2017 IL App (2d) 160234-U
No. 2-16-0234
Order filed February 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 15-CM-299
STEVEN R. DUFFIN,	)	Honorable Bruce R. Kelsey,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Birkett concurred in the judgment.
Justice Hutchinson dissented.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant's motion to suppress, as it applied an incorrect legal standard to the State's motion for a directed finding and then, after denying the State's motion, it prevented the State from presenting a case-in-chief; thus, we vacated the court's ruling and remanded the cause for reconsideration of the State's motion and for further proceedings.

¶ 2 The State appeals from the judgment of the circuit court of Du Page County granting defendant Stephen R. Duffin's motion to suppress evidence found in the passenger compartment of his vehicle during a traffic stop. Because the trial court applied an incorrect legal standard in

denying the State's motion for a directed finding and then erroneously precluded the State from presenting a case-in-chief, we vacate and remand.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by complaint with speeding (625 ILCS 5/11-601(b) (West 2014)), operating an uninsured vehicle (625 ILCS 5/3-707 (West 2014)), and possession of firearm ammunition without a valid firearm owner's identification (FOID) card (430 ILCS 65/2(a)(2) (West 2014)). Defendant filed a motion to suppress three 20-gauge shotgun shells found in the passenger compartment of his vehicle during the traffic stop.

¶ 5 The following evidence was established at the hearing on the motion to suppress. According to Officer Justin Sanchez of the Wheaton police department, the only witness to testify, at approximately 1 a.m. on January 24, 2015, he was conducting radar enforcement. His radar indicated that defendant's pickup truck was speeding.

¶ 6 Officer Sanchez stopped the vehicle and advised defendant, who was the driver, why he had been stopped. When Officer Sanchez asked defendant for a driver's license and insurance card, defendant produced the license but said that he did not think that he had an insurance card. Officer Sanchez told him to check in the vehicle to see if there was an insurance card.

¶ 7 Defendant then checked his wallet and the visor but could not locate a card. As defendant began to look in the center console, he told Officer Sanchez that he was going to roll up the driver's side window. Defendant closed the window before Officer Sanchez could respond. Officer Sanchez acknowledged that it was cold that night.

¶ 8 Because the driver's side window was tinted and Officer Sanchez could not see into the vehicle, he asked defendant to lower the window. Defendant disregarded that request. Officer Sanchez then repositioned himself so that he could see into the vehicle.

¶ 9 As defendant looked in the center console, he both held "paperwork" and turned his body, apparently to block Officer Sanchez's view of the center console. Defendant provided Officer Sanchez an expired insurance card. When Officer Sanchez asked defendant why he had rolled up the window, defendant "merely shrugged his shoulders."

¶ 10 Officer Sanchez asked defendant if he had any weapons or anything else that he should be concerned about, and defendant said no. Defendant refused Officer Sanchez's request to search the vehicle.

¶ 11 After Officer Sanchez requested identification from the female passenger, he returned to his squad car and conducted a computer check on both defendant and the passenger. In doing so, he discovered that there was an order of protection against defendant that indicated that defendant was prohibited from possessing firearms and had been deemed a risk for illegally using weapons. A criminal history check showed that defendant had a revoked FOID card and had been arrested for several weapon and assault offenses. Officer Sanchez could not recall the dates of those incidents.

¶ 12 As Officer Sanchez performed the computer check, he observed "furtive movements" in the vehicle. He explained that he saw both defendant and the passenger "moving within the passenger compartment of the vehicle towards leaning over the center console area and moving about their seated positions." It appeared that they were looking down, as opposed to talking with one another.

¶ 13 After completing the computer check, although defendant had not been aggressive, Officer Sanchez requested back-up. Officer Sanchez then approached the vehicle and asked defendant to exit so that he could speak with him about "his movements and [Officer Sanchez's]

discovery of his background and current status." Officer Sanchez directed defendant to go to the rear of defendant's vehicle, on the side away from traffic.

¶ 14 Officer Sanchez then patted down defendant for weapons but found none. He did not handcuff defendant. He also had the passenger exit the vehicle, patted her down, but discovered no weapons. He did not handcuff the passenger. According to Officer Sanchez, after patting them down, he did not fear for his safety "from them."

