FOURTH DIVISION
June 30, 2016

No. 1-14-1252

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 17458
	)	
RICHARD JACKSON,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction for aggravated unlawful use of a weapon is affirmed where the evidence of his possession of a firearm was obtained lawfully as defendant gave his voluntary consent to allow officers to search his vehicle.

¶ 2 Following a bench trial, defendant Richard Jackson was convicted of two counts of aggravated unlawful use of a weapon and sentenced to two years' probation. On appeal,

defendant contends that any evidence that he was in possession of a gun was obtained through an illegal search and seizure and thus, this evidence should be suppressed and his conviction reversed. Defendant also contends that because the initial search was unlawful, his subsequent statement to police officers admitting he purchased the gun and carried it without a firearm owner's identification (FOID) card is also inadmissible. We affirm.

¶ 3 Defendant was charged with four counts of aggravated unlawful use of a weapon (AUUW) and one count of possession of a stolen firearm (720 ILCS 5/16-16(a) (West 2010)). The State dismissed two of the AUUW counts prior to trial. The two remaining counts alleged that defendant possessed the firearm on his person or in his vehicle without a valid FOID card (720 ILCS 5/24-1.6(a)(1)(3)(A), (3)(C) (West 2012)).

¶ 4 Defendant filed a pretrial motion to quash arrest and suppress evidence on the basis that the gun in question was seized from his vehicle during an unlawful search and seizure in violation of his constitutional rights under the fourth amendment. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. At the hearing on this motion, defendant testified that the police were called to his girlfriend's mother's home following a physical altercation between his girlfriend, Danielle Anderson (Ms. Anderson), and her brother, Rasheed Anderson (Mr. Anderson). When the police arrived, defendant was inside the home but eventually walked outside to discuss the dispute with the officers. At some point, "information" was relayed to the officers over radio and they placed defendant in handcuffs, performed a pat down search and removed the keys to defendant's vehicle from his pocket. The officers searched the vehicle and discovered the firearm at issue. Defendant denied giving the officers consent to search his vehicle or his person and

denied leaving the home prior to the police officers' arrival. On cross-examination, defendant stated that he had "stepped outside" of the house prior to police arriving on the scene.

¶ 5 Officer Wojcik testified that on July 18, 2010, he and other officers, including Officers Maletich and Miro, responded to a domestic disturbance at 1444 Forest Place in Calumet City. While in route to this location, Officer Wojcik received information from dispatch that the suspect, Mr. Anderson, had left the scene in a maroon vehicle. Upon arriving, Officer Wojcik spoke with Ms. Anderson outside of the residence. No one else, including defendant, was present during this time although the ambulance had arrived. Ms. Anderson explained that the altercation began when defendant and her brother were inside the house arguing. Ms. Anderson got in between them and Mr. Anderson punched her in the head, knocked her down, and kicked her.

¶ 6 Officer Miro relayed over radio to Officer Wojcik that he had stopped a maroon vehicle he observed driving away from the area. Mr. Anderson was present in the vehicle. He advised Officer Miro that defendant should be arriving at the scene in a white Chevy Malibu and always had a gun in the vehicle.

¶ 7 A white Chevy Malibu driven by defendant subsequently arrived on scene. Defendant exited the vehicle and advised the officers that he was Ms. Anderson's boyfriend. Officer Maletich approached defendant and performed a pat down search to ensure he was not carrying a gun. Officer Wojcik remained with Ms. Anderson. While the pat down was being performed, Officer Wojcik overheard Officer Maletich advise defendant that he was performing the search because they had received a tip that defendant always carried a gun in his vehicle. A gun was not recovered at this time.

¶ 8 After the pat down search, Officer Maletich asked defendant if he had a gun in his vehicle. Defendant denied having a gun, but explained, "[T]he only thing I have is the lighter [in the shape of a gun] in there, but if you want to looked [*sic*] go ahead and look." Officer Maletich searched the vehicle and recovered a small pistol. Defendant was then taken into custody.

