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2012 IL App (3d) 110896-U

Order filed October 16, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

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|--------------------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court |
| |) | of the 13th Judicial Circuit, |
| Plaintiff-Appellee, |) | La Salle County, Illinois, |
| |) | |
| v. |) | Appeal No. 3-11-0896 |
| |) | Circuit No. 11-CF-10 |
| |) | |
| SANTO PALMIERI, |) | Honorable |
| |) | H. Chris Ryan, Jr., |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The police had lawful justification for the defendant's traffic stop which was not unlawfully prolonged. The street value fine imposed by the court was not supported by the record.

¶ 2 A jury found defendant, Santo Palmieri, guilty of unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(g) (West 2010)). The trial court sentenced defendant to six years' imprisonment and imposed a street value fine of \$36,000. On appeal, defendant challenges the basis and duration of the traffic stop and the propriety of the \$36,000 street value fine

assessed as part of his sentence. Affirmed in part, reversed in part, and remanded with directions.

¶ 3

FACTS

¶ 4 On January 18, 2011, defendant was charged by indictment with unlawful possession of cannabis with intent to deliver. Defendant filed a motion to quash arrest and suppress evidence. During the hearing on defendant's motion to suppress, defendant testified that on January 6, 2011, he was driving a U-Haul truck on Interstate 80 when he was stopped by Illinois State Trooper Kenneth Patterson for following a semitruck too closely. Defendant claimed he was traveling two car lengths behind the semitruck and did not notice any potholes in the roadway. Patterson informed defendant that there were a lot of potholes in the roadway and the semitruck in front of him might brake abruptly to avoid a pothole, causing a collision. Patterson testified that defendant was within four feet of the semitruck's rear bumper before the traffic stop.

¶ 5 During Patterson's testimony, the State introduced a video recording of the stop. The video recording began after Patterson pursued defendant, at approximately 9:01 a.m., and it did not show the traffic violation. The stop began at 9:02 a.m. At that time, Patterson approached defendant's passenger door, asked defendant a few questions, and informed him that he was receiving a written warning for following too close. Defendant gave Patterson his driver's license and rental agreement, and Patterson went to his squad car to prepare defendant's citation.

¶ 6 The videotape revealed that Patterson returned defendant's documents and issued the written warning approximately 10 minutes later. Patterson then asked defendant if he would answer a few more questions. Defendant agreed. During this conversation, Patterson asked defendant about his travel plans, the contents of the truck, and if he would consent to a search of

the cargo area. Defendant responded that he did not have a key to the cargo compartment but gave Patterson permission to search the cab. Patterson first instructed defendant to exit the cab and walk to the back of the vehicle where Patterson advised defendant he was not under arrest.

¶ 7 The officer conducted a pat-down search as required by state police policy. Patterson removed defendant's cellular telephone from his pocket and directed defendant to sit in the back of his squad car. According to Patterson it was "a very cold day" and he did not want defendant "running around in traffic." Defendant testified that he did not feel free to leave while he was sitting in the squad car while Patterson searched the cab.

¶ 8 While searching the cab, Patterson found items which were inconsistent with defendant's stated travel plans and a jacket with a cannabis reference on it. During the search, Illinois State Trooper John Morscheiser arrived and was directed by Patterson to locate a canine unit while he continued his search.

¶ 9 The canine unit arrived at 9:36 a.m. and began a walk-around search. Around 9:40 a.m., the dog alerted near the back of the vehicle, and Patterson ended the search of the cab, returned to his squad car and asked defendant for a key to the cargo area. Before Patterson could obtain a key, Morscheiser cut the lock off and discovered the cannabis.

¶ 10 The court denied defendant's motion and set the case for a jury trial. When ruling, the trial court reasoned that the burden was on defendant to show that a constitutional violation occurred. The court found that the initial stop was justified by probable cause of a traffic violation and found the traffic stop ended when Patterson returned defendant's documents to him, after approximately 10 minutes. Thereafter, the court observed defendant freely and voluntarily consented to the search of the cab. The court found the 26 minute search of the interior of the

cab was reasonable.

