2018 IL App (5th) 150149-U

NO. 5-15-0149

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 13-CF-517
	)	
TIMOTHY L. BOYD,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Circuit court did not err in denying defendant's motion to suppress evidence because the evidence was admissible under the inevitable discovery doctrine. The State presented sufficient evidence to support a finding defendant had constructive knowledge of the controlled substances located inside of the vehicle.

¶ 2 Defendant, Timothy L. Boyd, appeals from the trial court's judgment, entered after a stipulated bench trial, convicting him of unlawful possession of a controlled substance with intent to deliver. We affirm.

¶ 3 The State charged defendant with unlawful possession of a controlled substance with intent to deliver between 15 and 100 grams of a substance containing cocaine in

violation of section 401(a)(2)(A) of the Illinois Controlled Substances Act (720 ILCS 570/401(a)(2)(A) (West 2012)), a Class X felony. Defendant filed a "Motion to Suppress Evidence and Quash Arrest" seeking to suppress evidence of cocaine and cash that led to the charge.

¶ 4 At the hearing on the motion to suppress, the following evidence was adduced. On November 7, 2013, members of the Southern Illinois Enforcement Group (SIEG) received a tip from a confidential informant that Terrell Cooks and an individual known as "Timothy," or "Trip," from the Mt. Vernon area, were selling cocaine out of a hotel in Marion, Illinois. Officers investigated and learned that Cooks was staying at the Super 8 hotel in Marion. Sergeant Aaron Hoffman and other SIEG officers conducted surveillance at the hotel, and observed two vehicles in the parking lot. One of the vehicles, a blue Chevy Tahoe, was registered to a woman from Mt. Vernon.

¶ 5 The officers watched as defendant entered the Tahoe, and drove out of the parking lot. Sergeant Hoffman and other SIEG agents followed the Tahoe. Hoffman testified the officers suspected the Tahoe may be involved in drug sales, but acknowledged they initially did not have a reason to stop the vehicle. Thereafter, Hoffman observed defendant make a left-hand turn without signaling, and he initiated a traffic stop. Defendant pulled into a Burger King parking lot and parked the Tahoe in a parking space.

¶ 6 Sergeant Hoffman approached the driver's side window, indentified himself, and requested defendant's license and insurance card. Defendant produced the insurance card for the Tahoe, but told Hoffman he did not have a driver's license. Hoffman asked defendant if there was anything in the vehicle with his name on it, and defendant replied

"no." Hoffman asked defendant if his license was suspended, revoked, expired, or if defendant simply did not have his license with him, and defendant did not respond. Instead, defendant made a "quick movement" to the center console. Hoffman instructed defendant to keep his hands where Hoffman could see them.

¶ 7 Agent Eric Bethel, who was positioned near the passenger side door, asked defendant if he could open the door so he could hear the conversation between Hoffman and defendant. Defendant replied "yes," so Bethel opened the passenger door.

¶ 8 Defendant told Hoffman his name was Joseph L. Hart and that his birthday was June 21, 1993. Defendant's voice was trembling and he was swallowing hard, and it took defendant a long time to provide Hoffman with the information. Bethel testified that defendant appeared very nervous, and that he was visibly shaking and his carotid artery was throbbing. Bethel stated defendant was hesitant to provide information, was not answering all of the questions, and was not responding appropriately to Hoffman's questions.

¶ 9 Hoffman asked defendant his age, and defendant responded that he was 21, which would have been incorrect if the pedigree information defendant provided to Hoffman was accurate. Hoffman told defendant he did not believe defendant was being honest, and asked defendant for his real information. Defendant made another move toward the center console and Hoffman again instructed defendant to put his hands in front of him. Defendant then admitted that his driver's license was suspended. Hoffman repeatedly asked defendant for his name and defendant would not answer.