¶ 9 Officer Maletich's testimony was substantially similar to that of Officer Wojcik. In addition, Officer Maletich testified that he performed a "protective pat down" of defendant. Defendant asked what was "going on" and the officer informed him that Mr. Anderson told the officers that defendant had a gun in his vehicle. After the pat down search, Officer Maletich and defendant were relaying information "back and forth." Officer Maletich testified that he and defendant had the following conversation:

"[Defendant] said to me *** I have a lighter that looks like a gun that's in the console. I said, can I take a look, and [defendant] said absolutely[.] *** I opened up the car door and I saw the lighter. I said, okay that is fair enough *** is there anything else in the car that I should know about[?] [Defendant] said, [N]o. Go ahead and take a look."

Officer Maletich then searched the vehicle. "[U]nder the lose panel, the dashboard," he recovered a silver .25 caliber automatic pistol. He then placed defendant into custody. Officer Maletich denied that defendant was handcuffed prior to his arrival on the scene and confirmed that defendant arrived on the scene in a white vehicle following the officers' arrival.

¶10 Defendant recalled Officer Wojcik in rebuttal and was confronted with his grand jury testimony in which he had responded "Yes," to the question, "Did you search the vehicle and recover a .25-caliber semi-automatic pistol?" On cross-examination, Officer Wojcik explained he did not understand the question to mean "[him] personally."

¶ 11 The court denied defendant's motion, finding defendant gave his voluntary consent to search his vehicle. In so finding, the court stated that the initial "*Terry* pat down" (*Terry v. Ohio*, 392 U.S. 1 (1968)), was justifiable in light of the tip that defendant always carried a gun in his vehicle and defendant had exited the vehicle when he arrived on the scene. The court also concluded that no probable cause existed to search the vehicle. However, given the testimony of "two police officers" the trial court found "actual consent [was] given" and therefore, the consent "justif[ied] the search of the vehicle."

¶ 12 At trial, Thomas Tandaric testified that he was the owner of the firearm found in defendant's vehicle. He stated the gun was stolen from his vehicle on February 18, 1998, and he reported it stolen the next day.

¶ 13 Officer Wojcik's testimony at trial remained substantially the same as during the pretrial motion. In addition, he stated that defendant asked why he was being patted down when he arrived on the scene and the officers informed him that they were searching for a gun. When they searched defendant's vehicle, the gun they recovered was fully loaded. Upon finding the gun, defendant was taken into custody. The officers then ran a search of the gun and concluded the gun had been reported stolen. On cross-examination, Officer Wojcik stated that the gun they recovered was in a compartment within the dashboard, but the compartment was not locked.

¶ 14 Sergeant Rapacz testified that he interviewed defendant at the police station later that day. Before speaking with defendant, he read defendant his *Miranda* rights and defendant indicated he understood them. Defendant informed the sergeant that the gun recovered belonged to him, that he purchased it from a "street sale" but was not aware the gun was stolen, and admitted he did not have a FOID card. Defendant also stated that he keeps the gun in a

compartment located in the dashboard of his vehicle. Sergeant Rapacz reduced defendant's statement to writing and allowed defendant to review the statement before signing it. The State also entered into evidence a certification from the Illinois State Police that a FOID card had never been issued to defendant.

¶ 15 The court found defendant guilty of two counts of aggravated unlawful use of a weapon and not guilty of possession of a stolen firearm. It sentenced defendant to two years' probation.

¶ 16 On appeal, defendant contends the trial court erred by denying his motion to quash arrest and suppress evidence because the search of his vehicle that led to the officers' discovery of the handgun was conducted without his voluntary consent and that the officers lacked probable cause to search it. Defendant also argues that his statement to police once he was taken into custody was the fruit of the unlawful search of his vehicle and therefore, should have been suppressed. He asserts that his convictions should be reversed as, without the gun and his statement, the State could not prove on remand the necessary elements of the offense beyond a reasonable doubt. The State responds that defendant gave his voluntary consent to search the vehicle and thus the evidence was admissible and his convictions should be sustained. For the reasons that follow, we agree with the State and affirm defendant's convictions.

