniform, stood next to him. The overhead lights of Raciak's squad car were off. The backup officer, Officer Whitaker,¹ arrived while Raciak was asking defendant to come stand by the squad car. Whitaker parked her squad car behind Raciak's car and left on the vehicle's rear warning lights. Whitaker was also dressed in full uniform and stood near defendant and Raciak.

¶ 10 Raciak testified that the traffic stop was not completed until he issued the ticket and returned defendant's insurance paperwork, driver's license, and registration. Raciak testified that, *after* he gave defendant the paperwork and his license, he told defendant that the traffic stop was over and that he was "free to leave." According to Raciak, the traffic stop began at 3:38 p.m. and ended at 3:50 p.m.

¶ 11 Raciak further testified that, after telling defendant that he was free to leave, he inquired whether he could ask defendant some additional questions. Defendant agreed. Raciak asked defendant whether he was involved in any type of criminal activity, and whether he had any firearms, drugs, or large amounts of currency in the vehicle. Defendant answered "no" to those questions. Still standing by the squad car and while he and Whitaker were standing one to three feet away from defendant, Raciak asked defendant for permission to search the vehicle. Defendant provided verbal consent, telling Raciak "I could do whatever search of the vehicle and even get a [canine] if I was so inclined." Raciak testified that, on the basis that the car was not his, defendant declined signing

¹Officer Whitaker was not called to testify at the motion-to-suppress hearing.

a written consent-to-search form. However, Raciak testified that defendant never revoked his verbal consent to the search.

¶ 12 Between 3:59 and 4:05 p.m., Raciak called for a canine unit. Raciak learned that the unit would take at least 20 minutes to arrive. Raciak testified that he conveyed this information to defendant, and that defendant said it was “fine.” Raciak then proceeded to defendant’s vehicle, asked the passengers to step out of the vehicle and join defendant, and he frisked them for weapons. After completing the pat down, which Raciak estimated took approximately 10 minutes, he told the three men to “wait where they were standing” while he went to search the vehicle. Whitaker remained with the men while Raciak searched the vehicle.

¶ 13 Raciak started his search of the vehicle at the front passenger-side door. “Upon initial search,” he found a green, plant-like material mashed into the carpet that appeared to be cannabis, but none of it was collected for evidentiary value. Raciak explained the amount was minute and, as he was not going to charge anyone with residue amounts, not conducive to collection. While he was searching, Whitaker informed Raciak that defendant had asked that he stop the search and wait for the canine unit. Raciak stopped searching and returned to the squad car, confirming with defendant that he preferred that a canine walk around the vehicle, as opposed to Raciak searching inside of it. Accordingly, the two police officers, defendant, and his passengers stood by Raciak’s patrol car, “killing time waiting for a dog to show up.”

¶ 14 Raciak did not, while they were waiting, reiterate to defendant that he could leave. He testified that he did not stand between defendant and defendant’s vehicle, and agreed that the only key to defendant’s vehicle was in the ignition. Raciak did not, after directing defendant to stand by the patrol car, tell defendant to leave because, after seeing the trace amounts of residue in the car,

he suspected there would be cannabis in the car and he wanted to wait for the canine unit. Defendant did not ask to leave or to return to his vehicle.

¶ 15 The canine unit arrived at 4:27 p.m.² Officer Danielle Baron, who was in charge of the canine, was told that defendant had consented to a search, but then had “changed it,” consenting instead to a canine search. The canine search took place from around 4:35 to 4:55 p.m., ending approximately one hour after the traffic citation had been issued. Officers Raciak and Whitaker stood by defendant and his passengers during the canine search. “So, you stood facing them from an arm’s reach away throughout this entire time period?” Raciak agreed. The canine alerted at several locations on the vehicle. Raciak returned to personally search the car’s interior with Baron. No drugs were found in the vehicle. However, the vehicle had a third row of seating that was collapsed down. Under that third row of seating, were two shaving kits. Inside the shaving kits, Raciak found fraudulent identification documents.