¶ 10 The officers decided to arrest defendant for driving while license suspended and obstruction of justice for providing fictitious information. Agent Bethel reached across the passenger seat and placed a handcuff on defendant's right wrist, and Sergeant Hoffman instructed defendant to exit the vehicle. As defendant stepped out of the vehicle, he attempted to flee and was stopped approximately five to seven feet from the vehicle. Defendant was then taken into custody for resisting arrest.

¶ 11 After defendant was arrested, Deputy Andrew Notier from the Williamson County Sheriff's office arrived with a K-9 unit. Hoffman testified that the dog walked around the vehicle and "immediately jumped into the [open] passenger door and alerted on the center console." Agent Bethel testified that a subsequent search of the Tahoe yielded approximately 52.8 grams of a substance which was found in the center console. A field test performed on the substance tested positive for the presence of cocaine. The officers also recovered $1545, some of which they suspected were used by SIEG to purchase cocaine from Terrell Cooks.

¶ 12 Sergeant Hoffman testified that the Tahoe was not blocking any roads and was not illegally parked, but that the vehicle was going to be towed for "safety reasons" because the Tahoe was not registered to defendant. Hoffman testified that an inventory search of the vehicle would have been conducted because the vehicle was going to be towed. Agent Bethel testified that the Tahoe was going to be towed because defendant was under arrest and the vehicle did not belong to defendant. Bethel testified police learned after defendant's arrest that he used the name "Trip."

¶ 13 Defendant argued at the hearing that the evidence recovered from the Tahoe should be suppressed because the warrantless search of the vehicle was not authorized by any exception to the warrant requirement. Defendant contended the search was not a search incident to a lawful arrest because there was no evidence to be found in the vehicle related to the crimes for which defendant was arrested, and because defendant was not within reach of the vehicle when he was placed under arrest. Defendant also argued the officers did not have probable cause to search the vehicle for drugs absent the alert of the K-9, and the K-9 sniff was impermissible because free air sniffs are restricted to the exterior of the vehicle. Finally, defendant argued an inventory search was not warranted because it was not necessary to tow the Tahoe, as it was legally parked in a private parking lot.

¶ 14 The State argued that defendant was arrested while still inside the vehicle and acknowledged that it was unaware of any case law regarding K-9 sniff searches involving the interior of a vehicle. The State also argued that the evidence was admissible under the inevitable discovery rule because the drugs and currency would have been located during an inventory search of the Tahoe. The State contended the vehicle would have been towed because it was not defendant's vehicle, and the officers were unaware of the vehicle's status. Further, in the State's view, the restaurant was not obligated to allow vehicles to be parked in its lot for an extended period of time.

¶ 15 The circuit court agreed with defendant that the search of the Tahoe was not authorized as a search incident to a lawful arrest. The court found that while free air sniffs by a K-9 dog are limited to the exterior of the vehicle, in this case, the dog entered

the vehicle of its own accord after the defendant consented to opening the passenger door. The court found that once the dog alerted to the presence of narcotics, the officers had probable cause to look in the console where the drugs were ultimately found. The circuit court also found that the items would have been recovered as part of an inventory search of the vehicle. The court found the Tahoe would have been towed because defendant was being arrested, the vehicle did not belong to defendant, there was no one else present who was permitted to move the vehicle, and the restaurant had no interest or desire to have the vehicle left in the parking lot indefinitely. In light of these findings, the circuit court denied defendant's motion to suppress the evidence.

¶ 16 On December 16, 2014, defendant waived his right to a jury and the cause proceeded to a stipulated bench trial. The State amended the information to a charge of unlawful possession of a controlled substance with intent to deliver between 1 and 15 grams of a substance containing cocaine. 720 ILCS 570/401(c)(2) (West 2012). The parties agreed to a sentence cap of six years in the event defendant was found guilty. The parties stipulated to the admission of an Illinois State Police forensic report indicating the substance recovered from the Tahoe was determined to be 41.3 grams of a substance containing cocaine and 6 grams of a substance containing cocaine base. The parties also stipulated that the evidence at the bench trial would have been the same as the evidence presented to the court at the suppression hearing. Defense counsel renewed his objection to the court's decision denying defendant's motion to suppress. The circuit court advised the parties it would review the transcript and issue a written verdict.

