

NOTICE
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2017 IL App (5th) 150536-U

NO. 5-15-0536

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Madison County.
)	
v.)	No. 14-CF-1829
)	
JOHNNY L. SMITH,)	Honorable
)	Neil T. Schroeder,
Defendant-Appellee.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting the defendant’s motion to suppress evidence where the officer lacked a reasonable, articulable suspicion to prolong the traffic stop.

¶ 2 The defendant, Johnny L. Smith, was charged with one count of controlled substance trafficking (720 ILCS 570/401.1(a) (West 2012)) and one count of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(1) (West 2012)). The defendant filed a motion to suppress a package of suspected heroin found during a search of the defendant’s vehicle, alleging that the arresting officer impermissibly prolonged a routine traffic stop in violation of the fourth amendment.

Following an evidentiary hearing, the circuit court granted the defendant's motion and suppressed the suspected heroin. The State filed a certificate of substantial impairment, and a timely notice of appeal under Illinois Supreme Court Rule 604(a) (eff. Dec. 11, 2014). On appeal, the State contends that the circuit court erred in granting the defendant's motion to suppress where the traffic stop was justified and the officer, while making permissible inquiries incident to the stop, developed a reasonable suspicion that the defendant was transporting illegal drugs. For reasons that follow, we affirm.

¶ 3 On August 27, 2014, at approximately 10:30 a.m., the defendant was driving southbound on Interstate 55, when he was pulled over by Collinsville Police Officer Stacey McElroy for failure to display a front license plate and for operating a vehicle with a suspended registration. The defendant was detained for more than 16 minutes before Officer McElroy requested and received the defendant's consent to search the vehicle. During the search of the vehicle, Officer McElroy discovered a package in a space near the sunroof. The package contained a substance that field tested positive for heroin. The evidence was seized and the defendant was placed under arrest. He was subsequently charged with controlled substance trafficking and unlawful possession with intent to deliver a controlled substance.

¶ 4 The defendant filed a motion to quash his arrest and suppress the evidence obtained during the search of his vehicle. The defendant's motion was called for an evidentiary hearing. Officer McElroy was the sole witness to testify during the hearing. A disc containing a dash cam recording of the traffic stop, and some photographs depicting

the vehicle's interior were also admitted into evidence. A summary of the evidence follows.

¶ 5 Officer McElroy testified that he was on duty, conducting interstate criminal drug enforcement as part of a DEA task force, on the morning of August 27, 2014. At approximately 10:30 a.m., he was sitting in an unmarked patrol vehicle, which was stationed in the median of Interstate 55, when he observed a white Lexus drive past him. He noticed that the Lexus did not have a front license plate. He also noticed that the driver, later identified as the defendant, was wearing a yellow and orange reflective safety vest. Officer McElroy ran the vehicle's rear license plate number through his on-board computer, and within a few seconds learned that the Lexus was registered to a woman in Chicago, and that the registration was suspended for safety and financial reasons. Officer McElroy activated his emergency lights, pulled behind the Lexus, and initiated a traffic stop. Officer McElroy's vehicle was equipped with a dashboard audio and video recorder. The recorder was also activated and recorded the stop. The video includes a digital time clock, which shows the duration of the stop in minutes and seconds.

¶ 6 Officer McElroy testified that he walked up to the front passenger window, greeted the defendant, and identified himself as a member of the drug task force. He was wearing a Metro East Drug Task Force shirt, khaki pants, and a duty belt bearing a handgun, handcuffs, and a radio. Officer McElroy testified that he looked inside the vehicle during this initial confrontation. He stated that he observed a small duffle bag on the rear passenger seat, and a key ring that held a single key and a blunt cutter. Officer

McElroy admitted during cross-examination that he had not mentioned the blunt cutter in his police report, or in his testimony before the grand jury. He noted that the blunt cutter was depicted in a photograph taken of the interior of the vehicle at the time of the search, and that he remembered it when he viewed the photograph during trial preparations.

¶ 7 Officer McElroy testified that he informed the defendant that the reason for the stop was a missing front license plate and a suspended registration. After learning of the reasons for the stop, the defendant produced a letter from the Secretary of State, indicating that the suspension on the vehicle's registration had been lifted. Officer McElroy testified that he noticed the defendant's hand trembling as the defendant handed over the letter. Officer McElroy acknowledged he did not ask whether the defendant had any type of medical condition that might cause the trembling. He further acknowledged that it is common for motorists to exhibit signs of nervousness during traffic stops. Officer McElroy reviewed the letter from the Secretary of State, and then requested the defendant's driver's license and proof of insurance, which the defendant promptly provided. Officer McElroy asked where the defendant was going. The defendant stated that he was driving from Wisconsin to Rolla, Missouri, to perform road construction work for his uncle's company. When Officer McElroy asked the name of the company, the defendant replied, "Uh, Jones Construction." Officer McElroy then inquired about the defendant's work schedule. The defendant replied that he worked from Thursday to Tuesday each week. Officer McElroy testified that he noticed something in the defendant's tone of voice that suggested the defendant was fabricating a story about his work, but he did not request additional information to verify the defendant's employment.

