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2018 IL App (3d) 150708-U

Order filed November 5, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal Nos. 3-15-0708 and 3-15-0711
ELLIS M. COWART and HORACE C. MACKEY,	)	Circuit Nos. 13-CF-2347 and 13-CF-2348 (Consolidated)
Defendants-Appellants.	)	Honorable Edward A. Burmila Jr., Judge, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Presiding Justice Carter concurred in the judgment.  
Justice Schmidt dissented.

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**ORDER**

- ¶ 1 *Held:* The trial court erred when it denied defendants' motion to suppress where defendants did not consent to the search, and where the officer unduly extended the duration of the traffic stop in the absence of independent probable cause.
- ¶ 2 Horace C. Mackey and Ellis M. Cowart were tried before a judge on the charges of possession and transportation of contraband cigarettes. Contemporaneous with the bench trial, the court conducted a hearing on defendants' joint motion to quash arrest and suppress evidence,

which the court denied. Defendants appeal and assign error to the trial court's ruling on defendants' joint motion to suppress.

¶ 3

### FACTS

¶ 4

On November 7, 2013, Horace C. Mackey and Ellis M. Cowart (collectively defendants) were indicted on the charges of possession of contraband cigarettes (35 ILCS 130/24(c) (West 2012)), more than 1000 packages, and transportation of contraband cigarettes (35 ILCS 130/9(c) (West 2012)), more than 40,000 individual cigarettes, following a traffic stop conducted on the night of October 24, 2013. On June 9, 2015, defendants' filed a joint motion to quash arrest and suppress evidence (motion to suppress). Defendants' motion to suppress argued that their fourth amendment rights were violated because they were doing nothing indicative of a crime at the time they were seized, and because officers unreasonably prolonged the traffic stop, *inter alia*.

¶ 5

The case proceeded to a dual bench trial on August 20, 2015. Counsel for defendants informed the court that the defense and the State agreed to conduct the hearing on the motion to suppress in conjunction with the bench trial.

¶ 6

Illinois State Trooper Rick Zarate testified that he was patrolling I-80 eastbound on October 24, 2013, at 11:25 p.m. Zarate spotted a vehicle that appeared to be traveling above the posted speed limit. Zarate activated his radar, which showed that the vehicle was traveling "60 in a 55." Zarate conducted a stop for speeding.

¶ 7

As Zarate approached the van on foot, he noticed several, about seven, full-sized suitcases in the back of the van. Zarate observed Mackey in the driver's seat and Cowart in the passenger's seat. Zarate asked Mackey for his driver's license and proof of insurance. Mackey was unable to produce his driver's license, but he handed Zarate the rental agreement to the van.

¶ 8 Zarate asked Mackey to accompany Zarate back to the squad car so that Zarate could check Mackey's driver's license status. Mackey informed Zarate that his driver's license was suspended. Eventually, Zarate learned that Mackey's license was suspended for failing to pay child support. Zarate testified that at this time, he needed to check the status of Mackey's driver's license, look up the vehicle information on the plate, and look up information on Cowart. Additionally, Zarate had to run a check on Mackey's criminal history, and had to read an out-of-state warrant on Mackey.

¶ 9 Next, Mackey spent several minutes looking through his wallet before finding his state I.D. Mackey told Zarate that it took him so long to find the I.D. because he was nervous. With regard to Mackey's overall demeanor, Zarate stated that Mackey was very nervous. Zarate noticed that Mackey's breathing pattern changed, that Mackey's chest was pounding rapidly, and that Mackey's hands were shaking. Mackey would not make eye contact with Zarate. Mackey advised Zarate that he stayed or was staying in Joliet for one week.

¶ 10 Zarate spoke with Ellis. Ellis told Zarate that he and Mackey were only staying in Joliet for one day. Ellis also advised that he rented the van and that he knew Mackey was driving on a suspended license.

¶ 11 Based on the discrepancies between Cowart and Mackey's stories, and through his training and experience, Zarate believed "that there was some criminal activity happening at the time or going to happen or had already happened." Zarate requested that a canine from Plainfield come to the scene.