¶ 17 On December 17, 2014, the trial court found defendant guilty on the amended charge. The court denied defendant's posttrial motion raising the suppression issue and sentenced defendant to four years' imprisonment.

¶ 18 On appeal, defendant argues the trial court erred in denying his motion to suppress evidence where the officers violated his fourth amendment rights by conducting a warrantless search of the Tahoe without probable cause. Defendant also argues the evidence is insufficient to support the conviction because the State failed to establish that he had knowledge of the controlled substances located inside the Tahoe.

¶ 19 Admissibility of Evidence

¶ 20 Defendant contends that the search was not justified as a search incident to a lawful arrest. He also claims that the entry of the dog into the vehicle was an unconstitutional search executed without probable cause, and that the alert of the dog alone was insufficient to establish probable cause to search the vehicle. Further, defendant argues that the doctrine of inevitable discovery was inapplicable because an inventory search was not justified based on the facts of the case, and that there is insufficient evidence supporting the State's contention that the vehicle was towed, impounded, and inventoried.

¶ 21 At a hearing on a motion to suppress, the defendant bears the burden of proof. *People v. Gipson*, 203 Ill. 2d 298, 306 (2003); *People v. Cregan*, 2014 IL 113600, ¶ 23. The defendant must make a *prima facie* showing that the evidence was obtained by an illegal search or seizure. *Gipson*, 203 Ill. 2d at 306-07. If the defendant makes a *prima facie* case, the State then has the burden of presenting evidence to counter the

defendant's *prima facie* case. *Gipson*, 203 Ill. 2d at 307. Ultimately, the burden of proof remains with the defendant. *Gipson*, 203 Ill. 2d at 307.

¶ 22 The circuit court's factual findings are accorded great deference on appeal, and we will reverse only when the court's findings are against the manifest weight of the evidence. *Gipson*, 203 Ill. 2d at 303. The circuit court's determination of whether suppression was warranted is a legal question which is reviewed *de novo*. *Gipson*, 203 Ill. 2d at 304.

¶ 23 In this case, the trial court found the evidence was admissible because the K-9 dog alert provided the officers with probable cause to search the center console of the Tahoe, and the evidence would have been recovered as part of an inventory search of the vehicle. We agree with the circuit court's finding that the evidence was admissible under the inevitable discovery doctrine, and was admissible at trial. Therefore, we need not address defendant's alternative arguments in support of suppression of the evidence.

¶ 24 The exclusionary rule prohibits illegally seized evidence from being used at a criminal trial. *People v. Ursini*, 245 Ill. App. 3d 480, 483 (1993). The inevitable discovery doctrine is an exception to the exclusionary rule, permitting normally inadmissible evidence to be admitted if the State can demonstrate by a preponderance of the evidence that the evidence would have been discovered by lawful means without reference to any police error or misconduct. *People v. Perez*, 258 Ill. App. 3d 133, 137 (1994).

¶ 25 "Generally, courts will find that evidence inevitably would have been discovered where (1) the condition of the evidence when actually found by lawful means would have

been the same as that when improperly obtained; (2) the evidence would have been discovered through an independent line of investigation untainted by the illegal conduct; and (3) the independent investigation was already in progress at the time the evidence was unconstitutionally obtained." *Perez*, 258 Ill. App. 3d at 138. Here, the State argued, and circuit court found, that the controlled substances and cash recovered from the center console of the Tahoe would have been discovered during an inventory search of the vehicle.

