2017 IL App (1st) 151205-U

No. 1-15-1205

Order filed August 16, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 14 C3 30912
	)	
KYLE SCHULYER,	)	Honorable
	)	Thomas P. Fecarotta, Jr.,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in denying defendant's motion to quash arrest and suppress evidence. Police stopped car, with defendant as passenger, upon reasonable suspicion of criminal activity by occupants. Brief questioning of defendant while detained for investigation of reasonable suspicion did not violate *Miranda*.

¶ 2 Following a bench trial, defendant Kyle Schulyer was convicted of possession of a controlled substance (less than 15 grams of heroin) and sentenced to two years' probation. On appeal, defendant contends that his motion to quash arrest and suppress evidence was

erroneously denied because the police stopped the car he was riding in without reasonable suspicion, and failed to inform him of his *Miranda* rights before he gave an incriminating statement while in custody. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with possession of a controlled substance for allegedly possessing less than 15 grams of heroin on or about October 17, 2014.

¶ 4 Defendant filed a motion to quash arrest and suppress evidence, alleging that he was arrested on October 17, 2014, and that his conduct could not be reasonably interpreted as presenting probable cause that he committed or was about to commit a crime. He asked the court to suppress any physical evidence resulting from his detention and arrest and any statements he made following his detention and arrest.

¶ 5 The court heard the motion to quash arrest simultaneously with a bench trial.

¶ 6 Police officer Robert McNally testified that he was patrolling on the day in question when he saw Robert DePietro standing in the middle of an intersection and talking on a cellphone. Officer McNally asked DePietro what he was doing, and he answered that he was calling a friend. Officer McNally resumed his patrol but soon saw a beige car park near DePietro, so he stopped to observe. DePietro walked up to the beige car, which had two occupants, and entered the car from the passenger side. After about two to three minutes, he exited the car and walked away. Officer McNally stopped his police car by DePietro and asked him to stop and come to the car. Officer McNally spoke with DePietro, who admitted that "he was looking to purchase weed." Officer McNally then found on DePietro two "tins" or foil containers of a substance suspected to be heroin. The tins were later sent to a laboratory for testing.

¶ 7 Seeing the beige car drive past, Officer McNally radioed for other officers to stop the beige car because he suspected a drug transaction had occurred in the car. After DePietro was

detained and placed in a police car, Officer McNally went to where the beige car was stopped by another officer and saw defendant, who he identified at trial, seated on the passenger side of the beige car. The driver was also still in the car. The other officer had spoken with both defendant and the driver, and had not recovered anything from defendant, by the time Officer McNally arrived. Officer McNally asked defendant to exit the car (the driver also exited) and then asked him if he had anything illegal on his person and what he was doing in the area. Defendant was "kind of unresponsive" at first, but when Officer McNally asked again if he had anything he should not have, he replied that "it's in my sock." Officer McNally had defendant remove his shoes and socks, and saw in his left sock "two tins, the same type of tins that were recovered from Mr. DePietro." The contents of the tins were preliminarily tested at the police station and then sent to a laboratory for further testing.

¶ 8 On cross-examination, Officer McNally added that he could not see who the two men in the beige car were when DePietro entered the car, and he lost sight of the beige car for a few minutes while he interacted with DePietro, so that he did not know if anyone exited or entered the beige car during that time. While DePietro mentioned buying "weed," he did not say who he trying to buy it from, and Officer McNally did not recover any marijuana from him. Officer McNally had the beige car stopped so he could question the occupants, and the occupants were not free to leave once the car was stopped. Officer McNally did not see defendant engage in illegal activity before the car was stopped. He did not inform defendant of his *Miranda* rights until after he was taken to the police station, and he gave no statement at the police station.

¶ 9 The parties stipulated to the effect that the two tins recovered by police were tested and found to contain 0.6 grams and 0.4 grams of heroin.

¶ 10 Defendant made a motion for a directed finding on the motion to quash and the trial. In part, he argued that defendant was detained but had not been read the *Miranda* rights before police asked him a question that elicited an incriminatory statement. Following arguments, the court denied a directed finding. The court found a *prima facie* case for at least reasonable suspicion to stop the beige car. The incident where DePietro was standing in the middle of the street on the phone, and then was in the beige car for a couple of minutes, followed by DePietro's admission that he was trying to buy "weed," presented reasonable suspicion for the officer to investigate. After defendant made a statement, he took off his sock and revealed tins of heroin of the same type found on DePietro.

¶ 11 After defendant chose not to testify, the court denied the motion to quash, reiterating that there was "reasonable suspicion that gave rise to probable cause to stop the vehicle and further investigate. This is not a motion to suppress a statement. This is a motion to quash arrest and suppress evidence." DePietro's admission that he was trying to buy "weed" created reasonable suspicion that there was marijuana in the car whether or not the tins of heroin were found, the court stated. The court found defendant guilty, noting that he admitted to having the heroin and then showed it to police.

¶ 12 In his posttrial motion, defendant argued that his motion to quash should not have been denied because the police lacked reasonable suspicion to stop the car, lacked suspicion that the car's occupants were armed or otherwise dangerous to support ordering defendant to exit the car, and failed to give defendant his *Miranda* rights after ordering him to exit the car and before questioning him. The heroin was discovered based upon defendant's non-*Mirandized* statement and should thus be suppressed, he argued.