¶ 11 During defendant's jury trial, the parties stipulated that Illinois State Police Sergeant Wilfredo Rivera, an expert in the area of intent to deliver cannabis, would testify that in his experience the amount of cannabis entered into evidence far exceeded the 14 to 28 grams expected for personal use and indicated an intent to deliver. The stipulation did not address the street value of 14 to 28 grams of cannabis.

¶ 12 On September 21, 2011, the jury found defendant guilty of unlawful possession of cannabis with intent to deliver. Defendant filed a motion for new trial based, in part, on the court's ruling on defendant's motion to suppress evidence. The court denied the motion for new trial and proceeded to sentencing. During the sentencing hearing, the State requested a street value fine, based on the Rivera stipulation, of "\$3,000 per pound which would make it approximately \$36,000."

¶ 13 The trial court sentenced defendant to six years' imprisonment and assessed a street value fine "based upon the stipulation of the parties presented during the course of the trial and the evidence, is approximately [\$36,000]." Defendant did not object to the amount of the street value fine or file a postsentencing motion. Defendant filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 Defendant argues the trial court erroneously placed the burden of proof on him regarding his motion to suppress evidence and contends the video recording of the traffic stop reveals a traffic violation did not occur before the trooper initiated the traffic stop. The State responds that Patterson's observation of a traffic violation provided lawful justification for the stop.

¶ 16 When faced with a challenge to a trial court's ruling on a motion to suppress, we apply a

two-part standard of review. *People v. Luedemann*, 222 Ill. 2d 530 (2006). First, we review the trial court's findings of historical fact for clear error. We will not disturb its factual findings unless they are against the manifest weight of the evidence. *Id.* Second, we review the trial court's ultimate legal ruling on the motion to suppress *de novo*. *Id.*

¶ 17 Contrary to defendant's contentions on appeal, when a defendant motions the trial court to suppress evidence, the defendant has the burden to convince the court that the search and seizure were unlawful. 725 ILCS 5/114-12(b) (West 2010). The case law also provides that a defendant seeking the suppression of evidence must first make a *prima facie* case demonstrating the evidence was obtained as a result of an illegal search or seizure. *People v. Gipson*, 203 Ill. 2d 298 (2003). Once a defendant makes a *prima facie* case, the burden shifts to the State to counter the defendant's *prima facie* case, but the ultimate burden of proof remains with the defendant. *Id.* In this case, the court correctly allocated the burden of proof during the suppression hearing.

¶ 18 Next, defendant argues that the video recording contradicted and refuted Patterson's testimony that the stop was lawfully justified by a preceding traffic violation for following too closely. A traffic stop must be supported by reasonable, articulable suspicion that the driver has violated the Illinois Vehicle Code (Code). *People v. Hackett*, 2012 IL 111781. Reasonable suspicion exists where an officer possesses specific, articulable facts that, when combined with rational inferences derived from those facts, give rise to a belief that the driver is committing a traffic violation. *Id.*

¶ 19 Section 11-710(a) of the Code requires that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." 625 ILCS 5/11-

710(a) (West 2010). Here, Patterson testified before the court that he observed defendant's vehicle traveling on Interstate 80 within four feet of the bumper of a truck. Patterson also described the roadway had potholes making it dangerous for defendant to follow the vehicle ahead of him so closely.

¶ 20 After carefully reviewing the video recording, we agree the video does not document the condition of the roadway or the distance defendant was traveling behind the semitruck before the traffic stop. However, Patterson explained during his testimony that he did not activate the video camera until after he observed the Code violation and began pursuing defendant for purposes of stopping his vehicle. While defendant's version of the events differed from Patterson's, the trial court is in a superior position to evaluate the truthfulness of each witness' version of the events preceding the stop. We will not substitute our judgment on the credibility of the witnesses for that of the trial court. *People v. Sims*, 358 Ill. App. 3d 627 (2005).