¶ 26 The fourth amendment of the United States Constitution protects an individual from unreasonable searches and seizures. U.S. Const., amend. IV; *People v. Pitman*, 211 Ill. 2d 502, 513 (2004). Generally, warrantless searches and seizures are unreasonable and unconstitutional unless they fall within a few specifically established and well-delineated exceptions. *Pitman*, 211 Ill. 2d at 513. An inventory search of a lawfully impounded vehicle is a judicially created exception to the warrant requirement. *Gipson*, 203 Ill. 2d at 304. Inventory searches serve three objectives, (1) protection of the owner's property; (2) protection of the police against claims of lost or stolen property; and (3) protection of the police from potential danger. *Gipson*, 203 Ill. 2d at 304.

¶ 27 For a warrantless inventory search of a vehicle to be valid, three criteria must be met: "(1) the original impoundment of the vehicle must be lawful; (2) the purpose of the inventory search must be to protect the owner's property and the police from claims of lost, stolen, or vandalized property, and to guard the police from danger; and (3) the inventory search must be conducted in good faith pursuant to reasonable standardized police procedures and not as a pretext for an investigatory stop." *People v. Clark*, 394 Ill.

App. 3d 344, 348 (2009). An inventory search will be deemed reasonable in satisfaction of the fourth amendment as long as the police regulations are reasonable and administered in good faith. *Clark*, 394 Ill. App. 3d at 348.

¶ 28 Defendant contends the inevitable discovery doctrine does not apply because the vehicle was not subject to a proper inventory search. First, defendant contends there is no evidence that the vehicle was ever towed. Defendant failed to raise this issue in the circuit court. Defendant never asserted in the circuit court that the inventory exception was inapplicable because the vehicle was never towed, but instead argued that the police did not need to tow the vehicle. Defendant has waived this issue on appeal. *People v. Bowen*, 164 Ill. App. 3d 164, 175 (1987).[1]

¶ 29 Next, defendant contends any impoundment of the vehicle was improper because the vehicle was lawfully parked in a private parking lot, was not impeding traffic, and posed no threat to the public safety or convenience. Defendant also argues the State failed to offer any evidence of "any institutional towing or impoundment procedures other than Hoffman's testimony that the vehicle would have to be towed for nondescript 'safety reasons.' "

[1]Both defendant and the State attempt to inject on appeal novel issues and theories not advanced in the circuit court. We summarily deem those issues not previously raised as having been waived. *Bowen*, 164 Ill. App. 3d at 175 (issue or theory not raised by the defendant or the State in the circuit court is waived on appeal).

¶ 30 Here, Sergeant Hoffman testified the Tahoe was going to be towed for "safety reasons" because the Tahoe did not belong to defendant. Agent Bethel testified that the Tahoe was going to be towed because defendant was under arrest and the vehicle did not belong to defendant. Defendant presented no evidence contradicting the officers' testimony or challenging Hoffman's assertion that the vehicle was going to be towed for safety reasons. While defendant is correct that the vehicle was not impeding traffic, this is not the only reason justifying the impoundment of a vehicle. The police have the authority to impound vehicles impeding traffic or threatening public safety and convenience. *Ursini*, 245 Ill. App. 3d at 483. This authority is part of the police department's community caretaking function. *Ursini*, 245 Ill. App. 3d at 483.

¶ 31 Defendant asserts the police could not properly impound the Tahoe because, unless the vehicle was illegally parked, the fact that the arrestee's car would be left unattended is an insufficient reason to impound the vehicle. *Ursini*, 245 Ill. App. 3d at 483. This was not a case, however, where defendant's vehicle was simply being left unattended. Instead, the Tahoe was registered to someone else, and did not belong to defendant. The exact status of the Tahoe was unknown at the time of defendant's arrest. Sergeant Hoffman's testimony that the Tahoe was going to be towed for safety reasons went uncontested by defendant. An inventory search may be upheld solely on an officer's unrebutted testimony that he was following standard procedures. *Gipson*, 203 Ill. 2d at 309. Again, while defendant asserts the State failed to present sufficient evidence of the department's towing or impoundment procedures to support the officers' testimony, defendant did not raise this issue in the circuit court. Instead, defendant asserted below

that the inventory search was unwarranted only because the vehicle was not illegally parked in a public roadway.