¶ 15 By the time both defendant and the passenger had exited the vehicle, three additional officers had arrived. Officer Sanchez then searched the passenger compartment, including the center console, the seats, the doors, and the top of the dashboard. When he looked in the side pocket of the driver's door, he found three 20-gauge shotgun shells.

¶ 16 Officer Sanchez described defendant's demeanor during the initial contact as "very short" and said that he did not appear to be "making eye contact with [him] too much." According to Officer Sanchez, defendant appeared to be annoyed at being stopped. Officer Sanchez was concerned for his safety, because of defendant's demeanor, his rolling up of the tinted window, his apparent attempts to obstruct Officer Sanchez's view of the center console, and the information obtained via the computer check.

¶ 17 Following Officer Sanchez's testimony, the trial court asked the State if it wished to present any witnesses. The State, relying on *Michigan v. Long*, 463 U.S. 1032 (1983), responded that "[f]irst, [it] guess[ed] [it] would have a motion for a directed finding." In considering the State's motion, the court asked if the officer "need[ed] something more to conduct [a search] as in probable cause?" The State responded that it did not think so, because of the concern for officer safety. After noting that Officer Sanchez had a reasonable basis for the stop, the court commented that once the officer had "identified a specific issue that he want[ed] to go further, he

need[ed] probable cause to do that." When the court asked defense counsel if he had anything to add, counsel asked if he would be arguing only the motion for a directed finding. The court answered "yes" and that it did not think that the State "could add to what they [had] already had the officer testify to." The court found that Officer Sanchez did not conduct a pat-down. The court added that, based upon the officer's observations, it did not think that the officer needed to conduct a search. The court did not revisit its earlier question as to whether the State wanted to present any evidence. The court then granted the motion to suppress. The State filed a certificate of impairment (see Ill. S. Ct. R. 604(a)(1) (eff. Mar. 8, 2016)) and a timely notice of appeal.

¶ 18 II. ANALYSIS

¶ 19 On appeal, the State contends that Officer Sanchez did not need probable cause to search defendant's vehicle and that the search was valid under *Long*, as Officer Sanchez had reasonable suspicion that defendant was potentially dangerous and could gain control of a weapon in the vehicle. Defendant responds that: (1) the facts of this case are distinguishable from *Long* and insufficient to establish reasonable suspicion that defendant had a weapon in the vehicle; and (2) under *Arizona v. Gant*, 556 U.S. 332 (2009), there was no reason to believe that defendant could access a weapon in the vehicle, because he had been removed from the vehicle and several officers were present.

¶ 20 In reviewing a trial court's ruling on a motion to suppress evidence, a reviewing court applies a two-part standard. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)). Under that standard, a trial court's findings of fact should be reviewed only for clear error, and a reviewing court must give due weight to any inferences drawn from those facts by the fact finder. *Luedemann*, 222 Ill. 2d at 542. Put another

way, a reviewing court gives great deference to the trial court's factual findings and will reverse those findings only if they are against the manifest weight of the evidence. *Luedemann*, 222 Ill. 2d at 542. A reviewing court, however, remains free to independently assess the facts in relation to the issues and may draw its own conclusions when deciding what relief should be granted. *Luedemann*, 222 Ill. 2d at 542. Accordingly, a court reviews *de novo* the trial court's ultimate legal ruling as to whether suppression is warranted. *Luedemann*, 222 Ill. 2d at 542-43.

¶ 21 A police officer may conduct a reasonable search for weapons when he has reason to believe that a subject is armed and dangerous. *People v. Colyar*, 2013 IL 111835, ¶ 35 (citing *Terry v. Ohio*, 391 U.S. 1, 27 (1968)). The principles of *Terry* have been extended to permit the protective search of the passenger compartment of a vehicle during a traffic stop. *Colyar*, 2013 IL 111835, ¶ 38 (citing *Long*, 463 U.S. 1032). That is so because roadside encounters are especially dangerous and an officer might reasonably believe that he is in danger from the possible presence of accessible weapons inside the vehicle. *Colyar*, 2013 IL 111835, ¶ 38. Such danger includes an occupant who has been removed from the vehicle, who either breaks away from police control or who is permitted to return to the vehicle after termination of the stop. *Long*, 463 U.S. at 1051-52.