¶ 16 As the documents implicated defendant’s two passengers, they were arrested and defendant was released at the scene. After arresting defendant’s passengers, Raciak “thanked [defendant] for his cooperation [and] for waiting. I didn’t tell him he was free [to] leave again. He was free to leave the entire time. That’s all he had to say.” Defendant was later implicated at the police station and was subsequently arrested.

²The canine unit arrived in a police car with activated lights and sirens. It is not clear from the record where this third police car parked in relation to defendant and his vehicle, and whether the lights and sirens were turned off after its arrival.

¶ 17

C. Defendant's Testimony

¶ 18 Defendant also testified at the suppression hearing and his chronology of events differed from Raciak's. Whereas Raciak testified that he told defendant that he was free to leave *after* defendant signed the ticket and after Raciak had returned defendant's license and paperwork, defendant testified that Raciak told him that he was free to leave at an earlier point. Specifically, in response to questioning regarding what Raciak said that brought defendant out of his car, defendant explained that Raciak said "can you step to my car and come sign the ticket. You're free to go." On cross-examination, defendant was asked:

"ASSISTANT STATE'S ATTORNEY: And you said that when the officer came to your door and asked you to sign the ticket he told you he needed you to sign the ticket and you're free to leave?"

DEFENDANT: He told me walk back to the [patrol] car, sign the ticket, you're free to leave.

ASSISTANT STATE'S ATTORNEY: He said those words, you're free to leave?

DEFENDANT: Yes."

¶ 19 Raciak directed defendant to the patrol car.

"DEFENSE COUNSEL: Did he direct you back there?"

DEFENDANT: Yes, he did.

DEFENSE COUNSEL: And did you sign the ticket?

DEFENDANT: Yes, I did.

DEFENSE COUNSEL: Then what happened that caused you to stay at the front of his car? Explain to the Judge.

DEFENDANT: He started asking all kinds of questions, who are you here to see, where you going, how long you going to be here. *** *Then* he said can you sign the ticket. *As I am signing the ticket* he's questioning me. Do you mind if I look in the car. I said well, go ahead." (Emphases added.)

¶ 20 Defendant's testimony continued, "then as [Raciak] walked to the car I get on the phone to call my brother and said the officer gave me a hard time. He [is] going to look in the car. My brother said he don't have no reason to search, sign the ticket and leave, beat rush hour downtown. So I asked the other officer can you call the officer and *ask him to stop searching the car* so we can leave." (Emphasis added.) In addition, defendant testified that he called his brother when Raciak pulled his passengers out of the car. However, defendant testified that the officers never frisked him, and did not frisk the passengers until after they were arrested.

¶ 21 After Whitaker told Raciak to stop the search, and after Raciak came over, defendant asked why he was still there; Raciak said he was waiting for the canine unit. Defendant did not understand why the canine unit was called. Defendant did not feel free to leave. He said he understood he was detained because Whitaker had her hand on her gun while Raciak was searching defendant's car. Defendant testified that Raciak never showed him a written consent-to-search form. Further, defendant testified that Raciak did *not* return his paperwork or his driver's license to him until *after* he had searched the car.

¶ 22 D. Court's Ruling

¶ 23 The trial court granted defendant's motion to suppress. The court first noted that defendant was stopped for an expired registration. "So after that was dealt with and concluded, the defendant was told *the traffic stop is over*. He's asked to *come back and sign the ticket*." (Emphases added.)

The court noted that there was no explanation, such as officer safety, regarding why defendant had to go back to the patrol car to sign the ticket. The court found next that:

“[A]t that point, the officer testified as to why he continues to question the defendant. And basically he talks about the cell phones, the air fresheners, the plate on the car, where it’s from, the fact that defendant is from someplace else, going someplace else, staying someplace else, et cetera.

The stop is over and the stop should be over. The traffic stop is over, but the bottom line is *** *it’s not over* because the officer continues it.” (Emphases added.)

¶ 24 The court continued that, to continue to question and detain defendant, Raciak needed:

“a reasonable objective ground. There has to be that specific articulable circumstances. What the officer had here was not either of those things. He had a hunch. And it was not enough. So the Fourth Amendment kicks in. The subsequent questioning was unrelated to the initial justification for the stop. And it did, in fact, [im]permissibly prolong the fundamental nature of the stop. The stop was over. Again, in reality *it wasn’t over*. It was prolonged by the reporting officer.

