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2012 IL App (3d) 110497-U

Order filed July 18, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellant,)	Will County, Illinois,
)	
v.)	Appeal No. 3-11-0497
)	Circuit No. 10-CF-2217
)	
FRANSISCO X. CERNA,)	Honorable
)	Edward A. Burmila, Jr.,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice Holdridge dissented.

ORDER

- ¶ 1 *Held:* The trial court erred in partially granting defendant's motion to suppress evidence because the officer properly seized the evidence as part of a limited protective search of the vehicle for weapons.
- ¶ 2 Defendant, Fransisco X. Cerna, was charged with unlawful possession of a controlled substance with intent to deliver. 720 ILCS 570/401(a)(2)(A) (West 2010). Defendant filed a motion to quash arrest and suppress evidence (motion to suppress), which the trial court granted

in part. The State appeals, arguing that the trial court erred when it granted the motion. We reverse and remand.

¶ 3

FACTS

¶ 4 On October 22, 2010, at approximately 10:22 p.m., defendant was pulled over for a traffic violation. Following the stop, defendant was charged with unlawful possession with intent to deliver more than 15 but less than 100 grams of cocaine. 720 ILCS 570/401(a)(2)(A) (West 2010). Defendant subsequently filed a motion to suppress.

¶ 5 At the hearing on defendant's motion, the only witness to testify was Joliet police officer Jeffery German. German testified that he had been a police officer in Joliet for nine years, but for the past four years he had been assigned to a tactical unit to combat gangs, guns, and drug violence.

¶ 6 On October 22, 2010, at approximately 10 p.m., German saw a black Chevy Tahoe, later determined to be driven by defendant, pull into a bar parking lot. About one minute later, a person exited the bar and entered the Tahoe. Approximately two minutes later, the bar patron exited the Tahoe and walked back into the bar, and the Tahoe left the parking lot. German testified that he was unable to see either person do anything while inside the Tahoe, but based on prior drug transactions in the same area and the quick entry and exit, he believed a hand-to-hand drug transaction occurred.

¶ 7 German testified that he followed the Tahoe after it exited the parking lot. While following the Tahoe, German observed the driver twice fail to use a turn signal. German activated his lights to pull the Tahoe over for the traffic violation. While following the Tahoe, German observed the driver reach with his right hand behind the seat towards the rear

compartment of the vehicle. The Tahoe traveled 2½ blocks before pulling over.

¶ 8 After the vehicle stopped, German approached the driver and asked for his driver's license. Defendant was cooperative during the stop and gave German his driver's license. As he talked to defendant, German observed an aerosol can with a false bottom that was partially opened on the rear floorboard of the Tahoe, where German previously saw defendant reach. Given his experience as a police officer, German thought the aerosol can was suspicious based on his familiarity with this type of false bottom aerosol can being used to hide weapons or contraband. German also testified that the area where the traffic stop occurred regularly had gang violence, shootings, and drug activity.

¶ 9 German testified that he was concerned for his safety because he believed defendant may have been retrieving or hiding a weapon inside the vehicle. German ordered defendant out of the vehicle, and his partner secured defendant during the search. Without asking defendant any questions, German performed a weapons search of the vehicle in the area where he had seen defendant reach. German picked up the aerosol can, opened it to check for weapons, and discovered narcotics in the aerosol can. Defendant was subsequently placed under arrest. Defendant advised the officers that he had additional narcotics in his waistband, and pursuant to a pat-down search, the additional narcotics were retrieved. German did not indicate in his written reports that he searched defendant's vehicle for weapons or that defendant was reaching for weapons.

¶ 10 The trial court partially granted defendant's motion. The court found that German had probable cause to make a traffic stop, but suppressed the evidence seized, that being the false bottom aerosol can and its contents, as a result of the search of defendant's vehicle. The court did

not suppress the evidence found on defendant's person. The State appeals.

¶ 11

ANALYSIS

¶ 12 On appeal, the State argues that the trial court erred in partially granting defendant's motion to suppress because the search of defendant's vehicle was proper under both a protective search pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968) and the plain view doctrine.

¶ 13 In reviewing a trial court's ruling on a motion to suppress evidence, we apply a two-part standard of review. *People v. Luedemann*, 222 Ill. 2d 530 (2006). Under this standard, the trial court's findings of fact are given great deference and will not be reversed on appeal unless they are against the manifest weight of the evidence. *Id.* However, we review *de novo* the trial court's ultimate legal ruling as to whether suppression is warranted. *Id.*

¶ 14 The fourth amendment of the United States Constitution and article I, section 6, of the Illinois Constitution protect citizens from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. Generally, a warrant supported by probable cause is necessary to satisfy the reasonableness requirement of the fourth amendment. *People v. Sorenson*, 196 Ill. 2d 425 (2001). Pursuant to *Terry* and Illinois law, an officer may conduct a brief investigatory stop if the officer has a reasonable suspicion, based upon specific and articulable facts and the reasonable inferences to be drawn therefrom, to believe that the individual has committed or is about to commit a crime. 725 ILCS 5/107-14 (West 2010); *Terry*, 392 U.S. 1.

