2017 IL App (3d) 150133-U

Order filed July 14, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0133 Circuit No. 12-DT-738
FREDERICK GONZALEZ,	)	Honorable Bennett J. Braun,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court erred in denying motion to quash arrest and suppress evidence where officer impermissibly extended an otherwise lawful stop by detaining defendant for 24 minutes before asking defendant to exit the vehicle and arresting him for driving under the influence of alcohol 50 minutes after the stop was initiated.

¶ 2 Defendant, Frederick Gonzalez, was convicted of driving under the influence of alcohol (DUI) in violation of section 11-501(a)(1) of the Vehicle Code (625 ILCS 5/11-501(a)(1) (West 2012)). The trial court ordered him to serve 12 months' court supervision and imposed a $1,000

fine. On appeal, defendant argues that the trial court erred in denying his motion to quash arrest and suppress evidence. We reverse.

¶ 3 FACTS

¶ 4 Shortly after 11 p.m. on June 12, 2012, Plainfield Police Officer Jason Kopek observed defendant driving a van on Route 59 with an inoperable headlight and the hazard lights flashing. Kopek followed the van as it made a turn onto another road. As it turned, the van drove over the painted median. Kopek initiated a traffic stop, which was recorded on a dashboard monitor on the squad car, and issued citations for driving under the influence of alcohol and for improper lighting.

¶ 5 Defendant filed a motion to quash arrest and suppress evidence, requesting that his field sobriety tests and his statements to Kopek be excluded. At the hearing on the motion, a videotape of the stop was admitted into evidence. The tape begins with Kopek following the van for approximately 30 seconds. The stop is then initiated and the van pulls over.

¶ 6 The stop begins at the 23:22 (11:22 p.m.) minute mark of the tape. Kopek approaches the vehicle and asks if the driver knew he had a headlight out. Three minutes into the stop, Kopek returns to his squad car. Dispatch advises Kopek that there is no record for the driver's license number he reported. He asks dispatch to check the number again. Five minutes after the stop was initiated, dispatch informs Kopek that defendant's license is "valid and clear." Kopek then radios another officer for assistance and runs the driver's license number again.

¶ 7 At the 11 minute mark, Kopek returns to the van and asks defendant if he has any photo identification. Defendant hands something to him. One minute later, Kopek walks back toward the squad car while looking at the document with a flashlight. As he is walking, Officer Ryan Sester, the officer who responded to Kopek's radio request, approaches from behind Kopek's

squad car. Kopek continues toward his car. Sester approaches the driver's side of the van and begins talking to defendant. Kopek then returns to the van and uses his flashlight to look inside the van through the window while Sester converses with defendant.

¶ 8 Both officers then return to Kopek's squad car and have a conversation. Kopek asks Sester, "So what's the strategy now? Consent when I give the stuff back?" Sester replies, "Yeah, if you want to toss it, I would *** error and opportunity."

¶ 9 Seventeen minutes into the stop, dispatch reports an officer safety alert about gang crime activity based on an outstanding warrant for the passenger's arrest. The officers then wait for verification of the warrant information. At that time, Kopek also requests an update on his drug dog request.

¶ 10 After receiving verification that the passenger has an outstanding warrant, Kopek returns to the van and places the passenger under arrest 21 minutes and 30 seconds after the stop was initiated. While Kopek cuffs the passenger, Sester asks defendant questions about whether there are drugs in the van.

¶ 11 About one minute later, at the 24 minute mark, defendant exits the van while three officers stand nearby. Kopek asks defendant how much he has had to drink. As Kopek and defendant converse, another officer searches the van. Kopek then moves defendant to the side of the van. Defendant takes a phone call. After the call ends, defendant takes a portable breathalyzer test, and Kopek places him under arrest. The arrest occurs 49 minutes and 45 seconds after the stop was initiated.

¶ 12 Kopek testified that he first saw the van driving with one headlight a little after 11 p.m. As he followed defendant, he saw him swerve away from one car and cross over the painted median. When he pulled the van over, Kopek did not observe any slurring or stuttering by

defendant. The only smell he noticed when he approached the van was a strong smell of gasoline. Kopek testified that the marijuana leaf tattoo on defendant's left shoulder raised suspicion. He had a "hunch" that there might be cannabis in the van based on the tattoo.