¶ 12 Zarate again stated that he had to complete a lot of paperwork which included a citation, warnings, and a full-size Will County bail bond sheet. While completing paperwork, Zarate

continued to converse with Mackey. Mackey told Zarate that he was driving because Cowart became easily fatigued when he drove. Mackey stated that the van had been rented that day.

¶ 13 Zarate issued Mackey a ticket for driving while license suspended and a warning for speeding. Cowart received a warning for allowing an unauthorized person to drive the rented van. While Zarate was completing paperwork, Officer Wagner arrived at the scene with his canine. Wagner conducted a free-air sniff with his canine. The canine alerted to the presence of narcotics at the rear of the van by scratching the bumper and biting the license plate. Based on this alert, Zarate opened the back hatch and found untaxed cigarettes from Missouri in the suitcases. Zarate stated that Cowart told him he had been paid \$1200 to transport the cigarettes to Chicago.

¶ 14 Officer Wagner testified that he worked with a canine, Aron. Wagner and the canine became certified through a three-month certification program. Wagner and his canine train for 16 to 20 hours-per-month. Wagner's canine is trained to detect the odor of cannabis, heroin, methamphetamines, cocaine, and currency. Wagner's canine was an aggressive alert dog, which means he will scratch, bite, or claw where the substance or the odor is emitting from. In this matter, Wagner's canine alerted to the presence of drugs. No drugs were found in the van, and Wagner admitted that sometimes the canine is incorrect.

¶ 15 A video of the traffic stop was presented to the court. For the convenience of the reader, a timeline of the relevant events contained in the video is recited below.

(2:02) Zarate approaches the van and asks Mackey for his license, insurance, and rental agreement;

(2:45) Mackey tells Zarate that he does not have his driver's license. Zarate asks Mackey to come back to his squad car;

- (3:27) Mackey informs Zarate that his license is suspended for not paying child support;
- (3:48) Zarate asks Mackey “what’s up with all the luggage?”
- (3:52) Mackey responds that “we” stayed a few days with a friend in Joliet;
- (4:12) Mackey states that he is nervous because he doesn’t get stopped that much;
- (4:34) Mackey has trouble finding his state ID;
- (6:07) Mackey finds his state ID;
- (7:12) Zarate asks Mackey how long they stayed in Joliet. Mackey responds “about a week;”
- (9:48) Zarate asks Mackey how many suitcases belong to Mackey and Mackey responds “just a couple of them;”
- (10:29)Zarate goes back to the van and asks Cowart who rented the van. Cowart responds that he rented the van and that Cowart knew Mackey’s driver’s license was suspended;
- (10:59)Zarate and Cowart discuss Cowart’s stay in Joliet;<sup>1</sup>
- (11:15)Zarate returns to his squad car and asks Mackey when they got to Joliet. Mackey responds three days ago;
- (11:55)Zarate requests a canine unit;
- (12:00)Mackey states that they are not dealing or transporting drugs;
- (12:36)Zarate tells Mackey that Cowart stated that they had both come down to Joliet that day. Mackey responded that they had come down a few days ago;
- (13:00)Mackey tells the trooper there are no drugs in the van and states: “get the dog and sniff the car, we don’t have any drugs;”

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<sup>1</sup>The audio at this juncture is difficult to understand.

(15:30)Zarate tells Mackey he's going to ticket Mackey for driving while license suspended (DWLS) and will give Mackey a warning for speeding;

(15:34)Zarate asks Mackey why he was driving instead of Cowart. Mackey responds that Cowart falls asleep behind the wheel;

(15:59)Dispatch asks Zarate if he still wants the canine unit because the closest one was in Plainfield and that would be "too far." Mackey reacts to this news by loudly exclaiming: "PLAINFIELD;"

(16:26)Zarate confirms that he will wait for the canine unit;

(20:46)Zarate asks Mackey when they rented the van. Mackey responds, "yesterday" or this morning;"