¶ 32 Defendant has failed to meet his burden of demonstrating that he was subjected to an illegal search. The circuit court did not err in denying defendant's motion to suppress.

¶ 33 Sufficiency of the Evidence

¶ 34 On appeal, defendant also asserts the State failed to meet its burden of proof because it did not establish that defendant had knowledge of the controlled substances located inside of the Tahoe. We disagree.

¶ 35 On review of a challenge to the sufficiency of the evidence supporting a criminal conviction, this court, viewing the evidence in the light most favorable to the verdict, determines whether there was sufficient evidence from which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). It is the duty of the trier of fact to weigh the evidence, resolve conflicts in the testimony, and draw reasonable inferences from the evidence. *Siguenza-Brito*, 235 Ill. 2d at 224. The reviewing court will not substitute its judgment for the fact finder's on issues involving the weight of evidence or the credibility of the witnesses. *Siguenza-Brito*, 235 Ill. 2d at 224-25. This court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 36 A person commits the crime of unlawful possession of a controlled substance with intent to deliver when he knowingly possesses with intent to deliver, a controlled substance other than methamphetamine, a counterfeit substance, or a controlled substance

analog. 720 ILCS 570/401 (West 2012). At trial, the State presented evidence that 41.3 grams of a substance containing cocaine and 6 grams of a substance containing cocaine base were recovered from the Tahoe.

¶ 37 Possession is divided into two categories, actual or constructive. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Actual possession requires the defendant to exercise some form of dominion over the object. *Love*, 404 Ill. App. 3d at 788. Constructive possession requires the defendant to have had knowledge of the presence of the contraband and immediate and exclusive control over the area where the contraband was discovered. *Love*, 404 Ill. App. 3d at 788. The defendant's mere presence in a vehicle where contraband is found is not sufficient to establish the defendant's knowledge of the contraband. *Love*, 404 Ill. App. 3d at 788. A defendant's knowledge may be inferred from several factors, including "(1) the visibility of the contraband from the defendant's location within the car; (2) the amount of time that the defendant had to observe the contraband; (3) any gestures or movements made by the defendant that would suggest that the defendant was attempting to retrieve or conceal the contraband; and (4) the size of the contraband." *Love*, 404 Ill. App. 3d at 788. Courts can consider any relevant circumstantial evidence of knowledge, including whether the defendant had a possessory or ownership interest in the vehicle. *People v. Bailey*, 333 Ill. App. 3d 888, 892 (2002).

¶ 38 Although the Tahoe was not registered to defendant, defendant was alone in the vehicle from the time he left the motel until the officers stopped him for a traffic violation. During the traffic stop, defendant appeared nervous, provided the officers with false information, and repeatedly moved his hands toward the center console where a

large quantity of drugs and cash were later located.[2] Upon learning of his arrest for driving while his license was suspended, a relatively minor offense, defendant attempted to flee the police.

¶ 39 Based on the totality of the circumstances, and viewing the evidence in the light most favorable to the verdict, the State presented sufficient evidence from which a rational trier of fact could have found defendant was aware of the presence of the drugs in the car, and had constructive possession of them, as only defendant was in control of the Tahoe when the officer stopped the vehicle. The State presented sufficient evidence from which a rational trier of fact could find defendant guilty of the crime as alleged in the amended information.

¶ 40 Based on the foregoing, defendant's conviction and sentence are affirmed.

¶ 41 Affirmed.

[2]On appeal, defendant contends the State failed to present any evidence indicating where the controlled substances were recovered from inside the Tahoe. At the suppression hearing, however, defense counsel conceded that the "contraband" was discovered in the center console of the Tahoe.