¶ 13 After Sester arrived, he assisted Kopek with the stop. While Kopek handcuffed the passenger, Sester asked for and received consent to search the van from defendant. At the time the passenger was taken into custody, defendant did not have any outstanding warrants and his license was valid. Kopek admitted that the traffic stop data sheet he prepared incorrectly noted that the stop lasted for only 10 minutes.

¶ 14 Kopek did not develop any suspicion that defendant was operating under the influence of alcohol until defendant stepped out of the van, away from the smell of gasoline. At that point, Kopek detected an odor of an alcoholic beverage on defendant's breath. He did not recall how long the stop had taken, but he estimated that it was less than 30 minutes.

¶ 15 On cross-examination by the State, Kopek stated that defendant took a side-step when he first exited the van, which concerned him. When he asked defendant how much alcohol he had consumed, defendant responded that he drank two Steel Reserve beers. Kopek knew that Steel Reserve beer had a higher than normal alcohol content. Kopek asked defendant if he would perform field sobriety testing, and defendant consented. Defendant performed the horizontal gaze nystagmus (HGN) test, the one-leg stand test and the walk-and-turn test, all of which indicated some level of impairment. Defendant also took a preliminary breath test. According to Kopek, the result of defendant's breath test was "11." At the conclusion of the breath test, defendant was arrested and charged with DUI.

¶ 16 The trial court found that the stop was valid. The court agreed that the encounter was long, having lasted at least 50 minutes, but noted that "a lot happen[ed]" during the stop. The

court concluded that once Kopek asked defendant to step out of the car, his appearance led to the field sobriety tests and the portable breath test, which defendant failed, and the result of the breath test gave the officer reasonable grounds to arrest him. The court then denied defendant's motion to quash arrest and suppress evidence.

¶ 17 Kopek's testimony at trial was consistent with his testimony at the motion to suppress hearing. He further testified that defendant's breath sample at the station disclosed a breath alcohol content of 0.103.

¶ 18 The videotapes of the stop were also reviewed for the trial judge. The field sobriety tests were conducted outside the view of the camera and were not recorded on the videotapes. After viewing the videos, the court ruled that the only evidence it would consider regarding impairment was the portable breath test and the officer's testimony as to the odor of alcohol because the field sobriety tests were not recorded.

¶ 19 Sester testified that he assisted Kopek with the traffic stop. He approached the van and requested and received consent to search from defendant. No contraband was found during the search. The van smelled strongly of gasoline because defendant was transporting lawn care equipment in the back.

¶ 20 The trial court found defendant guilty beyond a reasonable doubt of driving under the influence of alcohol. Defendant was sentenced to 12 months' court supervision and fined $1,000.

¶ 21 ANALYSIS

¶ 22 Defendant argues that the trial court erred in denying his motion to quash arrest and suppress evidence because Officer Kopek unconstitutionally extended his detention beyond the mission of issuing a citation for the traffic violation that justified the stop. He claims that the

officer impermissibly extended the duration of the stop in violation of his fourth amendment rights.

¶ 23 The appeal of a ruling on a motion to suppress presents mixed questions of law and fact. *People v. Gherna,* 203 Ill. 2d 165, 175 (2003). We will not disturb the trial court's factual determinations and assessment of witnesses' credibility unless they are manifestly erroneous. *People v. Anthony,* 198 Ill. 2d 194, 200-01 (2001). We review *de novo* the trial court's ultimate decision of whether to suppress the evidence. *People v. Crane,* 195 Ill. 2d 42, 51 (2001).

¶ 24 The fourth amendment to the United States Constitution 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. Similarly, the Illinois Constitution affords citizens with "the right to be secure in their persons, houses, papers[,] and other possessions against unreasonable searches, [and] seizures." Ill. Const. 1970, art. I, § 6. Our supreme court has interpreted the search and seizure clause of section 6 in a manner consistent with the United States Supreme Court's fourth amendment jurisprudence. See *People v. Harris,* 228 Ill. 2d 222, 231 (2008).

