2019 IL App (1st) 170225-U

No. 1-17-0225

Order filed May 10, 2019

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 9129
	)	
DEMOYNE BLAKEMORE,	)	Honorable
	)	Thomas J. Byrne,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The police had probable cause to arrest defendant for soliciting unlawful business. We correct defendant's fines and fees order.

¶ 2 On May 16, 2015, defendant Demoyne Blakemore[1] was arrested for soliciting unlawful business in violation of section 10-8-515 of the Chicago Municipal Code. Chicago Municipal

[1] In captions for proceedings in the trial court, defendant's name is given as Demoyne Lakemore. The transcript shows that defendant informed the trial court that his name is Demoyne Blakemore, and we adopt that spelling in this order.

Code § 10-8-515 (added Apr. 1, 1998) (ordinance). He was subsequently charged by information with one count of possession of a controlled substance with the intent to deliver. 720 ILCS 570/401(c)(2) (West 2014). Following a bench trial, defendant was convicted of the lesser included offense of possession of a controlled substance (720 ILCS 570/402(c) (West 2014)), and sentenced to two years' imprisonment. He appeals, arguing that the circuit court erred in denying his motion to quash arrest and suppress evidence because his arrest was not supported by probable cause. Consequently, he asks us to reverse his conviction outright because he contends that the State would be unable to prove him guilty beyond a reasonable doubt without the fruits of the illegal arrest. Additionally, defendant argues that his fines and fees order should be corrected in several respects. We affirm the circuit court's ruling on the motion to quash arrest and suppress evidence, and correct the fines and fees order.

¶ 3 Before trial, defendant moved to quash his arrest and suppress evidence. At the hearing on the motion, defendant called Chicago police officer Hugh Gallagly, who testified as the only witness. Gallagly stated that at approximately 7:50 p.m. on May 16, 2015, he was driving an unmarked vehicle with his partner, Officer McKenna.[2] They turned onto the 3400 block of West Walnut Street, an area known for narcotic sales. As Gallagly was driving eastbound down Walnut, a one-way street, he was slowed down by two cars ahead of him that were "either stopped or rolling slowly." He did not remember what type of cars they were or how many people were in each vehicle. Gallagly acknowledged that he did not run their license plates or mention the cars in the narrative section of his arrest report.

[2] The transcript does not contain McKenna's first name.

¶ 4 Gallagly, whose windows were down, observed defendant standing on the porch of 3444 West Walnut, yelling "rocks" toward the cars. The house was on the side of the street nearer to his driver's side windows. Defendant was the only person standing on the porch, but there were two other men sitting on the porch and a group of young people at the bottom of the stairs. Gallagly heard defendant yell "rocks" at least two times from 50 to 60 feet away. He did not recall seeing defendant's lips move. Gallagly radioed an unmarked squad car behind him about his observations and advised that he would drive around the block and approach defendant. He circled the block and parked in front of 3444 West Walnut. He exited the car and asked defendant to come down to the bottom of the porch stairs. Defendant complied, and Gallagly arrested him. Gallagly did not have an arrest warrant and did not see drugs or weapons in defendant's hands. Gallagly recovered a plastic baggie containing 14 "rock-like" objects of suspected crack cocaine from defendant's pocket. He later learned that the objects tested positive for 1.4 grams of cocaine.

¶ 5 On cross-examination, Gallagly testified that he had been a Chicago police officer for 17 years, and had been assigned to the district encompassing 3444 West Walnut for four or five years. He stated that the area was known for the sale of crack cocaine, heroin, and cannabis. Through his experience as a police officer, he knew that "rocks" was a street term for crack cocaine and was used to solicit its sale. Gallagly arrested defendant for "soliciting unlawful business," and filled out an arrest report. He agreed that an arrest report is a "summary of the events" that an officer determined to provide probable cause for an arrest.