(21:00)Zarate tells Mackey his response does not make sense because Mackey previously stated that they had been in Joliet for a few days;

(22:22)Zarate tells Mackey that Cowart stated that he had not stayed in Joliet. Mackey responds that he had been in Joliet for a few days and that Cowart had just arrived that day to pick him up;

(22:50)Mackey informs Zarate that some of the suitcases belong to Mackey and some belong to Cowart because they were going to go to Iowa to gamble;

(24:30)Zarate asks Mackey about his previous conviction for possession of a controlled substance;

(26:35)Zarate tells Mackey that he is going to I-bond him instead of arresting him for DWLS;

(28:21)Mackey asks where he should sign;

(28:44)Sound of paper ripping;

(34:10)Zarate tells Mackey that he is going to write Cowart a warning for letting Mackey drive the van knowing Mackey was suspended;

(37:25)Mackey asks where he needs to sign;

(38:38)Zarate states that the paperwork is not over;

(38:58)The canine unit arrives;

(45:08)Zarate asks Mackey to sign something;

(45:35)Zarate and Wagner inform Mackey that he is not authorized to drive under the rental agreement;

(46:24)Zarate states that he still has to look up the code section prohibiting Cowart from allowing Mackey to drive the van;

(49:20)The canine alerts to the presence of narcotics by standing perpendicular to the back hatch of the van, scratching the back bumper, biting the license plate, and barking;

(50:25)Zarate opens a suitcase and states that it contains untaxed cigarettes.

¶ 16 Following argument, the trial court took the case and the ruling on the motion to suppress under advisement. On September 8, 2015, the trial court denied defendants' motion to suppress and reasoned that Mackey consented to the canine search.

¶ 17 Following the ruling on the motion to suppress, the trial court found both defendants guilty of possession of and transportation of contraband cigarettes. On October 8, 2015, the court sentenced defendants to 18 months of Treatment Alternatives for Safe Communities (TASC) probation. Defendants filed a motion for a new trial which the trial court denied on October 8, 2015. On October 9, 2015, defendants filed a timely notice of appeal.

¶ 18

## ANALYSIS

¶ 19

On appeal, defendants argue that the trial court erred by denying their motion to suppress because Trooper Zarate did not have probable cause to request a canine unit, because Mackey did not consent to wait for the arrival of the canine unit, and because Trooper Zarate unduly extended the traffic stop in violation of Cowart and Mackey's fourth amendment rights. Defendants request reversal of the trial court's ruling on their motion to suppress and their convictions.

¶ 20

The State contends that Trooper Zarate had probable cause to believe that defendants were engaged in criminal activity. In addition, the State contends Mackey consented to wait for the arrival of the canine unit, therefore, the traffic stop was not unduly extended while Trooper Zarate waited for the canine unit to arrive. The State also argues that the duration of the traffic stop was justified based on the necessary inquiries incident to the stop.

¶ 21

At the outset, we address our review of this case in light of the fact that both defendants' convictions were vacated and their charges were dismissed during the pendency of this appeal pursuant to section 40-10(e) of the Alcoholism and Other Drug Abuse and Dependency Act (the Act). 20 ILCS 301/40-10(e) (West 2016). Consequently, defendants could not have a subsequent judgment vacated under section 40-10(e) in the future. 20 ILCS 301/40-10(e) (West 2016). Under these circumstances, defendants could suffer collateral legal consequences, negating the mootness of their appeal. *People v. Jordan*, 218 Ill. 2d 255, 263-65 (2006). Therefore, even though defendants' convictions were previously vacated, we will address the issues raised on appeal.