¶ 25 A temporary detention of an individual during a vehicle stop constitutes a "seizure" of his or her person within the meaning of the fourth amendment, even if the stop is brief and for a limited purpose. *Whren v. United States,* 517 U.S. 806, 809-10 (1996). "An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. *Id*. at 810. Because a traffic stop is more analogous to a *Terry* investigative stop than a formal arrest, the reasonableness of a traffic stop is analyzed under *Terry* principles. *Terry v. Ohio,* 392 U.S. 1 (1968); *People v. Brunch,* 207 Ill. 2d 7, 13-14 (2003). A *Terry* analysis requires a two-prong inquiry: (1) whether the officer's actions were justified at the

inception, and (2) whether the officer's subsequent actions unduly prolonged the duration of the stop. *Terry,* 392 U.S. at 19-20; *Harris,* 228 Ill. 2d at 240.

¶ 26 Here, the legality of the initial stop of defendant's vehicle under the first prong of *Terry* is not at issue. Both parties agree Kopek was justified in stopping defendant's vehicle because of his observation of a traffic violation. He stopped defendant because he was driving his van in the dark with an inoperable headlight, a violation of section 12-211(a) of the Vehicle Code (625 ILCS 5/12–211(a) (West 2002)). See also *People v. Sorenson,* 196 Ill. 2d 425, 433 (2001) (stop of vehicle justified based on officer's observation of traffic violation). Thus, Kopek had probable cause to initiate a valid traffic stop.

¶ 27 A seizure that is lawful at its inception can violate the fourth amendment if its manner of execution unreasonably infringes constitutionally protected interests. *Illinois v. Caballes,* 543 U.S. 405, 407 (2005). Police conduct during an otherwise lawful seizure does not render the seizure unlawful unless it unreasonably prolongs the duration of the detention or independently triggers the fourth amendment. *Harris,* 228 Ill. 2d at 244. Upon initiating a minor traffic stop, a police officer may briefly detain the driver to request a driver's license, determine its validity and, under certain circumstances, conduct a speedy warrant check. *People* v. *Ortiz,* 317 Ill. App. 3d 212, 220 (2000). However, "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Caballes,* 543 U.S. at 407.

¶ 28 Once a check of a driver's license and any warrant information is completed, "if no further suspicion is aroused, the traffic stop must cease and the individual should no longer be detained." *Ortiz,* 317 Ill. App. 3d at 220. The officer should then issue a ticket or warning and allow the driver to continue on his or her way. See *People v. Miller,* 345 Ill. App. 3d 836, 843

(2004) (officer's request to exit the vehicle without articulable facts justifying an investigative seizure was unreasonable and tainted subsequent search). The duration of the stop may not be extended unless the officer discovers specific, articulable facts which give rise to a reasonable suspicion that the defendant has committed, or is about to commit, a crime. *People v. Ruffin*, 315 Ill. App. 3d 744, 748 (2000). Mere hunches are insufficient to justify broadening the stop into an investigatory detention. *Id.*

¶ 29 In *People v. Koutsakis*, 272 Ill. App. 3d 159 (1995), this court held that a routine traffic stop may not be used as a subterfuge to obtain other evidence on the basis of officer suspicion. *Id.* at 164. In that case, Koutsakis was detained between 14 and 20 minutes while the police waited for a drug-sniffing dog to arrive. The court stated that there "is no talismatic (sic) time beyond which" a traffic stop violates the fourth amendment guarantee against unreasonable searches and seizures. But, the court held that the brevity of the stop is an important factor in determining whether the stop was reasonable. *Id.* at 163-64.

¶ 30 Similarly, in *Ruffin*, the defendant and his fiancée were stopped in a rental car for speeding. *Ruffin*, 315 Ill. App. 3d at 746. After a brief discussion about the couple's travels, the officer brought the defendant back to his squad car, where they further discussed the couple's trip. During the discussion, the defendant gave differing dates for the trip. The defendant received a warning ticket for speeding and a ticket for driving without a license. The officer then told the couple they could go but immediately asked about contraband and requested consent to search the vehicle. The officer eventually obtained consent, searched the car, and found cannabis. *Id*. at 747-48. The *Ruffin* court found that by the time the officer issued the defendant a warning ticket and returned his license, he had already unreasonably prolonged the stop. The court noted that the stop lasted nearly 22 minutes and stated "[i]t seems clear that the officer was

prolonging the stop in an effort to obtain incriminating information from the defendant." *Id*. at 749. The court held that the prolonged detention was unreasonable and reversed the trial court's denial of the defendant's motion to suppress. *Id*. at 749-50.

