2014 IL App (2d) 120702-U
No. 2-12-0702
Order filed January 3, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-90
TYRONE JONES,	)	Honorable Patricia Piper Golden,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: (1) The trial court properly denied defendant's motion to suppress: defendant lacked standing, as he completely denied any interest in, or connection to, the evidence seized, which, he testified, was not derived from a search of his person or property; (2) we remanded the cause for the trial court to award the correct credit for time served, to clarify the fines imposed, to impose any additional mandatory fines, to award monetary credit of $5 per day for each day served before sentencing (not merely before trial), and to apply that credit to the appropriate fines.

¶ 2

¶ 2 Defendant, Tyrone Jones, was indicted in the circuit court of Kane County on one count of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010)), arising out of the seizure of two packets of crack cocaine during a traffic stop. Defendant appeals the denial

of his motion to suppress evidence and also challenges certain aspects of his sentence. Because the trial court correctly ruled that defendant lacked standing, we affirm the denial of the motion to suppress. However, we remand for entry of the correct amount of credit for time served, clarification of the fines that were imposed, imposition of any applicable mandatory fines, award of the $5-per-day credit for all days served prior to sentencing, and application of that credit to the appropriate fines.

¶ 3 I. BACKGROUND

¶ 4 Defendant filed a motion to suppress evidence in which he asserted that the traffic stop was improper, because the Aurora police stopped him outside of their jurisdiction and because there was no valid basis for the stop. He further posited that there was no probable cause, exigent circumstances, consent, or search warrant that justified the search of his person.

¶ 5 On direct examination at the hearing on the motion to suppress, defendant testified that on January 14, 2010, he was driving in Batavia when the police stopped him. After one of the officers asked for, and defendant gave him, his license and proof of insurance, the officer returned to his squad car. About 10 minutes later, the officer returned, banged on the window of defendant's vehicle, and told defendant to step out of the vehicle. When defendant asked why he wanted him to exit his vehicle, the officer unclipped his holster. Defendant exited the vehicle.

¶ 6 The officer told defendant that he was going to search him and asked defendant to go to the rear of the car and "assume the position." Defendant did so, putting up his hands and spreading his legs. The officer then searched defendant and arrested him. According to defendant, there was no arrest warrant for him, nor was there a search warrant for either him or his vehicle.

¶ 7 On cross-examination, defendant stated that he began driving north on Farnsworth Avenue in Aurora before he entered Batavia. When asked if he used his turn signal when entering the roadway from the Aurora Fox Valley Inn, defendant answered that he "always use[d] [his] turn signals." To the question of whether he used his turn signal when he changed lanes, he reiterated that he always used his signal. The trial court interjected, asking him if he used his signal in that particular situation, to which he responded, "Yes, I used my signal."

¶ 8 Defendant elaborated on cross-examination that, when the officer unsnapped his holster, he "aggressively said get out" of the vehicle. As defendant exited, the officer "grabbed [his] arm and aggressively pulled [him] around" and told him to assume the position. Defendant acknowledged that he knew what the officer meant by that latter phrase.

¶ 9 The officer then patted him down. Defendant denied having anything in his hand, or having dropped anything on the ground. Although defendant agreed that there was "something on the ground," he denied having seen two white baggies on the ground, or that any baggies were his.

¶ 10 Defendant's only other witness was Benjamin Grabowski, one of the two arresting officers. Officer Grabowski testified that he was employed by the Aurora police department when he stopped defendant.

¶ 11 After defendant rested, the State contended that "the burden [had] not shifted." In support, the State argued that there had been no testimony "as to what was illegally confiscated" and that defendant had denied ownership of whatever was confiscated. Thus, the State argued that the evidence was "abandoned property" and that defendant had "no standing to contest the arrest."

¶ 12 Defendant responded that he was asking for a ruling that the stop was illegal and that it occurred outside the officers' jurisdiction. He added that he was seeking suppression of anything that "happen[ed] after the stop."

¶ 13 The trial court reviewed defendant's motion to suppress, and after doing so, ruled that defendant had not "sustained the necessary burden based upon standing." The court added that the motion was not one to quash an arrest, but rather was a motion to suppress evidence.

¶ 14 The trial court ruled that there must be "some indicia of ownership to suppress something that you own" and that defendant had not established that there "[was] any connection to the property that was found by the police in reference to the [d]efendant." The court pointed to defendant having denied knowing anything about the two baggies or that he owned them. Accordingly, the court ruled that because there was "no indicia of ownership," no "indication that [the evidence] was taken from the person of the [d]efendant," and no "connection to the [d]efendant," it could not presume any such connection. Therefore, the court denied the motion to suppress.