According to the video recording, this initial exchange between Officer McElroy and the defendant lasted approximately three minutes.

¶ 8 Officer McElroy testified that he returned to his patrol vehicle to run the defendant's driver's license, check for active warrants, verify the status of the vehicle's registration, and obtain the defendant's criminal history. He determined that the defendant had a valid driver's license and no active warrants. The vehicle's registration, however, was still reported as suspended. Officer McElroy testified that at this point he decided to issue warnings for failure to display a front license plate and for driving with a suspended registration.

¶ 9 The records check indicated that the defendant had a criminal history, including a conviction in Illinois for the manufacture and delivery of heroin, and charges in Missouri for manufacture and delivery of a controlled substance and possession of cannabis. Officer McElroy then phoned an analyst at the DEA, and learned that the defendant was the subject of a pending criminal investigation in Rolla, Missouri. According to the video recording, this call was placed at 9 minutes, 15 seconds into the traffic stop. The duration of the call was 3 minutes, 16 seconds. After speaking with the analyst, Officer McElroy decided that he was going to ask the defendant some additional questions about his construction vest, and then seek the defendant's consent to search the vehicle. He also decided to request a canine unit as a precaution in the event the defendant refused to provide consent.

¶ 10 Officer McElroy completed the traffic warnings and exited his vehicle. He placed his clipboard holding the defendant's license and the traffic warnings onto the hood of his

vehicle, and approached the defendant's vehicle. At this time, according to the video recording, 12 minutes, 40 seconds had elapsed since the initiation of the traffic stop. Defense counsel asked Officer McElroy if he would have had any additional basis to re-stop the defendant, had the defendant been allowed to leave then with only a warning. Officer McElroy stated that he would not have personally stopped the defendant again, but that another officer would have been justified in stopping the defendant based on the traffic violations he had noted.

¶ 11 Officer McElroy approached the defendant's vehicle, and asked the defendant to step outside of it. The officer did not return the defendant's license or issue the completed traffic warnings. Instead, Officer McElroy subjected the defendant to additional questioning. Officer McElroy testified that he wanted to know why the defendant was wearing his work vest while travelling on a day he was not scheduled to work. He suspected the defendant was wearing it as a prop to authenticate his story, in an effort to avoid suspicion for drug trafficking. As the two men stood on the roadside, Officer McElroy requested permission to conduct a pat down of the defendant's person. The defendant consented, and Officer McElroy conducted a limited pat down of the defendant's front pockets. No weapons or contraband were found.

¶ 12 Officer McElroy testified that the defendant was not free to leave at this point. Officer McElroy continued to press the defendant for details about the construction industry, the length of his employment, his work schedule, and why he was driving in his work vest while off-duty. The officer testified that he was careful to avoid asking detailed questions so that the exchange felt more like a conversation than an interrogation. He

then asked the defendant if there was any contraband in the vehicle, such as marijuana, methamphetamine, heroin, or large amounts of cash. The defendant denied possessing any contraband, and stated that he only had \$13 in cash.

¶ 13 At this point, over 16 minutes into the stop, Officer McElroy requested permission to search the vehicle. The defendant responded, “Anything to get me up out of here.” Officer McElroy returned the defendant’s driver’s license, and asked to conduct a second pat-down search of his person. The defendant agreed, and the officer did a full pat down of the defendant, including his shoes, before searching the vehicle. Officer McElroy stated that once the defendant consented to the search, he was not free to leave. The vehicle search yielded approximately 33.3 grams of a substance that field tested positive for heroin. The defendant was arrested and taken into custody.

¶ 14 At the close of the evidence, the court took the matter under advisement. After considering the testimony of Officer McElroy, the audio and video recording of the traffic stop, and the photographs, the trial court issued a written order granting the defendant’s motion to suppress. The court found there was no reasonable suspicion that the defendant was involved in criminal activity to justify prolonging the traffic stop. The court also found that the total time of the traffic stop was greatly extended due to the officer’s extensive inquiry into the defendant’s background, and that the officer did not have a reasonable, articulable suspicion that other crimes existed. Finally, the trial court found that the defendant’s consent to search was obtained as a result of an illegal detention.

¶ 15 On appeal, the State contends that the trial court erred in granting the defendant's motion to suppress. The State argued that the initial traffic stop was justified, and that the officer, while making permissible inquiries incident to the stop, developed a reasonable suspicion that the defendant was transporting illegal drugs. The defendant acknowledged the initial traffic stop was justified. The defendant argued that the officer impermissibly prolonged the traffic stop without a reasonable, articulable suspicion that the defendant was engaged in criminal activity.

¶ 16 A challenge to a trial court's ruling on a motion to suppress is subject to a two-part standard of review. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). The trial court's findings of historical fact will be reversed only if they are against the manifest weight of the evidence. *People v. Cosby*, 231 Ill. 2d 262, 271 (2008). A reviewing court, however, remains free to undertake its own assessment of the facts in relation to the issues, and so we review *de novo* the ultimate question of whether the evidence should be suppressed. *Cosby*, 231 Ill. 2d at 271.