¶ 17 A bifurcated standard of review is employed when reviewing a trial court's ruling on a motion to suppress. *People v. Almond,* 2015 IL 113817, ¶ 55. We review a trial court's factual findings under a manifest weight of the evidence standard of review but apply a *de novo* standard of review to the ultimate legal question as to whether the evidence should be suppressed. *People v. Timmsen*, 2016 IL 118181, ¶ 11. Further, we may consider evidence presented at defendant's trial and at the suppression hearing. *Almond*, 2015 IL 113817, ¶ 55.

¶ 18 Defendant does not challenge the trial court's factual or credibility findings in its ruling on the motion to suppress. Instead, he argues that the evidence does not support a finding of voluntary consent as a matter of law. As such, our review is *de novo*.

¶ 19 Our supreme court has construed the search-and-seizure clause of the Illinois Constitution in a manner consistent with the United States Supreme Court's fourth-amendment jurisprudence. *People v. Anthony*, 198 Ill. 2d 194, 201 (2001). The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. Generally, reasonableness in this context requires a warrant supported by probable cause. *Anthony,* 198 Ill. 2d at 201-02. However, a warrantless search conducted with the voluntary consent of the person whose property is searched does not violate the fourth amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Anthony,* 198 Ill. 2d at 202.

¶ 20 Consent searches do not involve coercion or detention and therefore do not involve a seizure. *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006). "The validity of a consent search depends on the voluntariness of the consent." *Anthony,* 198 Ill. 2d at 202. Consent is invalid unless it is voluntary, which requires that consent be given freely without duress or coercion, either express or implied. *Schneckloth*, 412 U.S. at 228; *Anthony*, 198 Ill. 2d at 202. Consent cannot be "extracted" by implied threat or covert force. *Anthony,* 198 Ill. 2d at 202.

¶ 21 Under the fourth amendment, an individual is "seized" when an officer "restrain[s] the liberty of a citizen," " 'by means of physical force or show of authority.' " *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Terry*, 392 U.S. at 19). However, a seizure does not occur simply because an officer approaches an individual and asks them questions. *United States v. Drayton*,

536 U.S. 194, 200 (2002). "So long as a reasonable person would feel free to 'disregard the police and go about his business,' [citation], the encounter is consensual and no reasonable suspicion is required." *Bostick,* 501 U.S. at 434.

"[W]hen taking into account ' " 'all the circumstances surrounding the incident' " ' [citation], [if] the conduct of the police would lead a reasonable innocent person under identical circumstances to believe that he or she was not 'free to decline the officers' requests or otherwise terminate the encounter' [citation], that person is seized. Accordingly, this analysis hinges on an objective evaluation of the police conduct and not upon the subjective perception of the individual approached." *People v. Gherna,* 203 Ill. 2d 165, 178 (2003).

¶ 22 Applying the principles above, we conclude the trial court was correct in holding that defendant gave his voluntary consent to search his vehicle and was not seized within the meaning of the fourth amendment to render his consent involuntary. The record reveals that the encounter between defendant and the police officers was initiated by defendant when he drove his vehicle to the scene, exited his vehicle, and spoke with the officers. After the initial pat down, for which defendant does not dispute that police had lawful justification, the encounter became conversational in nature. Defendant and Officer Maletich were exchanging information "back and forth."

¶ 23 Subsequent to this exchange of information, Officer Maletich questioned defendant regarding the gun's presence in his vehicle, to which defendant voluntarily supplied information regarding a gun-shaped lighter in the console and allowed Officer Maletich to search the console in response to the officer's request. The officer then asked if there was anything additional in the vehicle. Defendant responded, "[N]o. Go ahead and take a look," and the officer subsequently

recovered a handgun. The question posed to defendant after the initial search of the console, however, was not a request to search the vehicle.