¶ 15 At defendant's bench trial, it was established that on January 14, 2010, Aurora police officers Grabowski and Hahn were working as part of the special operations group, investigating drug and gang activity. At about 9:40 p.m., they were parked in their semi-marked squad car along Farnsworth Avenue in Aurora, approximately one mile from the border with Batavia. They observed defendant's vehicle driving north on Kirk Road within the city limits of Aurora.[1] They followed defendant and saw him make at least one lane change without using a turn signal. It took "awhile to catch up to the vehicle because the flow of the traffic [was] heavy." They did not attempt to stop the vehicle while they were still in Aurora. By the time they overtook defendant's vehicle, they were in the city of Batavia. They

[1] Farnsworth Avenue becomes Kirk Road before it enters Batavia.

stopped the vehicle by activating their emergency lights.

¶ 16 Both officers approached the vehicle, with Officer Hahn on the driver's side and Officer Grabowski on the passenger side. The only occupant was defendant.

¶ 17 After briefly talking with defendant, Officer Hahn asked him to exit and go to the rear of defendant's vehicle. Officer Hahn asked defendant if he had anything on him that was illegal, and defendant said no. Officer Hahn asked if he could pat down defendant, and defendant said yes.

¶ 18 As Officer Hahn asked defendant to put his hands on his head, he observed defendant "drop what appeared to be two plastic baggies from his hand that [fell] to the ground." Before that, Officer Hahn saw nothing on the ground. Based on his prior police training and experience, Officer Hahn recognized the substance in the baggies as crack cocaine.

¶ 19 Officer Hahn arrested defendant. After waiving his *Miranda* rights, defendant stated that he was coming from a nearby motel and that he was "just hanging on to the substance for a friend."

¶ 20 Defendant did not testify at trial. The trial court found that defendant made an illegal lane change before the stop. It also found that the stop occurred outside the city of Aurora. The court found that defendant dropped the plastic baggies and that he told the officers that he was holding them for someone. Thus, the court found that defendant knowingly possessed the crack cocaine and found him guilty of possession of a controlled substance.

¶ 21 Defendant filed a written posttrial motion, in which he contended that the trial court "erred in denying his motion to suppress" and that, had the court granted his motion, there would have been no evidence upon which to find him guilty. Defendant argued orally that the motion to suppress should have been granted because the stop occurred outside the Aurora city limits. He also stated that "there was nothing [that] happened at the motion hearing that didn't happen at the trial." The trial court, in denying the posttrial motion, stated that there was testimony at the trial about the officers' location in Aurora when they first observed defendant and that it took time for them to catch up through the traffic. The court noted that nothing it heard at the trial caused it to conclude that the earlier ruling (by a different judge) on the motion to suppress was error.

¶ 22 At the sentencing hearing, the trial court sentenced defendant to 180 days in jail. Because of good-time credit applied to time already served, defendant was released. He was also sentenced to 30 months' probation, conditioned on his participation in the TASC program.

¶ 23 The trial court also imposed "regular fines, costs, fees and assessments." In doing so, it noted that defendant would get the $5-per-day credit toward fines for his pretrial custody only and not for his posttrial, presentencing custody. The written judgment stated that defendant was to pay $50 per month as a probation fee, a $300 fine, costs of $350, a drug fine of $100, a trauma center fee of $100, a drug testing fee of $50, and a crime lab fee of $100. The total amount defendant was ordered to pay in fines, fees, and costs was stated in the written judgment as $2,400.[2] The written judgment also stated that defendant received 113 days of credit for time served. Defendant then filed this timely appeal.

¶ 3 ¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant contends that the trial court erred when it ruled that he lacked standing. Specifically, he argues that his testimony at the suppression hearing, in which he denied any knowledge of, or connection to, the two baggies of crack cocaine, did not deprive him of standing to challenge "the legality of the officer's search and seizure of him." Defendant also contends that the written judgment should be corrected to reflect the actual number of days of presentencing credit for time served and to award him $5-per-day credit against his fines for all days served before sentencing. In his reply brief, he agrees with the State that the case should be remanded so that the trial court can correct the mittimus to reflect the proper amount of credit for time served, specify what fines the $300 fine was meant to cover, impose any applicable mandatory fines, and apply the $5-per-day credit to the appropriate fines.