¶ 22 Such a protective search of the passenger compartment should be limited to the areas where a weapon might be located. *Colyar*, 2013 IL 111835, ¶ 39. The search is permissible only when the officer has a reasonable belief, based on specific, articulable facts and reasonable inferences from those facts, that the individual is dangerous and could gain control of a weapon. *Colyar*, 2013 IL 111835, ¶ 39. The issue is whether a reasonably prudent person under the circumstances would be warranted in believing that his, or others', safety is threatened. *Colyar*, 2013 IL 111835, ¶ 39. To justify such a search for weapons, an officer's level of suspicion need

not rise to the level of probable cause. *Colyar*, 2013 IL 111835, ¶ 40. Nonetheless, it must be more than a mere hunch. *Colyar*, 2013 IL 111835, ¶ 40. When reviewing an officer's conduct, we apply an objective standard in deciding whether the facts available to the officer would lead a person of reasonable caution to believe that the action was appropriate. *Colyar*, 2013 IL 111835, ¶ 40.

¶ 23 On a motion for directed finding, the trial court must first determine whether the defendant has made out a *prima facie* case and, if so, it must then weigh the evidence, including that which favors the State. *People v. Green*, 2014 IL App (3d) 120522, ¶ 28. Defendant established a *prima facie* case, as Officer Sanchez searched defendant's truck without a warrant. See *People v. Gipson*, 203 Ill. 2d 298, 307 (2003).

¶ 24 The trial court was then required to weigh defendant's evidence, including that which favored the State. Although the court did so, it applied an incorrect legal standard. Instead of applying the reasonable-suspicion standard under *Long* (see *Colyar*, 2013 IL 111835, ¶ 39 (discussing *Long*)), the court applied a probable-cause standard. Thus, we vacate the judgment of the court to the extent that it denied the motion for directed finding and remand for it to rule on the motion for directed finding under the *Long* standard. In remanding, we note that the court's finding that there was no pat-down was against the manifest weight of the evidence, as Officer Sanchez testified that he patted down both defendant and the passenger. See *People v. Lopez*, 2013 IL App (1st) 111819, ¶ 17 (a finding is against the manifest weight of the evidence when an opposite conclusion is apparent or the finding is not based on the evidence).

¶ 25 Although ordinarily we could apply the correct legal standard in the first instance (see *Luedemann*, 222 Ill. 2d at 542-43), here the trial court committed the additional error of cutting off the State's case. Once it denied the State's motion for a directed finding, it did not provide

the State with an opportunity to present any evidence. Instead, it simply concluded that the State could offer no evidence. In doing so, the court effectively granted defendant a directed finding *sua sponte*. This was clearly error.

¶ 26 Our conclusion is well-supported by the decision in *People v. Elliott*, 162 Ill. App. 3d 542 (1987). At a motion to suppress evidence, the defendant called the arresting officer. *Elliott*, 162 Ill. App. 3d at 543. During the State's cross-examination of the arresting officer, the trial court interrupted the State and stated that it was going to grant the motion. *Elliott*, 162 Ill. App. 3d at 543. When the State asked to continue with the cross-examination, the court refused to allow it to do so or to present its own case. *Elliott*, 162 Ill. App. 3d at 544. In reversing, this court emphasized that it is fundamental to an adversarial proceeding that each side have an opportunity to cross examine and to present its own case. *Elliott*, 162 Ill. App. 3d at 544. Indeed, at a motion to suppress evidence, the State has a substantial right to present evidence. *Elliott*, 162 Ill. App. 3d at 544-45. Although the facts of this case differ slightly from those in *Elliott*, the result is the same—the State was denied the opportunity to present its own case.