¶ 17 The fourth amendment to the United States Constitution and article I, section 6, of the Illinois Constitution afford citizens the right to be free from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. The detention by police of an individual during a routine traffic stop constitutes a seizure under the fourth amendment. *Cosby*, 231 Ill. 2d at 273. An initially lawful seizure becomes unlawful if subsequent police conduct violates the fourth amendment's reasonableness standard. *People v. Baldwin*, 388 Ill. App. 3d 1028, 1031 (2009). The reasonableness of police actions taken during a routine traffic stop is measured by the principles set forth in *Terry*

v. Ohio, 392 U.S. 1 (1968). *Baldwin*, 388 Ill. App. 3d at 1031. Under *Terry*, the reviewing court considers (1) whether the officer's action was justified at its inception, and (2) whether the action was reasonably related in scope to the circumstances that justified the interference in the first place. *Baldwin*, 388 Ill. App. 3d at 1031-32.

¶ 18 In the context of a traffic stop, the first prong of *Terry* is generally satisfied when a police officer observes a traffic violation. *People v. Harris*, 228 Ill. 2d 222, 231 (2008). In analyzing *Terry*'s second prong a court must determine whether the officer's questioning related to the initial purpose of the traffic stop. *People v. Cummings*, 2016 IL 115769, ¶ 15; *Cosby*, 231 Ill. 2d at 275. If the questioning was not reasonably related to the purpose of the stop, the court must determine whether the officer had a reasonable, articulable suspicion that justified the questioning. *Cosby*, 231 Ill. 2d at 275. In the absence of a reasonable, articulable suspicion, the court must consider whether, under the totality of the circumstances, the questioning impermissibly prolonged the detention. *Harris*, 228 Ill. 2d at 247.

¶ 19 In this case, there is no dispute that the original stop for routine traffic violations was lawful. The issue is whether Officer McElroy's questioning was reasonably related to the initial purpose of the traffic stop. Officer McElroy informed the defendant of the reasons for the stop, the failure to display a front license plate and the suspension of the vehicle's registration. He asked the defendant for his driver's license and insurance information, which the defendant promptly produced. Officer McElroy then asked a series of questions unrelated to the traffic violations. He asked where the defendant was going, who employed him, what days and hours he worked, and why he was wearing a

construction vest. With the defendant's license in hand, Officer McElroy returned to his vehicle. He ran the defendant's license, checked for active warrants, and conducted a search for defendant's criminal history. This was a permissible inquiry related to the traffic stop and related safety concerns. *Cummings*, 2016 IL 115769, ¶ 15. Officer McElroy quickly learned the defendant had a valid license and no active warrants. Officer McElroy testified that at that point he decided to issue warnings for the traffic violations. While writing the warnings, he learned of the defendant's criminal history and a pending investigation. At that point, he decided that he would ask additional questions about the defendant's work, and then attempt to gain the defendant's consent to search the vehicle. He also requested a canine in case the defendant refused to give consent. Officer McElroy exited his vehicle with the warnings and license on his clipboard. But he did not issue the warnings, return the defendant's license, or allow the defendant to go on his way. Instead, he placed the clipboard on the hood of his vehicle, and asked the defendant to step out the Lexus. By that point, 12 minutes and 40 seconds after the initiation of the stop, the purpose of the original traffic stop had ended. Nevertheless, Officer McElroy prolonged the stop and detained the defendant. He secured the defendant's consent to conduct a consensual pat-down search. He candidly testified that at this point, the defendant was not free to leave. For the next four minutes, Officer McElroy peppered the defendant with questions unrelated to the traffic stop, and then asked for the defendant's consent to search the vehicle.

¶ 20 After reviewing the recording and the testimony in this case, we conclude that Officer McElroy was acting on a mere hunch, and an unparticularized suspicion, when he

decided to prolong the stop and requested the canine. At that time, he did not have a reasonable, articulable suspicion that the defendant was engaging in criminal activity. The defendant gave plausible answers when asked about his destination and his construction job. The defendant also gave a plausible answer when asked why he was nervous. The purported change in the tone of the defendant's voice is not evident in the recording. Officer McElroy acknowledged that it would not be unusual for a motorist to appear nervous or anxious during a routine traffic stop. We note that Officer McElroy initially testified that the blunt cutter was part of his reasonable suspicion for prolonging the traffic stop, but he later cast doubt on his own statement when he admitted that he did not mention the blunt cutter in his police report or during his grand jury testimony. In this case, the defendant's criminal history was not sufficient to provide a reasonable suspicion that the defendant was engaging in criminal activity. The officer recognized as much because he continued to question the defendant for an additional four minutes on the roadside before asking for consent to search the vehicle. After considering the officer's conduct in light of the totality of the circumstances surrounding the traffic stop, we conclude that the trial court did not err in granting the defendant's motion to suppress.

¶ 21 Accordingly, the circuit court's order granting the defendant's motion to suppress is affirmed.

¶ 22 Affirmed.