¶ 6 At closing, the State argued that, under *People v. Grant*, 2013 IL 112734, there was "no question" that defendant solicited unlawful business by yelling "rocks" towards the passing cars.

The court responded that the facts of *Grant* were "almost directly on point," but questioned whether the State could prove that defendant occupied the public way. The State replied that, although defendant was on private property, he violated the ordinance because he interfered with or impeded traffic on a public street. Defense counsel argued that it was unreasonable for Gallagly to believe that yelling "rocks" constituted soliciting unlawful business, that defendant was the person yelling, or that the yelling caused the passing cars to slow down. The court denied defendant's motion.

¶ 7 At trial, the State called Gallagly, who gave virtually identical testimony to his suppression hearing testimony. On cross-examination, he acknowledged that there is a speed bump "just past the house" on 3444 West Walnut, but he did not recall seeing a sign to that effect. To refresh Gallagly's recollection, defense counsel presented him with a photograph of a speed bump sign. Gallagly stated that he "assume[d]" that the photograph, which is not in the record on appeal, showed Walnut Street, but he could not remember seeing the sign before. Defense counsel introduced into evidence another photograph showing the house at 3444 West Walnut and the nearby speed bump, which Gallagly stated accurately depicted the street as it appeared on the day of defendant's arrest. This photograph is also not in the record on appeal. On redirect-examination, Gallagly explained that the speed bump was "one house east" of 3444 West Walnut. He testified that he has made "[h]undreds" of narcotics arrests, and in his experience, the cocaine recovered from defendant's pocket was packaged consistently with how narcotics are commonly sold.

¶ 8 The parties stipulated that Arthur Weathers, a forensic chemist for the Illinois State Police, would testify that he received an envelope containing the 14 objects of suspected cocaine

from the Chicago Police Department. Weathers tested the objects, which weighed 1.5 grams, and concluded that they were positive for cocaine. The State then rested.

¶ 9 Defendant renewed his motion to quash arrest and suppress evidence, arguing that the two cars in front of Gallagly slowed down because of the speed bump in the road, not in response to somebody yelling "rocks." The court denied defendant's renewed motion, stating that there was probable cause to arrest defendant because Gallagly was "a reasonably prudent person" who testified that defendant "appeared to be interfering with the vehicular traffic on Walnut Street."

¶ 10 After closing arguments, the court found defendant not guilty of possession with intent to deliver, but guilty of the lesser included offense of possession of a controlled substance. In so finding, the court stated that Gallagly "testified credibly" that he observed defendant yelling "rocks," and that he believed the cars on the street slowed down in response to defendant's yelling. The court denied defendant's motion to reconsider the finding of guilt. Following a sentencing hearing, the court sentenced defendant to two years' imprisonment, and denied his motion to reconsider sentence.

¶ 11 On appeal, defendant first argues that the circuit court erred in denying his motion to quash arrest and suppress evidence because Gallagly lacked probable cause to arrest him for soliciting unlawful business. Specifically, defendant contends that Gallagly's testimony was not credible, and alternatively, that a reasonable person would not have believed that defendant violated the ordinance based on the events described in Gallagly's testimony.

¶ 12 A warrantless arrest is valid only if it was supported by probable cause. *People v. Jackson*, 232 Ill. 2d 246, 274-75 (2009). Probable cause exists when the facts known to the

officer at the time of the arrest would "lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Gocmen*, 2018 IL 122388, ¶ 19. The existence of probable cause is based on the totality of the circumstances, including the arresting officer's factual knowledge and law enforcement experience. *Grant*, 2013 IL 112734, ¶ 11. Whether probable cause existed depends on particularized factual considerations, and is "not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Ultimately, the determination depends on "commonsense, nontechnical conceptions" that reasonable people rely upon in everyday life. *Ornelas v. U.S.*, 517 U.S. 690, 695 (1996). The evidence need not prove that a crime occurred beyond a reasonable doubt, or even that one more likely occurred than not. *Gocmen*, 2018 IL 122388, ¶ 19. Rather, probable cause exists when there is a "probability of criminal activity." *Id.*