The Court finds it was not consensual for him to be kept there. The Court finds he was seized, *still seized*, it wasn’t sufficient grounds for him to remain there and forced to remain there for any further time.” (Emphases added.)

¶ 25 The court granted the motion to suppress the evidence found in the search of defendant’s vehicle. The State filed a certificate of impairment and appeals.

¶ 26

II. ANALYSIS

¶ 27

A. Standards of Review

¶ 28 In reviewing a trial court's ruling on a motion to suppress, our review is twofold. First, we review with "great deference" the trial court's factual findings, reversing them only if they are contrary to the manifest weight of the evidence. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Second, remaining free to make our own assessment of the facts in relation to the issues, we review *de novo* the ultimate ruling as to whether suppression is warranted. *Id.*

¶ 29 The detention by police of individuals during a traffic stop constitutes a "seizure" of persons under our federal and state constitutions. See U.S. Const., amend IV; Ill. Const. 1970, art. I, § 6; *People v. Cosby*, 231 Ill. 2d 262, 273 (2008). Our federal and state constitutions protect individuals from unreasonable seizures. *Cosby*, 231 Ill. 2d at 274-75. Traffic stops are analogous in duration to the investigative stops observed in *Terry v. Ohio*, 392 U.S. 1 (1968); accordingly, our supreme court has applied a *Terry* analysis to judge the reasonableness of challenged traffic stops. *Cosby*, 231 Ill. 2d at 274-75. The *Terry* analysis asks: (1) whether the officer's action was justified at its inception;³ and (2) whether the action was reasonably related in scope to the circumstances that justified the interference in the first place. *Id.* at 275.

¶ 30

B. Findings of Fact and Analytical Framework

¶ 31 We begin with the court's findings of fact, to which we greatly defer. The State asserts, without explanation, that the trial court "did not reject any factual aspect" of and "appeared to accept" Raciak's testimony; thereafter, it uses Raciak's testimony as the foundation for its legal arguments. It is unclear why the State assumes that the court accepted Raciak's testimony. Indeed,

³This first prong is not at issue here.

after hearing Raciak's and defendant's testimonies, which differed, the court ruled against the State. Further, as explained below, the only facts upon which the court explicitly relied in its ruling did not comport with the chronology of the stop as testified to by Raciak.

¶ 32 At the hearing on the motion to suppress, Raciak and defendant provided differing chronologies of the relevant events. Raciak testified that: (1) he directed defendant to the patrol car to sign the ticket; (2) defendant signed the ticket; (3) Raciak returned all of defendant's papers and driver's license; (4) Raciak told defendant that he was free to leave; and (5) only then, did he begin to ask defendant additional questions and for his consent to search the vehicle. In contrast, defendant testified that, while he was sitting in his vehicle, Raciak told him that he needed to step out of the car to sign the ticket, but that he was free to leave. Then, defendant testified, *while* he was signing the ticket, Raciak asked additional questions and for consent to search the vehicle. Accordingly, the witnesses diverged on when Raciak asked further questions and for consent to search, *i.e.*, after the stop was over versus while defendant signed the ticket.

¶ 33 The trial court's ruling comports with *defendant's* chronology. See *People v. James*, 391 Ill. App. 3d 1045,1052 (2009) (where testimonies about the events during the traffic stop varied and trial court's factual findings were consistent with one witness's testimony, court implicitly found that witness more credible than the others). Specifically, the court found, consistent with defendant's chronology, that "the defendant was told the traffic stop is over. He's asked to come back and sign the ticket." Next, the court found that, "at that point," Raciak continued to question defendant. Again, this is consistent with defendant's chronology that, when he was asked back to sign the ticket, Raciak began asking questions and for consent to search. Critically, nothing in the court's ruling reflects that it found, consistent with Raciak's testimony, the reverse to be true, *i.e.*, that defendant

signed the ticket and *then*, after returning defendant's license and paperwork, Raciak told defendant the stop was over and asked additional questions. Rather than finding a break between the traffic stop and the questioning, the court found that defendant was being questioned while signing the ticket and, accordingly, that the defendant was "still seized," *i.e.*, that the traffic stop had not ended.