¶ 24 As previously stated, a seizure does not occur simply because the officers pose questions to a person. *Drayton*, 536 U.S. at 200. Defendant was not seized at the time he suggested that Officer Maletich search his vehicle. After the initial pat down search, the encounter became conversational in nature and defendant voluntarily remained on the scene to relay information to the officers, but was not detained. The officers did not use physical force or a show of authority that in some manner suggested to defendant that he was not free to leave or could not ignore the initial request to search his vehicle's console or offer his permission to extend the scope of the search. Defendant was not a suspect in the domestic violence incident and there is no evidence in the record to suggest that the officers intimidated defendant, brandished their weapons, placed him in handcuffs, restricted his movements, raised their voices or gave him an order in a manner that suggested defendant had no choice but to allow officers to search his vehicle.

¶ 25 It was defendant, not the officers, who initiated the entire encounter. Although defendant testified that he was in the house and the police initiated the encounter, the court found the officers' version of events credible and defendant does not challenge that credibility determination on appeal. We defer to the court's credibility finding as it had the opportunity to observe the witnesses' demeanor and resolve conflicts in their testimony and its credibility findings were not against the manifest weight of the evidence. *Gherna*, 203 Ill. 2d at 175.

¶ 26 Further, although there were two officers present when defendant arrived on the scene, one remained with defendant's girlfriend to continue the interview regarding the domestic dispute while the other spoke with defendant. Thus, under these circumstances, we disagree with

defendant that his consent to search his vehicle, both at the officer's request, and then again unprompted, was " 'mere acquiescence' " to a display of the officers' force or show of authority (*Anthony*, 198 Ill. 2d at 202), or that his consent was involuntary because he had been seized when the officers performed a pat down search prior to questioning him. The consent was given free of duress or coercion on the part of the police officers and thus was voluntary. *Schneckloth*, 412 U.S. at 228.

¶ 27 Defendant relies on several cases including *Anthony*, 198 Ill. 2d 194, *People v. Kveton*, 362 Ill. App. 3d 822 (2005), and *Gherna*, 203 Ill. 2d 165, to illustrate allegedly similar circumstances wherein the court found that consent to search was involuntary as the initial encounter evolved into a seizure and consent was given only in acquiescence to police authority. These cases are distinguishable.

¶ 28 First, none of the cases cited by defendant involve a consensual encounter that, as here, was initiated by defendant rather than police officers. Second, in both *Gherna* and *Kveton*, the court found the defendant's consent to search was involuntary as it was given after an unlawful seizure had occurred. In both cases, the court held that the police officers exceeded the scope of their initial stop without justification by unlawfully continuing to detain the defendant once the impetus for the stop had been allayed. *Gherna*, 203 Ill. 2d at 184; *Kveton*, 362 Ill. App. 3d at 825.

¶ 29 In *Kveton*, police officers approached the defendant as he was leaving his home based on an informant's tip that he usually bought cannabis from the defendant. *Kveton*, 362 Ill. App. 3d at 824, 827. The officers crossed oncoming traffic with their police vehicles, "came to a screeching halt" in front of the defendant's home, and blocked the path available for exit. *Id.* at 825. The

arresting officer used a "directive voice," told the defendant to "get over here," and stated that "he knew what the defendant 'was up to.' " *Id.* The officer then asked what the "backpack contained," told the defendant he was under arrest, and "ordered defendant to open the backpack." *Id.* Defendant allowed the officer to search his backpack and afterwards gave permission for the officers to search his home. *Id.* at 825-26. This court concluded that "police officers had no reason to believe that defendant had committed a crime at the time of the [initial] encounter," and reasoned that "[the] defendant's consent to the initial encounter and ensuing search outside was an involuntary acquiescence to police authority." *Id.* at 825. We reasoned that "even if the first search was constitutional, [the] defendant's consent to the second search [of] his home was involuntary because he was under arrest at that point." *Id.*