¶ 31 In this case, Kopek did not return defendant's papers or issue a citation for the improper headlight prior to asking defendant to exit the vehicle. Nevertheless, the traffic stop was complete. When Kopek returned to defendant's car, he had completed his determination of the motor vehicle offense and verified defendant's identity. At that point, he had nothing else to do except return defendant's documents to him and issue a citation. Thus, we must assess Kopek's subsequent request for defendant to get out of the van to determine whether his conduct unreasonably prolonged the duration of the detention. See *Harris*, 228 Ill. 2d at 239-40.

¶ 32 After stopping defendant, Kopek obtained defendant's information from a ticket defendant received earlier that day. Five minutes later, dispatch verified that defendant's driver's license was valid and there were no outstanding warrants for his arrest. Kopek then returned to the van and asked defendant for another form of identification to confirm his identity. Defendant provided documentation and Kopek used a flashlight to review the material. Once Kopek verified defendant's identity, he should have been able to issue the ticket for the faulty headlight, completing his task related to the traffic offense. Instead, Kopek returned to his squad car and discussed his strategy with Officer Sester, who had arrived in a second squad car to assist with the stop. Four minutes later, dispatch informed the officers that the passenger had an outstanding warrant for his arrest. The officers then waited seven more minutes for verification of the warrant and arrested the passenger 21 minutes after the stop was initiated. While Kopek cuffed the passenger, Officer Sester asked defendant whether there were drugs in the vehicle and requested consent to search the van. Shortly thereafter, 23 minutes into the stop, defendant

exited the car and Kopek made the observations that ultimately led to defendant's arrest for DUI. In this case, the seizure should have terminated once the officer possessed all the information needed to issue the ticket, long before he was asked to exit the vehicle. Under these circumstances, the duration of the detention was prolonged beyond the time reasonably required to complete the traffic stop. See *Caballes*, 543 U.S. at 407.

¶ 33 Given that Kopek's actions unreasonably prolonged the traffic stop, we must consider whether those actions had a separate fourth amendment justification. See *Caballes*, 543 U.S. at 407-08; *Ruffin*, 315 Ill. App. 3d at 749 (stop may be broadened into investigative detention if the officer discovers specific, articulable facts which give rise to reasonable suspicion). Kopek stated that he had a "hunch" that defendant had committed or was about to commit a crime because he had a marijuana tattoo on his arm. But there was no odor of marijuana emanating from the vehicle and Kopek testified that he did not detect an odor of alcohol on defendant's breath during initial conversations with defendant. He only noticed the smell of gasoline coming from the back of the van. It is well settled that mere hunches are not enough to justify a broadening of a stop into an investigatory detention. See *Ruffin*, 315 Ill. App. 3d at 748. Accordingly, Kopek did not have a separate fourth amendment justification for the seizure.

¶ 34 The State argues that the seizure is lawful here because "an officer is always free to request permission to search." In *People v. Brownlee*, 186 Ill. 2d 501 (1999), the officers completed all that was necessary for their traffic stop. They then delayed allowing the vehicle to leave before asking for permission to search the car. The court held that during the delay, the driver of the car could not have believed himself free to leave. *Id*. at 520-21. The videotape here shows that while Kopek had nothing more to do to complete the traffic stop, he held on to defendant's documents, thereby preventing him from leaving. See *People v. Hardy*, 142 Ill. App.

3d 108, 117-18 (1986) (retention of driver's license tends to negate freedom to leave). The officers' request for defendant to exit the van therefore was the same as the request in *Brownlee* to search the car, *i.e.*, without articulable facts justifying a *Terry* investigative seizure. Any evidence the officers obtained after defendant exited the van is therefore tainted and should have been suppressed. See *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

¶ 35 CONCLUSION

¶ 36 Defendant's motion to quash arrest and suppress evidence should have been granted. Because the State will be unable to prevail without the portable breath test or field sobriety tests, we reverse defendant's conviction outright. See *People v. Abdur-Rahim*, 2014 IL App (3d) 130558, ¶ 33. The judgment of the circuit court of Will County is reversed.

¶ 37 Reversed.