¶ 34 The court's findings regarding the chronology are critical because they implicate an analytical framework different than that proffered by the parties on appeal. The State, relying on Raciak's testimony, asserts (with defendant following suit) that the traffic stop ended when Raciak returned defendant's paperwork and told him he was free to leave. Then, relying on cases considering whether, after a traffic stop terminated, a subsequent illegal seizure took place (*e.g.*, *Cosby*, 231 Ill. 2d at 274-75; *U.S. v. Mendenhall*, 446 U.S. 544 (1980)⁴), the parties debate whether, after the stop here was terminated, there was a *second* seizure that tainted defendant's consent to the search. However, the State's reliance on Raciak's testimony that the stop terminated before his questioning began is misplaced. As the court's ruling was consistent with defendant's chronology, not Raciak's, the question for this court is *not* whether the search was valid because, after the traffic stop had

⁴*Mendenhall* holds that a person has been seized only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *Id.* at 553. *Mendenhall* provided examples of circumstances where a reasonable person might not feel free to leave, such as a threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the language or tone of voice indicating that compliance with the officer's request might be compelled. *Id.* at 554. The presence of these factors may taint the voluntariness of a consent to search. Here, however, we assume there was a seizure and, therefore, we need not apply *Mendenhall* to assess whether a seizure took place.

terminated, defendant consented to the search. Rather, accepting the court's findings that, while he was signing the ticket, defendant was questioned (findings which, given defendant's testimony, are not contrary to the manifest weight of the evidence), we proceed presuming that the *initial* traffic stop seizure remained in effect when Raciak posed his questions to defendant. Accordingly, rather than considering whether Raciak's questioning constituted a second seizure, the proper framework for our analysis is simply whether Raciak's questions impermissibly extended the initial traffic stop, and whether defendant's consent, given during that detention, was voluntary.

¶ 35 C. Traffic Stop was Not Prolonged

¶ 36 A court considering whether, under the second "scope" prong of the *Terry* analysis, police questioning during a traffic stop violated the fourth amendment must first determine whether the questioning was related to the initial justification of the stop. *Cosby*, 231 Ill. 2d at 275. If it was not, the court must determine whether the officer had a reasonable, articulable suspicion that would justify the questioning. *Id.* If there was no reasonable, articulable suspicion justifying the questioning, the court must consider whether, in light of the totality of the circumstances, the questioning impermissibly prolonged the detention. *Id.* A lawful seizure to issue a traffic ticket may become unlawful if unreasonably prolonged, *i.e.*, if "prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *People v. Kats*, 2012 IL App (3d) 100683, ¶ 18. There is no specific period beyond which an initially justified traffic stop becomes an unreasonable and, therefore, unconstitutional seizure. *Kats*, 2012 IL App (3d) at ¶ 19. However, the brevity of the stop is an important factor when determining whether it was reasonable. *Id.* "An officer's authority to investigate a traffic violation 'may not become a subterfuge in order to obtain other evidence merely based on the officer's suspicion.'" *Id.* (quoting *People v. Koutsakis*,

272 Ill. App. 3d 159, 163 (1995)). Considering these questions, we disagree with the trial court that Raciak impermissibly prolonged the stop.

¶ 37 As to the first question, we agree that Raciak's questions to defendant regarding where he was going and what was in the vehicle did not relate to the initial justification for the stop—an expired registration. We also agree with the court's determination on the second question, specifically, that Raciak had no reasonable, articulable suspicion of criminal activity to justify the questioning. Neither defendant, nor his passengers acted furtively; Raciak did not smell or (prior to the search) see cannabis, nor did defendant appear to be under the influence. Instead, Raciak reported that defendant appeared nervous, there were cell phones and air fresheners in the car, defendant had a prior arrest or conviction for drug trafficking, defendant's vehicle was registered to someone else (his wife), and that he had driven it across state lines. As the court stated, these observations did not constitute reasonable, articulable suspicion of criminal activity. See *e.g.*, *People v. Caballes*, 207 Ill. 2d 504, 510 (2003) (*rev'd on other grounds*, 543 U.S. 405 (2005)) (air fresheners and nervousness insufficient bases to detain a defendant). Indeed, the fact that Raciak did not have a reasonable articulable suspicion is presumably why he asked defendant for consent to conduct the search.