¶ 30 Similarly, in *Gherna*, our supreme court concluded that the defendant had been unlawfully seized once the officers continued to detain defendant after their initial justification for the *Terry* stop had been dispelled. *Gherna*, 203 Ill. 2d at 184. In *Gherna*, police officers approached the defendant while she was seated in her vehicle with her 13-year-old daughter based upon their suspicion that underage drinking had occurred. *Id.* at 179. They had observed a beer bottle in the center console of defendant's vehicle. *Id.* The officers approached the vehicle, confirmed the beer bottle was unopened and that defendant was over the age of 21. *Id.* at 185. However, they remained "stationed on both sides of [the] defendant's truck, with their bicycles positioned next the vehicle's doors, and proceeded to question defendant about her reasons for being in the area" while "using a flashlight to illuminate the interior of the passenger compartment." *Id.* at 185-86. The court found that the officers' actions demonstrated that the

defendant was detained, that she "remained [unlawfully] seized within the meaning of the fourth amendment," and thus, her subsequent consent to search was given involuntarily. *Id.* at 186-87.

¶ 31 Unlike in *Kveton* and *Gherna*, the officers in the instant case did not continue to detain defendant after the initial lawful search – here, the pat down. There is no credible evidence that they otherwise surrounded him or otherwise intimidated or coerced him. He was free to leave but chose not to.

¶ 32 Defendant also relies heavily on our supreme court's holding in *Anthony*. In *Anthony*, upon observing defendant leave a building and walk towards an alley to avoid police contact, police officers called to the defendant from 50 feet away and questioned him regarding his presence in the area as the officers knew the defendant did not live in the building. *Anthony*, 198 Ill. 2d at 197-98. During the encounter, officers ordered defendant to keep his hands out of his pockets, asked the defendant if he had anything on him that he should not, and after defendant responded "no," finally requested to perform a pat down search. *Id.* at 198. Defendant did not verbally consent, but "spread his legs apart and put his hands on top of his head, assuming the position," which officers understood as nonverbal consent to search his person. *Id*. Although the officers did not use physical force, the defendant was "nervous[,] his hands were shaking, and his voice was stuttering." *Id.*

¶ 33 The *Anthony* court looked not only to the police officers' objective conduct but also to evidence of the defendant's behavior which expressed the "possibly vulnerable subjective state of the person who consents" to interpret whether the officers objectively should have known whether the defendant's nonverbal gesture communicated voluntary consent. *Id.* at 202, 203. It found the defendant's non-verbal gesture was "a single ambiguous gesture" from which "dueling

inferences [of acquiescence and consent] so easily arise." *Id.* at 203. The court concluded that "considering the totality of the undisputed facts in this case," that absent a clear indication of voluntary consent, where equal inferences can be made from the evidence that defendant had acquiesced to force and voluntarily consented, the State failed to meet its burden to prove defendant gave his voluntary consent. *Id.* at 203-04.

¶ 34 Unlike in *Anthony*, defendant's consent here was not ambiguous. *Anthony*, 198 Ill. 2d at 203. He twice gave his unequivocal verbal consent to search his vehicle. In the second instance, he suggested the officers' search his vehicle before it was asked of him. Further, unlike in *Anthony*, there is no indication that defendant was in a "vulnerable subjective state." There is no evidence to suggest defendant was intimidated or nervous about the officer's questions as he initiated the encounter with the officers and continued to exchange information with them after the initial pat down.

¶ 35 In conclusion, we find the officers' objective behavior did not demonstrate duress or coercion. The encounter was not a seizure within the meaning of the fourth amendment. Defendant was able to, and clearly gave, his voluntary consent for police officers to search his vehicle which resulted in the discovery of a handgun. Defendant's statement admitting ownership of the gun and its presence in his vehicle was not the result of an unlawful search and seizure. Thus, the trial court did not err when it denied defendant's motion to quash arrest and suppress evidence. Accordingly, defendant's conviction is affirmed.

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.