¶ 26 Review of a trial court's decision on a motion to suppress evidence presents a mixed question of law and fact. *People v. Nichols*, 2012 IL App (2d) 100028, ¶ 40. Findings of fact will be upheld unless they are against the manifest weight of the evidence. *Nichols*, 2012 IL App (2d) 100028, ¶ 40. Because a reviewing court remains free to assess the facts in relation to the issues presented and draw its own conclusions when deciding what relief to grant, we review *de novo* the ultimate question of whether the evidence should be suppressed. *Nichols*, 2012 IL App (2d) 100028, ¶ 40.

¶ 27 As to the issue of standing, a fourth amendment challenge can be maintained only by someone whose rights

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[2] This is an apparent mathematical error, as the various amounts, including the $50-per-month probation fee, total $2,500. Further, although the State states in its brief that defendant was ordered to pay a $5 spinal cord injury fine, the written judgment does not indicate that that fine was imposed.

actually have been violated by the search or seizure, and not by someone who has been aggrieved solely by the introduction of damaging evidence. *Nichols*, 2012 IL App (2d) 100028, ¶ 41. The capacity to claim a fourth amendment violation depends, not upon property rights, but upon whether the defendant has a legitimate expectation of privacy in the place searched or the item seized. *Nichols*, 2012 IL App (2d) 100028, ¶ 41.

¶ 28 In determining whether a defendant has standing to contest a search or seizure, property ownership is one factor, along with the defendant's legitimate presence in the area searched, his possessory interest in the area searched or the property seized, his prior use of the area searched or the property[3] seized, the defendant's ability to control the property or exclude others from using it, and the defendant's subjective expectation of privacy in the property. *Nichols*, 2012 IL App (2d) 100028, ¶ 41 (citing *People v. Kidd*, 178 Ill. 2d 92, 135-36 (1997)). The defendant has the burden of demonstrating that he has standing to challenge a search or seizure. *People v. Rosenberg*, 213 Ill. 2d 69, 78 (2004).

¶ 29 A defendant who completely denies any interest in a seized item does not have standing to seek suppression of that evidence. *People v. Casas*, 234 Ill. App. 3d 847, 853 (1992); see also *People v. Allen*, 268 Ill. App. 3d 279, 285 (1994) (defendant who disavows an ownership or property interest in an item loses standing to dispute the search and seizure related to that item). Because a defendant has the right to testify at a suppression hearing without jeopardizing his defense at trial, the State may contend at trial that a defendant possessed an illegal substance even though it argued at a suppression hearing that he had no interest in the substance sufficient to invoke standing.[4] *Casas*, 234 Ill. App. 3d at 853 (citing *United States v. Salvucci*, 448 U.S. 83, 90 (1980)).

¶ 30 In our case, during cross-examination at the suppression hearing, defendant denied having anything in his hands or dropping anything to the ground while he was at the back of his vehicle. Although he agreed that there was

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[3] Although in *Nichols* the court, in listing this factor, used the term "area" as opposed to property, it did so presumably because the case it was citing, *People v. Kidd*, 178 Ill. 2d 92, 135-36 (1997), used that term. However, the case that *Kidd* cited, *People v. Johnson*, 114 Ill. 2d 170, 191-92 (1986), used the term "property." Thus, we use the term "property" as to this factor.

[4] The former rule of "automatic standing" to challenge a search or seizure in a case involving a possession offense was abolished by *Rakas v. Illinois*, 439 U.S. 128 (1978). See *People v. McCoy*, 269 Ill. App. 3d 587, 591 (1995).

"something on the ground" when he was being patted down, he denied ever seeing "two white bags"[5] and also denied that they were his bags. His unequivocal denial of any interest in, or connection to, the evidence seized defeated his standing to seek its suppression.[6]

¶ 31 Although defendant relies primarily on two cases in contending that he had standing, those cases are distinguishable. In *People v. Davis*, (187 Ill. 2d 265 (1989)) the defendant sought to challenge the seizure of narcotics that resulted from an alleged illegal search of his clothing. Although the defendant denied the existence of the seized drugs, the court rejected the State's argument that the defendant lacked standing. It did so because the evidence showed that the defendant had an interest in his person and clothing, the places searched, irrespective of whether he denied the presence of the drugs seized therefrom. *Davis*, 187 Ill. App. 3d at 268. That differs from our case, in which defendant denied the existence of the evidence, or any connection thereto, and there was no evidence of any search of his person or clothing that resulted in the discovery of the crack cocaine.