¶ 38 We do not, however, agree with the court's determination on the third question, namely that, in light of the totality of the circumstances, the questioning impermissibly prolonged the duration of the detention. Quite simply, the questioning occurred while the initial traffic stop was being completed and, therefore, did not unreasonably prolong it. Although an officer may not prolong the processing of an initial traffic stop as a subterfuge to obtain evidence unrelated to the purpose of the stop, here, the only evidence arguably reflecting that Raciak delayed processing the ticket as a

subterfuge to obtain consent to search is that he asked defendant out of the car to sign the ticket and, when he did so, he knew he intended to ask for consent to search. Indeed, the trial court found that, rather than permitting defendant to sign the ticket and drive away, Raciak continued the stop beyond the period when the registration-expiration-issue was resolved by asking, without any apparent justification, that defendant step out of the vehicle. In so finding, the court apparently rejected Raciak's proffered reason for asking defendant out of the car, *i.e.*, to explain the ticketing process as it relates to an out-of-state resident.

¶ 39 However, the fact that Raciak knew he planned to request a consent to search does not necessarily render his request that defendant step out of the vehicle an impermissible prolongation of the stop. An officer may ask a driver out of the vehicle at any point during the traffic stop. See *e.g., People v. Sorenson*, 196 Ill. 2d 425, 433 (2001) (“it is well established that following a lawful traffic stop, police may, as a matter of course, order the driver and any passengers out of the vehicle pending completion of the stop without violating the protections of the fourth amendment”). Indeed, even with defendant stepping out of the vehicle to sign the ticket, only 12 minutes elapsed from the initial stop until the ticket was issued. In that period, Raciak conversed with defendant, returned to his squad car to run routine computer checks on defendant's license, wrote the ticket, returned to defendant's vehicle to ask defendant out of the vehicle, directed defendant to the squad car, and explained and issued the ticket. Compare *People v. Kats*, 2012 IL App (3d) 100683, ¶ 20 (nine minutes not an unduly long period to complete traffic stop), and *People v. Staley*, 334 Ill. App. 3d 358, 366 (2002) (traffic stop lasting over 18 minutes not unreasonably long), with *People v. Cox*, 202 Ill. 3d 462, 469-70 (2002) (rejecting argument that, where a canine unit arrived 15 minutes after the initial traffic stop but *while* the officer was writing the traffic ticket, the detention was not

impermissibly extended; court found that the routine circumstances of the stop justified only an expeditious detention and, if the officer had expeditiously written the ticket, the defendant would have left prior to the canine unit's arrival) (*rev'd on other grounds*, 228 Ill. 2d 122, 130-31 (2008)), and *People v. Baldwin*, 388 Ill. App. 3d 1028, 1034-35 (2009) (duration of stop unreasonable where officer, after deciding not to issue a ticket, prolonged the stop for 9½ minutes by questioning defendant and calling for a canine unit), and *Koutsakis*, 272 Ill. App. 3d at 164 (unreasonable duration where officer, after writing the warning ticket, detained the defendant for several minutes to wait for another officer to arrive with a canine unit). Therefore, as the processing of the traffic stop was not unduly long, and as the questioning itself happened during that period, we do not agree with the trial court's determination that the questioning during the stop prolonged and created an illegal detention. See *People v. Brownlee*, 186 Ill. 2d 501, 515 (1999) (an officer is always free to request permission to search); *People v. Roa*, 398 Ill. App. 3d 158, 164 (2010) ("questioning of a seized individual alone may not unduly prolong a stop or constitute an additional seizure within the meaning of the fourth amendment").