¶ 13 The court denied the motion following arguments, finding that there was probable cause to believe there was heroin in the beige car and reiterating that defendant did not file a motion to suppress statements but a motion to quash arrest. The court then held a sentencing hearing and sentenced defendant to two years' probation with fines and fees.

¶ 14 On appeal, defendant contends that his motion to quash was erroneously denied because the police stopped the car he was riding in without reasonable suspicion, and failed to inform him of his *Miranda* rights before he gave an incriminating statement while in custody. We shall address these claims separately and in order.

¶ 15 The people of the United States and this State are protected against unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. It is well-settled that stopping a vehicle and detaining its occupants constitutes a seizure analyzed pursuant to the *Terry* principles (*Terry v. Ohio,* 392 U.S. 1 (1968)) whereby a police officer may conduct a brief, investigatory stop of a person when he reasonably believes that the person has committed, or is about to commit, a crime. *People v. Timmsen*, 2016 IL 118181, ¶ 9. The officer must have a reasonable and articulable suspicion that criminal activity is afoot, a standard requiring less than probable cause for an arrest but more than a mere suspicion or "hunch" of criminal activity. *Id*. The investigatory stop must be justified at its inception and the officer must be able to point to specific and articulable facts which, together with rational inferences from those facts, reasonably warrant the stop. *Id*. In reviewing the officer's conduct, we consider the totality of the circumstances under an objective standard; that is, we consider whether all the facts available to the officer at the time of the seizure would cause a person of reasonable caution to believe that the stop and investigation were appropriate. *Id.*

¶ 16 When a ruling on a motion to quash involves factual determinations or credibility assessments, the court's findings will not be disturbed on review unless they are against the manifest weight of the evidence. *Id.*, ¶ 11. However, we review *de novo* the trial court's ultimate legal ruling to grant or deny the motion. *Id*.

¶ 17 Here, we find that, when Officer McNally called for the beige car containing defendant to be stopped so that he could question the occupants, he had a reasonable suspicion that criminal activity – the sale of heroin – involving the car's occupants had occurred. By that time, he knew that DePietro had stood in the middle of the street phoning for someone to meet him, a short time later the beige car arrived, he entered the car, and he remained in the car for two or three minutes before walking away. Officer McNally had also learned that DePietro was seeking to purchase "weed" and had two "tins" of heroin. These are articulable facts that would cause a reasonably cautious person to suspect that DePietro had purchased heroin from the occupants of the beige car. We do not consider the difference between what DePietro said he was trying to buy and what he actually possessed fatal to a finding of reasonable suspicion. It is certainly not unknown, in lawful and illicit commerce, for a person to intend to buy one thing and end up buying another. We also do not consider it fatal that DePietro did not expressly implicate the occupants of the beige car as the persons from whom he intended to buy "weed." It is reasonable to infer from the unusual interaction between DePietro and the beige car, followed quickly by his admission that he was trying to buy "weed," that the two matters were related. While Officer McNally lost sight of the beige car for a few minutes, it was still in the vicinity for him to see it after his interaction with DePietro. The aforesaid facts, and the facts that Officer McNally could not identify the occupants who interacted with DePietro before the car was stopped and did not

see them sell heroin to DePietro, do not defeat or disprove his reasonable suspicion. Instead, they explain why he believed an investigation to confirm or dispel his suspicion was warranted.

¶ 18 Turning to defendant's *Miranda* claim, we find that defendant has forfeited it by not properly raising it in the trial court. In the hearing on the motion to quash, he elicited the lack of *Miranda* warnings before his inculpatory statement at the scene, and that he did not make an inculpatory statement at the police station following his arrest. He argued the *Miranda* claim in oral argument on the motion, and in his written posttrial motion. However, his written motion to quash did not raise a *Miranda* claim, nor did it allege that defendant was not read his *Miranda* rights, and thus did not put the court or State on notice before the hearing that *Miranda* would be at issue. That said, and noting that we have sufficient basis on the record, we may consider this claim as a matter of plain error. *People v. Maxey*, 2016 IL App (1st) 130698, ¶ 33. The first step in plain-error analysis is determining whether any error occurred. *Id.*, ¶ 34.

¶ 19 We find that defendant was not in custody for *Miranda* purposes when he made his inculpatory statement. The United States Supreme Court has observed that a *Terry* stop

> "means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. [U]nless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*." *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984).

The Court noted that traffic stops and *Terry* stops are "presumptively temporary and brief," and typically conducted in public by "only one or at most two policemen," and thus "quite different

from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." *Id*. at 437-38. "Our cases make clear *** that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010). Instead, "the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' " *Berkemer*, 468 U.S. at 440, quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983).

¶ 20 Here, only two police officers interacted with the two occupants of the beige car, including defendant. Defendant gave the inculpatory statement at issue in response to brief questioning consistent with Officer McNally's investigation of his reasonable suspicion. We do not consider the fact that defendant was asked to exit the car, when he as much as the driver was the subject of Officer McNally's reasonable suspicion and investigation, converted his *Terry* stop into a level of custody akin to formal arrest. In sum, we see no reason to bring this case into the ambit of *Miranda*. Accordingly, the judgment of the circuit court is affirmed.

¶ 21 Affirmed.