¶ 21 Defendant argues that the police unlawfully prolonged the traffic stop itself by repeatedly questioning him regarding matters unrelated to the traffic offense in order to detain him until the arrival of a drug-sniffing dog. Generally, stopping a vehicle and detaining its occupants constitute a seizure and is subject to the requirement of reasonableness. *People v. McDonough*, 239 Ill. 2d 260 (2010). However, a traffic stop that is justified solely in the interest of issuing a warning ticket to the driver can become unlawful if it is "prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

¶ 22 There is no set period of time beyond which a lawfully justified traffic stop becomes an unreasonable seizure. *People v. Kats*, 2012 IL App (3d) 100683. Each case must be evaluated on its own facts. In the instant case, defendant was stopped at 9:02 a.m., when Patterson asked

defendant a few questions, requested his license and rental information, informed defendant of his traffic violation, prepared the warning citation, and returned defendant's documents to him together with his warning ticket, 10 minutes later. At this point, the traffic stop ended. We conclude, the initial traffic stop was not unduly prolonged and involved a reasonable period of time to complete a traffic stop for the traffic violation of following too closely.

¶ 23 Next, we consider whether Patterson's actions after delivering the warning ticket to defendant constituted a second, and potentially unreasonable seizure. See *People v. Cosby*, 231 Ill. 2d 262 (2008). A person is seized when, considering the totality of the circumstances, a reasonable person would believe he was not free to leave. *People v. Oliver*, 236 Ill. 2d 448 (2010); *People v. Brownlee*, 186 Ill. 2d 501 (1999). Circumstances that indicate a seizure include: (1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person of the citizen; or (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *United States v. Mendenhall*, 446 U.S. 544 (1980).

¶ 24 In this case, after the traffic stop ended, Patterson asked defendant a few additional questions before asking for permission to search the cargo area of the vehicle. Defendant denied permission to search the cargo area but agreed to allow Patterson to search the cab. At this point the video recording reveals Patterson was the only officer on the scene, did not use language or a tone of voice to compel compliance with his request, and did not display his weapon. Consequently, we conclude defendant was not subject to a second seizure when he voluntarily consented to allow the trooper to search the cab. The case law provides that an agreement to wait during the consensual search is inherent in the initial consent to the ensuing search and an

offender "cannot later complain the search time constituted an improper seizure." *Oliver*, 236 Ill. 2d at 458.

¶ 25 Based on this record, we conclude the trial court correctly found the 26-minute search was not unreasonably long and was lawful. The arrival of the canine unit during the 26-minute search of the cab did not violate defendant's rights. Defendant does not contest the basis for the entry into the cargo area once the dog alerted within minutes of arriving at the scene of the lawful traffic stop.

¶ 26 Finally, defendant submits the trial court erroneously imposed a street value fine without evidence to support the amount of the street value fine. The State contends defendant forfeited review of this issue by failing to ask the trial court to reconsider the sentence imposed or argue plain error on appeal. However, if this court reaches the merits of the sentencing issue, the State agrees that the street value fine did not have an evidentiary basis in the record.

¶ 27 To preserve an issue for appellate review, a defendant must object to the issue at trial and include it in a postjudgment motion. *People v. Enoch*, 122 Ill. 2d 176 (1988). Here, defendant did not object to the imposition of the street value fine, and he did not file a postsentencing motion. Consequently, this claim may only be reviewed for plain error. *People v. Franklin*, 2012 IL App (3d) 100618.

¶ 28 The traditional plain error test considers whether the trial court erred and: (1) the evidence was so closely balanced that the error threatened to tip the scales of justice against defendant; or (2) the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. See *People v. Piatkowski*, 225 Ill. 2d 551 (2007). It is undisputed the prosecutor misinformed the trial court that the stipulation contained information

regarding the value of the cannabis seized from the cargo compartment in this case. The record does not contain any evidence concerning the basis for the \$36,000 street value fine the court imposed. Thus, the second prong applies because this issue involves fundamental fairness and the integrity of the judicial process. *People v. Lewis*, 234 Ill. 2d 32 (2009) (plain error found where defendant's fine was imposed without an evidentiary basis). We conclude the court's imposition of a street value fine without an evidentiary basis constituted plain error. Therefore, we reverse and vacate the street value fine ordered by the court and remand the cause to modify the sentence accordingly.

¶ 29

CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court of La Salle County is affirmed in part and reversed in part, and the cause is remanded with directions.

¶ 31 Affirmed in part and reversed in part.

¶ 32 Cause remanded.