¶ 15 In the present case, the initial stop of defendant's vehicle was proper based on German's observation of a traffic violation. See *People v. Stewart*, 242 Ill. App. 3d 599 (1993). Thus, we must address the constitutionality of the subsequent search of defendant's vehicle. Under

Michigan v. Long, 463 U.S. 1032 (1983) an officer making a proper investigatory stop under *Terry* may conduct a protective search of the passenger compartment of the vehicle, limited to those areas in which a weapon may be placed or hidden, when the officer reasonably believes that the occupant is dangerous and may gain immediate control of a weapon. See also *People v. Johnson*, 387 Ill. App. 3d 780 (2009). A protective search also allows examination of the contents of any open or closed containers found within the passenger compartment. *Long*, 463 U.S. 1032.

¶ 16 The justification for a protective search is not lost merely because the officer currently has the suspect's movement under control, because if the suspect is not arrested, he may return to his vehicle and gain access to any weapon located inside. *Long*, 463 U.S. 1032. In analyzing the justification to search for weapons, the officer need not be certain that defendant is armed; it is sufficient if a reasonably prudent man under the circumstances would be warranted in the belief that his safety was in danger based on a totality of the circumstances. See *Long*, 463 U.S. 1032; *People v. Moore*, 341 Ill. App. 3d 804 (2003).

¶ 17 Under the circumstances of this case, German did not act unreasonably in taking preventative measures to ensure that no weapons were within immediate grasp of defendant during the traffic stop. German observed defendant reach toward the back of the vehicle, and after pulling defendant over, also observed a partially opened false bottom aerosol can in the same area where he had seen defendant reach. Although furtive movements alone are not enough to conduct a protective search, here, defendant's furtive movement was directed toward the location of a false bottom aerosol can, which could contain a weapon that was within reach of defendant. See *People v. Anderson*, 304 Ill. App. 3d 454 (1999).

¶ 18 In light of German's experience in law enforcement and familiarity with false bottom aerosol cans, combined with his observation that the can was in the same location of defendant's furtive movement, German could have reasonably believed that defendant was dangerous and could have gained immediate control of a weapon. See *Long*, 463 U.S. 1032. Furthermore, the search of defendant's vehicle was restricted to the area of defendant's furtive movement, where defendant would gain immediate control of a weapon. See *Johnson*, 387 Ill. App. 3d 780. Therefore, we find that the trial court erred in partially granting defendant's motion to suppress the evidence seized from the search of defendant's vehicle.

¶ 19 **CONCLUSION**

¶ 20 For the foregoing reasons, the judgment of the circuit court of Will County is reversed, and the cause is remanded for further proceedings.

¶ 21 Reversed and remanded.

2012 IL App (3d) 110497-U, *People v. Fransisco X. Cerna*

¶ 22 JUSTICE HOLDRIDGE, dissenting:

¶ 23 I would affirm the trial court's suppression of the false bottom can and its contents. As the majority points out, an officer making a proper investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968), may conduct a protective search of the passenger compartment of a vehicle. However, the search must be limited to the those areas where the officer has a reasonable belief that the suspect may gain immediate control of a weapon. *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983). The issue is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. In

other words, for a search to be justifiable under *Terry*, an officer "must present specific, articulable facts which would cause a reasonable person to fear for his safety or the safety of others." *People v. Anderson*, 303 Ill. App. 3d 454, 462 (1999).

¶ 24 Here, the record contains no specific, articulable facts from which it could be determined that a reasonable person would fear for his safety or the safety of others regarding the content of the can. Officer German described the can as an aerosol can, possibly a Fix-A-Flat can, with a false bottom. German also testified that the can was partially opened and that such cans are typically used to hide weapons or other contraband. There was no testimony as to the specific nature or dimensions of the can or how the partially opened aerosol can could reasonably be thought to conceal a weapon. Given this record, there is no evidence, other than German's own brief reference to the mere possibility that the can might somehow contain a weapon. Moreover, there was no testimony from German as to how, under these circumstances, an officer would have an objective fear for his safety or the safety of others. *People v. Galvin*, 127 Ill. 2d 153, 162-67 (1989) (subjective fears, without specificity, are insufficient to justify a warrantless search). Therefore, I would find that the trial court did not err in partially granting the defendant's motion to suppress the evidence seized from the search of his vehicle. I would affirm the trial court.