¶ 13 When considering a circuit court's ruling on a motion to quash arrest and suppress evidence, a reviewing court applies a two-part standard of review. *Grant*, 2013 IL 112734, ¶ 12. The circuit court's factual findings are entitled to great deference, and are reversed only if they are against the manifest weight of the evidence. *Gocmen*, 2018 IL 122388, ¶ 21. However, a reviewing court evaluates the ultimate legal ruling on the motion *de novo*. *Id.* When, as here, a defendant renews his suppression motion at trial, a reviewing court may consider evidence presented both at the motion hearing and at trial. *People v. Mendez*, 322 Ill. App. 3d 103, 112 (2001). In proceedings on a motion to quash arrest and suppress evidence, a defendant bears the burden of proof. *People v. Garcia*, 2017 IL App (1st) 142141, ¶ 28. If a defendant shows a *prima facie* case that the evidence was obtained in an illegal search or seizure, the burden then shifts to

the State to prove the search or seizure was legal. *Id.* The "ultimate burden of proof," however, remains with the defendant. *Id.*

¶ 14 A person violates the ordinance by either (1) occupying a public way in the course of soliciting unlawful business, or (2) "interfer[ing] with or imped[ing]" a pedestrian or vehicle on a public way for the purpose of soliciting unlawful business. Chicago Municipal Code § 10-8-515(a)(i-ii) (added Apr. 1, 1998). Soliciting can be done through words or gestures, and "unlawful business" includes, but is not limited to, the illegal sale of narcotics. Chicago Municipal Code § 10-8-515(b) (added Apr. 1, 1998).

¶ 15 As defendant was on private property at all relevant times, he argues, correctly, that prong one is inapplicable here. However, in finding probable cause for his arrest, the circuit court interpreted the second prong to mean that a person can violate the ordinance from private property so long as he interferes with or impedes others on a public way. Although defendant does not expressly challenge the circuit court's construction of the ordinance, he argues that his conduct on private property "did not and could not provide sufficient information to establish probable cause because section 10-8-515 requires that the solicitation be done in 'a public way' in order for there to be a violation of the ordinance." As such, we will briefly address the construction of the ordinance.

¶ 16 When a reviewing court construes an ordinance, it applies the same principles as it would in construing a statute. *Victory Auto Wreckers, Inc. v. Village of Bensenville*, 358 Ill. App. 3d 505, 508 (2005). The standard of review is *de novo*. *People v. Swift*, 202 Ill. 2d 378, 385 (2002). In construing a statute, the key objective is to effectuate the legislature's intent. *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 24. When the statutory language is clear and

unambiguous, a reviewing court may not depart from the plain meaning of the words. *Id.* Additionally, a reviewing court should read the statute as a whole and construe it such that no part is rendered superfluous or meaningless. *Palm v. Holocker*, 2018 IL 123152, ¶ 21.

¶ 17 Here, the language of the ordinance is clear and unambiguous. By its terms, prong two provides that it is a violation for a solicitor of unlawful business to "interfere with or impede" traffic on a public way, regardless of where the solicitor is. Chicago Municipal Code § 10-8-515 (a)(ii) (added Apr. 1, 1998). Indeed, as the ordinance's first prong forbids all unlawful solicitation by those on a public way, regardless of its effect on others, any other interpretation would render prong two superfluous.

¶ 18 Defendant's reliance on *People v. Cole*, 369 Ill. App. 3d 960 (2007), is therefore misplaced. In *Cole*, we held that traffic stops based on good-faith mistakes of law are generally unconstitutional. *Id.* at 967. Thus, an officer does not act reasonably in initiating a traffic stop based on acts that are not illegal. *Id.* at 968. Even so, we also held that the relevant inquiry remains whether a hypothetical reasonable person interpreting the law correctly would have had the required suspicion based on the facts known to the arresting officer. *Id.* Setting aside the fact that *Cole* dealt with traffic stops, rather than arrests, it is still inapposite to the present case because, as we have explained, Gallagly did not make a mistake of law. Accordingly, defendant's arrest for soliciting from private property was not unreasonable as a matter of law, and we must proceed to an examination of the facts known to Gallagly at the time of arrest.