¶ 40

D. Consent to Search

¶ 41 We have concluded that, when defendant was asked for consent to search, he had not been illegally detained. Accordingly, this case does not fall into the category of cases where a consent to search was found tainted by an illegal detention. See *Brownlee*, 186 Ill. 2d at 521. The question, therefore, is simply whether, despite the fact that it was given during a lawful seizure, defendant's consent was voluntary. See *People v. Anthony*, 198 Ill. 2d 194, 202 (2001) (a search conducted without a warrant, but with a defendant's voluntary consent, does not violate the fourth amendment); *James*, 391 Ill. App. 3d at 1052 (*Mendenhall* noted that the crucial question is whether a defendant's

seizure at the time he was asked for consent to search meant that the consent was coerced and, therefore, involuntary; if the consent to search was involuntary, evidence obtained as a result of the search would be tainted).

¶ 42 The court here did not make an express finding that defendant's consent to the search was involuntary. Arguably, we could end our analysis by simply disagreeing with the court's conclusion that the stop was impermissibly prolonged. However, the court stated that "it was not consensual for him to be kept there;" as a valid consent to search may given even where one is seized, it is possible that, in ordering suppression, the court also implicitly found that defendant's consent was not voluntary. See *People v. Winters*, 97 Ill. 2d 151, 158 (1983) (trial court did not provide specific findings of fact to support suppression order, but "we must presume that in the absence of such express findings of fact the trial court credited only the testimony that supports its ruling"). Accordingly, because the court's finding that "it was not consensual for him to be kept there" could have been a reference to the validity of defendant's consent to the search, we address the voluntariness of that consent.

¶ 43 To be valid, a defendant's consent to search must be voluntary, which means it must be given freely without express or implied duress or coercion. *People v. Plante*, 371 Ill. App. 3d 264, 269 (2007). When considering whether a motorist's consent to search in response to an officer's request was voluntarily given, courts utilize a totality-of-the-circumstances test. *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (validity of a consent to search requires the consent to be voluntary, and voluntariness is "a *question of fact* to be determined from all of the circumstances") (emphasis added.); *Brownlee*, 186 Ill. 2d at 514, 515 n. 1 (same, citing *Robinette*). Examples of factors that may be considered when determining whether consent was voluntarily given include: (1) the defendant's age,

intelligence, and education; (2) whether the defendant was advised of his or her constitutional rights; (3) the length of detention prior to consent; (4) whether the consent was immediate or prompted by repeated requests by police; (5) whether any physical coercion was used; and (6) whether the defendant was in police custody when he or she gave consent; however, no one factor is controlling. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973); *U.S. v. Figueroa-Espana*, 511 F.3d 696, 704-05 (7th Cir. 2007). Accordingly, we must determine whether the trial court's implicit finding of fact that defendant's consent was not voluntary was contrary to the manifest weight of the evidence.

¶ 44 Applying the foregoing factors, and considering the totality of the circumstances, we conclude that, to the extent the court made a finding regarding the consent to search, its implicit determination that defendant's consent was involuntary was contrary to the manifest weight of the evidence. Certain factors do weigh in favor of the court's ruling, such as the fact that defendant was, in fact, seized when he gave consent and, when he consented, he was removed from his vehicle and was standing by the squad car, with two marked police cars and two uniformed and armed officers standing next to him. In addition, according to defendant, his consent, "well, go ahead," was arguably reluctant, as opposed to unequivocal.

¶ 45 However, the circumstances as a whole reflect a voluntary consent in that: (1) defendant was an adult and this was not his first encounter with police authorities; (2) as discussed above, the length of the detention, prior to the request for consent, was not unreasonable; (3) Raciak did not make repeated requests for consent, and defendant's consent, after a single request, was immediate; and (4) the officers used no physical coercion. Further, although two officers were present, the evidence did not reflect that they acted in an intimidating manner. The officers did not physically touch

defendant or raise their voices. The stop took place in the middle of the afternoon and, with the exception of rear warning lights, the lights of the squad cars were turned off. Although defendant testified that Whitaker stood with her hand on her gun during the *search*, and that he never felt free to leave, he did not testify that Whitaker had her hand on her gun when he gave consent, or that she wielded the gun in a threatening manner. Finally, although defendant was detained when he gave consent, he was not under arrest, handcuffed, or placed inside one of the police cars. We do not find that defendant's consent was given when he was under direct or implied duress or coercion. Accordingly, we find contrary to the manifest weight of the evidence the court's implicit finding that defendant's consent to the search of his vehicle was involuntary.