¶ 22

Reviewing courts apply a two-part standard of review to rulings on motions to quash arrest and suppress evidence. *People v. Wear*, 229 Ill. 2d 545, 561 (2008). The trial court's



findings of historical fact are reviewed only for clear error as we afford great deference to the inferences the trial court drew from the facts. *People v. Baldwin*, 388 Ill. App. 3d 1028, 1031 (2009). Reviewing courts also afford great deference to the trial court’s factual findings, and those findings will not be reversed unless they are against the manifest weight of the evidence. *People v. Sorenson*, 196 Ill. 2d 425, 430-31 (2001). A finding is said to be against the manifest weight of the evidence only where the opposite conclusion is clearly evident, or when the finding is unreasonable, arbitrary, or not based on the evidence. *People v. Deleon*, 227 Ill. 2d 322, 332 (2008). However, in accordance with the two-part standard of review, reviewing courts remain free to undertake their own assessment of the facts in relation to the issues, and may draw their own conclusions when deciding the proper relief to grant. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Thus, the trial court’s ultimate legal ruling regarding suppression is reviewed *de novo*. *Id.*

¶ 23 The case law recognizes 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.” *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). Reasonableness belies any fourth amendment analysis and is determined under an objective standard, based on the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). An officer’s inquiries into matters unrelated to the stop are constitutionally permissible as long as those inquiries do not unlawfully extend the duration of the stop. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). Beyond determining whether to issue a traffic ticket, an officer’s mission includes “ordinary inquiries incident to [the traffic] stop.” *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) (quoting *Caballes*, 543 U.S. at 408). Such ordinary but unrelated inquiries include: checking the driver’s license, determining whether or not there are outstanding warrants

against the driver, and inspecting the automobile's registration and proof of insurance. *Rodriguez*, 135 S. Ct. at 1615; *People v. Pulling*, 2015 IL App (3d) 140516, ¶ 17. These inquiries help insure that vehicles are being operated safely and responsibly on the road. *Rodriguez*, 135 S. Ct. at 1615.

¶ 24 No bright-line rule exists with regard to the reasonableness of a stop's duration. *Baldwin*, 388 Ill. App. 3d at 1034. Instead, court's "employ a contextual, totality of the circumstances analysis that includes consideration of the brevity of the stop and whether the police acted diligently during the stop." *Id.*

¶ 25 Before we analyze the reasonableness of the stop's duration, we respond to the State's argument that any extension in the duration of the stop was warranted because Mackey consented to await the arrival of the canine unit by stating: "get the dog and sniff the car, we don't have any drugs." The State argues that this case is similar to our holding in *People v. Sanchez*, 292 Ill. App. 3d 763 (1997), wherein this court held that the delay of 40 minutes was reasonable after the driver consented to a search of a motor home by responding, "yeah," to the officer's request to search.

¶ 26 The case at bar presents circumstances unlike those considered by our court in *Sanchez*. Instead, the facts of this case are more analogous to the facts addressed by this court in *People v. Pulling*, 2015 IL App (3d) 140516. In *Pulling*, this court held that where defendant gave consent to search the vehicle *after* the officer had already explained that he was going to conduct a free-air sniff, defendant's consent "did not transform [the] prolonged stop into a permissible seizure." *Id.* at ¶ 20.

¶ 27 Similarly, in this case, Zarate first requested a canine to come to the scene to conduct a free-air sniff. After overhearing Zarate's request for a canine, Mackey stated "get the dog and

sniff the car, we don't have any drugs." Further, Mackey expressed displeasure upon learning that there would necessarily be more delay because the closest canine unit was in Plainfield. Based on *Pulling*, we conclude Mackey's after-the-fact statement cannot be construed as his consent to the free-air sniff.

¶ 28 With regard to the duration of the stop, Zarate testified that he had to complete the following tasks pursuant to this particular traffic stop: (1) check Mackey's driver's license status; (2) look up information about the van's plates; (3) look up Mackey's criminal history; (4) read an out-of-state warrant on Mackey; (5) look up information about Cowart; (6) complete a citation for DWLS; (7) complete a warning for speeding; (8) complete a warning for allowing an unauthorized person to drive the rental vehicle; (9) and complete a bail bond sheet. The State argues that the approximate 47 minute period, measured from the beginning of the stop<sup>2</sup> until the canine alerted to the presence of narcotics, was reasonable and necessary to complete the tasks listed above. The State's assertion is not supported by the undisputed facts documented by the video.