¶ 27 Indeed, when asked at oral argument, defendant effectively conceded that the State should have been given the opportunity to present its own evidence.[1] Thus, upon remand, should

[1] The dissent states that defendant did not make such a concession. We respectfully disagree. At oral argument, when Justice Birkett asked defense counsel if he would agree that the State should not have been cut off and should have been allowed to present its own evidence, counsel agreed that a trial court should not make decisions on behalf of the litigants, not only in this case but in any case. Further, despite being asked that question several times, defense counsel never said no or that he disagreed. When Justice Zenoff asked defense counsel whether the trial court said that it did not think that the State had anything else to present, counsel

the court again deny the State's motion for a directed finding, the State must have an opportunity to present its own evidence. Once the State has presented its case, and defendant has the opportunity to offer any rebuttal, then the court must rule on the motion to suppress.

¶ 28 The dissent states that the record does not show that the State actually intended to present any witnesses or evidence. However, when asked if it wished to present any witnesses, the State answered that it first wanted to move for a directed finding. By using the term "first," the State was indicating that it might well have wanted to present its own evidence should the trial court deny its motion for a directed finding. However, once the court indicated that the search was improper, it commented that it did not think that the State could add anything to Officer Sanchez's testimony. Further, the court never followed up its original question by asking the State whether it wanted to present any of its own evidence.

¶ 29 Finally, the dissent discusses the merits of the search and how it would have decided this case. We emphasize that, in remanding, we offer no opinion as to the merits. Nor should the court's questions or comments during oral argument be construed as indicating how the court would rule on the merits**.** We set forth the applicable law simply to guide the trial court in applying the proper standard.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we vacate the judgment of the circuit court of Du Page County and remand for further proceedings.

¶ 32 Vacated and remanded.

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answered that that was what the record reflected. Thus, defense counsel effectively conceded that the trial court prevented the State from presenting its case.

Justice BIRKETT concurred in the judgment.

Justice HUTCHINSON dissented.

¶ 33 Justice HUTCHINSON, dissenting:

¶ 34 I must respectfully disagree with my colleagues' resolution of this appeal. There are instances where it is appropriate to remand a matter for the continuation of proceedings in which the State was deprived of a fair and impartial hearing. This is not one of them. I do not believe that the State planned to present any additional evidence or witnesses, and I find it telling that the State did not raise any such arguments in its brief. Moreover, although I agree with the majority that the trial court incorrectly applied a probable-cause standard, I would have ruled that the search was nonetheless invalid under the reasonable-suspicion standard from *Michigan v. Long*, 463 U.S. 1032, 1050 (1983).

¶ 35 This case is nothing like *People v. Elliott*, 162 Ill. App. 3d 542 (1987), where the sole issue was whether the trial court improperly hindered the State's presentation of evidence during a suppression hearing. After hearing only part of the prosecutor's cross-examination of the defendant's first witness, the trial court interrupted the prosecutor and granted the defendant's motion to suppress. *Id*. at 543. Even though the prosecutor argued that she could strengthen the State's case if she were permitted to continue her cross-examination, the trial court refused. *Id*. at 544. The appellate court remanded the cause with instructions that the State be allowed to continue its cross-examination and offer rebuttal testimony, holding as follows: "After careful consideration of the remarks of the court in context, we are persuaded that the State is entitled to further hearing. We believe that the trial judge's premature remarks and ruling denied the State a fair and impartial hearing." *Id*. at 545.

¶ 36 Here, unlike in *Elliott*, the context of the trial court's ruling does not indicate that the State was denied a fair and impartial suppression hearing. Defense counsel informed the trial court at the outset that he anticipated calling only one witness: Officer Sanchez. The prosecutor then had an opportunity to conduct a thorough cross-examination of Sanchez. Following defense counsel's redirect examination, the trial court asked whether defense counsel had any further witnesses. Defense counsel responded by reiterating, "[t]his is the only witness." As the majority notes in paragraph 16, the trial court turned to the prosecutor and asked if she wished to present any witnesses. The prosecutor responded, "[f]irst, I guess I would have a motion for directed finding." The prosecutor went on to argue that a directed finding was warranted under the reasonable suspicion standard from *Long*, and the rest is history.