¶ 46 On appeal, defendant agrees that he initially consented to the search, but he argues that his refusal to sign the written consent-to-search form served as a revocation of the verbal consent. We reject defendant's argument. First, defendant testified at the suppression hearing that Raciak never even showed him a written consent-to-search form. Thus, his assertion on appeal that he refused to sign the form as an act of revocation is not well-taken. Second, even if, as Raciak testified, defendant refused to sign that form, neither a refusal, nor an agreement to sign such a form is necessarily dispositive of consent, because the voluntariness of consent requires consideration of the totality of the circumstances. See *e.g.*, *People v. Cardenas*, 237 Ill. App. 3d 584, 587-88 (1992). Finally, defendant asserts that his withdrawal of consent was "unequivocal," but we disagree. Defendant verbally consented and then, according to Raciak, refused to sign the consent form on the sole basis that the car was not his own. This proffered reason for refusing does not reflect unequivocally that defendant objected to the search, so much as it reflects an expression of the view that, perhaps, he did not have the authority to sign the form.

¶ 47 Further, to the extent that defendant revoked his consent when, after speaking with his brother, he asked Whitaker to tell Raciak to stop the search so that he could leave, probable cause to continue the detention existed. Raciak testified that he began his search of the vehicle at the front passenger-side door and, upon his initial search, noticed the suspected cannabis on the floor. Raciak testified that, once he saw the substance on the floor, he suspected there would be other narcotics in the car. Accordingly, assuming that defendant told Whitaker to stop the search so that he could leave, probable cause to continue the detention existed before that revocation. See *People v. Hopson*, 2012 IL App (2d) 110471, ¶ 12 (citing *People v. Clark*, 92 Ill. 2d 96 (1982) (officer's observation of what appeared to be cannabis leaves on floor of car was sufficient to establish probable cause to search the car)).

¶ 48 Defendant concedes that, once Raciak saw the suspected cannabis, probable cause to continue the detention was established. At oral argument, however, defense counsel suggested that defendant's revocation possibly *preceded* Raciak's entry of the vehicle. Specifically, counsel argued that, because defendant called his brother "immediately," and because Raciak's pat-down search of defendant and the passengers took 10 minutes, it is not clear that Raciak was already in the car and had seen the suspected cannabis on the floor before defendant revoked consent. We disagree.

¶ 49 If it is defendant's position that he revoked consent before probable cause was established (*i.e.*, before Raciak entered the vehicle and saw the suspected cannabis), it was his burden to so establish at the motion-to-suppress hearing. See *People v. Gipson*, 203 Ill. 2d 298, 306-07 (2003) (defendant bears the ultimate burden of proof on a motion to suppress). Instead, defendant's evidence on this point was only vague. For example, at one point in his testimony, defendant recalled that he said Raciak could search the car and then he (defendant) called his brother,

suggesting an “immediate” telephone call. However, defendant also testified that he called his brother *after* Raciak pulled the passengers out of the vehicle, which implies he did not “immediately” call his brother upon giving consent. Further, defendant asks us to find that the delay resulting from the pat-down search gave him time to revoke consent before Raciak entered the vehicle. At the hearing, however, he testified that *there was no pat-down search* until the passengers were arrested. Most telling, however, is that defendant testified that he asked Whitaker to “call the officer and *ask him to stop searching the car* so we can leave.” Asking that the search *cease* implies that the search had begun. Thus, as Raciak noticed the suspected cannabis upon his initial search, the record reflects that probable cause existed before defendant revoked consent.

¶ 50 In sum, the trial court erred in determining that defendant’s detention was impermissibly prolonged. Further, despite the detention, defendant voluntarily consented to the search of his vehicle. Finally, before defendant revoked consent, probable cause existed to continue the detention. Accordingly, the trial court improperly suppressed the evidence.

¶ 51

III. CONCLUSION

¶ 52 For the foregoing reasons, we reverse the judgment of the circuit court of Lake County and remand the cause.

¶ 53 Reversed and remanded.