¶ 29 Approximately 43 seconds after Zarate first approached the van, Zarate requested that Mackey exit the van and come back to Zarate's squad car. Mackey informed Zarate that his driver's license was suspended.

¶ 30 During the next seven minutes, Zarate questions Mackey on several topics such as the luggage and the duration of Mackey's stay in Joliet. This conversation took place at Zarate's squad car. Then, Zarate walks back to the van to speak with Cowart. Cowart tells the officer that Cowart knew Mackey's driver's license was suspended. At this time, Zarate questions Cowart on his stay in Joliet, a matter unrelated to Mackey's legal ability to drive or the speeding violation.

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<sup>2</sup>For purposes of clarity, the time periods referenced in this analysis are measured from the time Zarate approaches the van, approximately two minutes into the videotape.

¶ 31           Approximately 9 minutes and 15 seconds into the stop, Zarate ends his conversation with Cowart at the rental van and returns to his squad car where Mackey is waiting. Zarate again questions Mackey about his stay in Joliet. Based on Mackey’s responses to Zarate’s questions, Zarate requests a canine unit approximately 9 minutes and 55 seconds into the stop.

¶ 32           Approximately four minutes later, Zarate informs Mackey that he is going to give Mackey a ticket for DWLS and a warning for speeding. Approximately 30 seconds later, dispatch informs Zarate that the closest canine unit was in Plainfield, to which Zarate responds that he will wait for the canine. For approximately the next 33 minutes, Mackey stands outside Zarate’s squad car, while Zarate completes paperwork for both occupants of the rental vehicle.

¶ 33           Approximately 24 minutes into the stop, Zarate informs Mackey that he is going to I-bond him instead of arresting him. Approximately 26 minutes into the stop, Mackey asks where he should sign. Approximately 32 minutes into the stop, Zarate tells Mackey that he is going to write Cowart a warning for letting Mackey drive the van while knowing that Mackey’s license was suspended. Approximately 34 minutes into the stop, Mackey asks where he needs to sign. Around this time, Zarate states that the paperwork is still not complete and the canine arrives. Approximately 43 minutes into the stop, Zarate again asks Mackey to sign something. Approximately 44 minutes into the stop, Zarate states that he still has to look up the code section prohibiting Cowart from allowing Mackey to drive the van. Finally, three minutes later, the canine alerts to the presence of narcotics approximately 47 minutes into the stop.

¶ 34           We recognize the nature of this particular stop required duplicative efforts for routine background checks and paperwork after Zarate determined both occupants of the rental vehicle would receive citations and/or warnings for traffic violations. The case law recognizes that a seizure pursuant to a traffic violation justifies a police investigation of that particular traffic

violation. *Rodriguez*, 135 S. Ct. at 1614. A traffic stop may broaden into an investigatory detention if 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). However, hunches and unparticularized suspicions do not justify the broadening of the stop into an investigatory detention. *Id.* Reviewing courts determine reasonable suspicion by reviewing the totality of the circumstances, and recognizing the inferences and deductions that may be drawn by the officer based on his or her training. *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002).

¶ 35 Defendants concede that Zarate had probable cause to stop the rental vehicle for speeding but contest that Zarate had the reasonable suspicion necessary to broaden the traffic stop into a criminal investigation. The State asserts that Zarate’s observation of Mackey’s nervous behavior and the large number of suitcases in the back of the van, coupled with defendants’ inconsistent stories, gave Zarate a reasonable, articulable suspicion that defendants were engaged in criminal activity, thus justifying the canine request and continued seizure.