¶ 37 Regarding the majority's conclusions in paragraph 25, I do not believe that the trial court "cut off" the State's case or "concluded that the State would have no evidence to offer." Unlike in *Elliott*, nothing in the record indicates that the State intended to present any witnesses or evidence. To the contrary, it seems clear to me that the parties and the trial court each understood that Sanchez would be the only witness to testify. I find it hard to believe that the State would not have moved to re-open the proofs or at least raised the issue in its appellate brief if this was not the case. And yet, the majority has resolved *sua sponte* to remand the case for proceedings which the State has not requested. But see *People v. Givens*, 237 Ill. 2d 311, 323 (2010) (noting that appellate courts should generally refrain from ruling upon issues raised *sua sponte*).

¶ 38 I also disagree with the majority's conclusion in paragraph 27 that defense counsel "effectively conceded" during oral argument "that the State should have been given the opportunity to present its own evidence." Defense counsel was asked whether he agreed that the

trial court had erred by "cutting off" the State's case. Defense counsel responded: "I would agree that the trial court should not make the decisions on behalf of the litigants." I suppose reasonable minds can differ as to whether this constituted an "effective concession," but after listening to defense counsel's statement in context, I am not persuaded that the majority's characterization is correct. Either way, this issue is not my primary concern.

¶ 39 What concerns me most is that I feel the State is being given an unfair advantage. As one might expect, the oral argument included a lengthy discussion on whether Sanchez's search was valid under the reasonable-suspicion standard from *Long*. As one might further expect, this discussion focused predominantly on the sufficiency of the State's evidence. Because the majority is now vacating the trial court's judgment and remanding the cause for the State to possibly present more evidence, the State will have the opportunity to tailor its case to the discussion from the oral argument. It would be one thing if the State had argued in its brief that it was deprived of a fair and impartial hearing. Under those circumstances, understanding that the case could be remanded for the presentation of further evidence, I suspect that we would have been more cautious in discussing the sufficiency of the State's evidence. However, under the circumstances at play here, I am uncomfortable with the State being given a second bite at the apple. Therefore, in the interest of fairness, I will offer my two cents as to why I would have ruled that Sanchez's search was invalid.

¶ 40 The issue in this case is whether Sanchez possessed a reasonable belief, based on specific and articulable facts and reasonable inferences from those facts, that defendant was dangerous and could gain control of a weapon. See *People v. Colyar*, 2013 IL 111835, ¶ 39 (applying the standard from *Long*). I do not believe that the "furtive movements" described by Sanchez were adequate to justify the search of defendant's vehicle. To me, these movements do not seem

consistent with someone who was accessing or concealing a weapon; rather, they seem consistent with someone who was annoyed because they were stopped for speeding on a cold January night.

¶ 41 I understand that Sanchez learned additional facts about defendant from a computer check. However, I do not believe that these additional facts would, by themselves, justify a warrantless search of defendant's vehicle. I therefore fail to see how any of these additional facts could combine with the "furtive movements" described by Sanchez to justify a reasonably prudent person in believing that defendant was dangerous and could gain control of a weapon. In my opinion, to hold that the search in this case was proper would effectively promote a bright-line rule that police officers can, after observing "furtive movements," search the vehicle of anyone found to have an order of protection, a revoked FOID card, or any prior weapon or assault conviction.

¶ 42 Before concluding, I would briefly note that my colleagues came to a similar conclusion in *People v. Fox*, 2014 IL App (2d) 130320 (opinion of Birkett, J., with the concurrence of Zenoff, J.). Although *Fox* did not involve a vehicle stop, the standard for determining the propriety of the search in that case was similar to the standard at issue in this case. See *Fox*, 2014 IL App (2d) 130320, ¶ 12 (noting that an officer may search a suspect for weapons during a temporary detention "if there is reasonable and articulable suspicion that the suspect is armed and is presently dangerous to the officer or to other persons"). I would have affirmed the trial court's ruling in this case for the same reasons articulated by my colleagues in *Fox*: (1) there was a lack of specific information suggesting that defendant was dangerous; and (2) courts should refrain from establishing bright-line rules allowing an automatic search upon the satisfaction of certain prerequisites. See *Fox*, 2014 IL App (2d) 130320, ¶ 25.