¶ 32 The other case principally relied on by defendant, *Gardner v. United States*, 680 F.3d 1006 (7th Cir. 2012), is equally unavailing. In that case, the defendant sought to suppress a pistol found in his coat pocket during a frisk. *Gardner*, 680 F.3d at 1007. In holding that trial counsel was ineffective for concluding that the defendant had no standing to challenge the search of his coat pocket, the Seventh Circuit stated that the defendant indeed had a reasonable expectation of privacy in his person and coat, notwithstanding his denial of having possessed the pistol. *Gardner*, 680 F. 3d at 1010. That case is also distinguishable from the case before us, as the defendant there had an expectation of privacy in the area from which the evidence was seized. There was no showing here that an invasion of any similar privacy interest resulted in the seizure of the evidence.

¶ 33 Because of defendant's clear denials of the existence of the evidence, or of any interest in, or connection to, that evidence, he failed to meet his burden of establishing any reasonable expectation of privacy in the evidence or in

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[5] Although defendant states in his brief that he "acknowledged that the officers found two white bags on the ground," that is an inaccurate description of his testimony. He merely admitted that there was "something on the ground," but otherwise denied the presence of the two bags or his having any connection thereto.

[6] We recognize that defendant would have standing to seek suppression of any evidence that was seized as a result of the search or seizure of his person. See *People v. Johnson*, 237 Ill. 2d 81, 92 (2010). Nonetheless, based on defendant's testimony at the suppression hearing, the evidence here was not found on defendant's person and was not otherwise connected to defendant.

the area in which it was found. Therefore, the trial court correctly denied his motion to suppress evidence.[7]

¶ 34 Defendant next contends that the trial court erred in determining the number of days for which he was entitled to credit for time served and asks us to correct the mittimus to reflect the proper number of days of credit. He contended in his opening brief that he should have received credit for 120 days, as opposed to 113 days, the amount shown on the written judgment. The State agreed, but, in his reply brief, defendant maintained that the total was 121 days, because he actually served part of the day on both January 14 and 15, 2010.

¶ 35 A request for a correction in the amount of credit for time served may be made for the first time on appeal. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008). Here, the State agrees that the mittimus should reflect 120 days of credit. As for the additional day of credit sought by defendant in his reply brief, he is entitled to that for having been in custody at least a portion of both January 14 and 15, 2010.[8] See *People v. Smith*, 258 Ill. App. 3d 261, 267-68 (1994). Although we have the authority to correct the mittimus as to the credit for time served (see Ill. S. Ct. R. 615(b) (eff. Jan. 1, 1967); *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007)), we direct the trial court to do so as we are remanding this cause for other reasons.

¶ 36 Defendant contends that the trial court erred in limiting the $5-per-day credit for each day of time served to the time in which he was in custody before trial and that he should receive credit for the time he spent in custody after trial but before he was sentenced. The State correctly agrees. See *People v. Jones*, 223 Ill. 2d 569, 580 (2006).

¶ 37 As for the $5-per-day credit, the State contends, relying on section 5-9-1(c-5) of the Unified Code of Corrections (730 ILCS 5/5-9-1(c-5) (West 2010)), that that credit does not apply to the Trauma Center Fund fine. That argument lacks merit. The provision that applies to this case, pertaining to a controlled substance offense, is section 5-9-1.1(b) (730 ILCS 5/5-9-1.1(b) (West 2010)). Section 5-9-1.1(b) does not prohibit application of the $5-per-day credit in this case. See *Jones*, 223 Ill. 2d at 593-95. Accordingly, the Trauma Center Fund fine is subject to the $5-per-day credit.

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[7] Because we decide the issue on this basis, we need not address the State's argument that defendant forfeited his contention that the pat-down was illegal.

[8] The record shows that defendant was taken into custody on January 14, 2010, and released on January 15, 2010. The State agrees that defendant was in pretrial custody "on January 14-15, 2010."

¶ 38 Additionally, the State contends that the trial court needs to clarify what it meant when it imposed the $300 fine. Defendant agrees. Thus, we remand for that purpose.

¶ 39 The State also argues that this case should be remanded so that the trial court can impose any mandatory fines not already imposed. Defendant agrees to a remand for this purpose. We agree that certain other mandatory fines might be applicable and, if so, that the $5-per-day credit might apply to those fines. See *People v. Williams*, 2011 IL App (1st) 091667-B, ¶ 19. Thus, we remand for the trial court to make those determinations.

¶ 40 III. CONCLUSION

¶ 4 ¶ 4 1 For the foregoing reasons, we affirm the denial of defendant's motion to suppress evidence. However, we remand this case for the trial court to enter the proper number of days of credit for time served, to clarify what it meant by the $300 fine, to impose any applicable mandatory fines not already imposed, to credit defendant $5 per day for all days served prior to sentencing, and to apply the $5-per-day credit to all appropriate fines.

¶ 5 ¶ 4 2 Affirmed; cause remanded with directions.