¶ 36 This case bears a striking resemblance to this court’s decision in *Ruffin*. *Ruffin*, 315 Ill. App. 3d at 744. In *Ruffin*, the officer knew the defendant was driving a rented car, saw that the defendant was nervous, knew that the defendant was traveling from southern California, and knew that the defendant had visited Mexico and New York. *Id.* at 750. Additionally, the officer knew that the defendant and his fiancé had given different stories about who had gone with them to San Diego and Tijuana. *Id.* This court rejected the State’s argument in *Ruffin* that the officer had an independent reasonable suspicion to detain defendant based on these facts. *Id.*

¶ 37 It is well established that a driver’s nervous appearance, without more, cannot serve as a reasonable basis for a criminal investigation. *People v. Stewart*, 242 Ill. App. 3d 599, 606 (1993);

*People v. Penny*, 188 Ill. App. 3d 499, 503 (1989). The presence of approximately seven suitcases inside the van, which bore no unique characteristics other than the fact that there were approximately seven of them, strikes this court as unremarkable. Further, while each defendant provided conflicting answers about the duration of their visit in Joliet, their answers were in response to questioning that was completely unrelated to the purpose of the traffic stop. Put together, the facts in this case gave rise to an educated hunch that something illegal was afoot, but did not support probable cause to detain the occupants of the car for 47 minutes until the canine arrived. Furthermore, the officer spent a significant amount of time questioning defendants about the luggage and the duration of their visit in Joliet. The video shows the officer was not working on paperwork as he spent time going from one vehicle to another to ask each defendant about the duration of their stay in Joliet. This line of questioning appears to precede the officer's decision to issue the traffic citation and/or warnings. Therefore, we conclude such conduct by the officer unreasonably extended the duration of the stop.

¶ 38 For the aforementioned reasons, the trial court erred by denying defendants' motion to suppress. Because the State would have been unable to proceed against defendants without the suppressed evidence, we reverse defendants' convictions outright. *People v. Jones*, 346 Ill. App. 3d 1101, 1106-07 (2004); *People v. Smith*, 331 Ill. App. 3d 1049, 1056 (2002). We note the convictions are vacated based on this evidentiary issue rather than successful completion of task probation.

¶ 39 CONCLUSION

¶ 40 The judgment of the circuit court of Will County is reversed.

¶ 41 Reversed.

¶ 42 JUSTICE SCHMIDT, dissenting:

¶ 43 We should affirm the trial court. The majority notes that “the facts of this case gave rise to an educated hunch that something illegal was afoot, but it did not support probable cause to detain the occupants of the car for 47 minutes until the canine arrived. *Supra* ¶ 37. First of all, no one disputes that the original traffic stop was based on probable cause. The majority incorrectly concludes that the subsequent detention required probable cause. It did not. It required a reasonable, articulable suspicion. *Terry v. Ohio*, 392 U.S. 1 (1968). Unlike the majority, I believe that Trooper Zarate’s observation of Mackey’s nervous behavior, an inability to retrieve his state identification, the large number of suitcases in the back of the van, together with defendants’ inconsistent stories, gave Zarate a reasonable, articulable suspicion that defendants were engaged in criminal activity. Furthermore, in this case, defendant consented to wait for a dog. He challenged them to do it by stating, “get the dog and sniff the car, we don’t have any drugs.” Consent alone ought to put this case to rest.

¶ 44 This was not your garden variety traffic stop. Mackey was driving a rented van on a suspended driver’s license. A routine criminal history check revealed an active out-of-state warrant on Mackey. The trooper decided not to make a custodial arrest of Mackey on the suspended driver’s license charge and had to complete a Will County bail-bond sheet.

¶ 45 In a nutshell, we have a probable cause traffic stop that evolved into a *Terry* stop coupled with the driver’s consent to wait for a dog. The majority relies on *People v. Pulling* for the notion that consent granted after an officer explains he is going to conduct a free-air sniff somehow negates the consent. *Supra* ¶ 26. I respectfully submit that *Pulling* was wrongly decided on a couple of grounds.

¶ 46 The majority also seems to find it significant that “while each defendant provided conflicting answers about the duration of their visit in Joliet, their answers were in response to

questioning that was completely unrelated to the purpose of the traffic stop. *Supra* ¶ 37. Whether the questioning was related to the purpose of the traffic stop is not the issue. The issue is whether those questions unreasonably extended the traffic stop. They did not.