¶ 19 The State maintains that a reasonable person with Gallagly's experience would have believed that defendant was soliciting the sale of crack cocaine and that the two cars slowed down in response to his yelling. In response, defendant contends that Gallagly's testimony

cannot establish the facts necessary for probable cause because he was not credible and was impeached by his failure to mention the two other cars in his postarrest reports. As noted, we must uphold the circuit court's factual findings unless they are contrary to the manifest weight of the evidence. *Gocmen*, 2018 IL 122388, ¶ 21. This is so because the circuit court is in a superior position to observe the witnesses' demeanors, resolve conflicts in the testimony, and determine the credibility of the witnesses. *People v. Gherna*, 203 Ill. 2d 165, 175 (2003).

¶ 20 Here, Gallagly testified consistently at the pretrial suppression hearing and at trial, and the court found him credible on both occasions. Gallagly stated he observed defendant yell "rocks" from the porch toward two stopped or slow-moving cars. The circuit court credited these observations despite also hearing testimony that Gallagly was unable to recall seeing defendant's lips move or detailed descriptions of the cars. We cannot say that Gallagly's failure to remember such details rendered the rest of his testimony incredible. See *People v. Gray*, 2017 IL 120958, ¶ 47 (it is the trier of fact's role to decide how flaws in the testimony affect witness credibility). Similarly, Gallagly's testimony is not against the manifest weight of the evidence simply because he did not run the cars' license plates, ask other officers to investigate the cars, or confront defendant before driving around the block. *Id.* (testimony on collateral matters need not render testimony on material questions incredible).

¶ 21 Additionally, the circuit court was not required to find Gallagly incredible based on the omission of the two cars from his police reports. While an officer's credibility may be attacked through his reports, omissions and discrepancies in such reports affect only the weight assigned to his testimony. *People v. Wehrwein*, 190 Ill. App. 3d 35, 40 (1989). Defense counsel fully explored the omission at both the pretrial suppression hearing and trial, and the circuit court

found Gallagly credible nonetheless. Furthermore, there was no evidence that anything in Gallagly's arrest report was inconsistent with his testimony. In any event, the question on appeal is not whether Gallagly subjectively believed that mentioning the cars was required to establish probable cause, but rather whether the factual circumstances known to Gallagly at the time of the arrest objectively gave rise to probable cause. See *Cole*, 369 Ill. App. 3d at 968. The manifest weight of the evidence does not suggest that Gallagly did not see two cars slow down as defendant yelled "rocks." Consequently, the circuit court's findings of fact will not be overturned.

¶ 22 We next address whether these fact were sufficient to establish probable cause as a matter of law, a question we consider *de novo*. *Gocmen*, 2018 IL 122388, ¶ 21. Defendant argues that the facts known to Gallagly were, "at worst, ambiguous and equivocal," and lacked "classic indicia of drug activity." In particular, defendant emphasizes that Gallagly did not witness him approach any cars, engage in any transactions, hold anything in his hands, discard any contraband, or flee from police.

¶ 23 To the extent defendant argues Gallagly lacked probable cause to believe that he was soliciting unlawful business at all, we reject his argument. Our supreme court's decision in *Grant*, 2013 IL 112734, is instructive. The defendant in *Grant* was arrested under the first prong of the ordinance after an officer heard him yelling "dro, dro" to a passing vehicle from the entrance of a public housing building. *Id.* ¶ 4. The officer testified that the area was known for drug activity, and based on his law enforcement experience, he understood "dro" to be a slang term for marijuana. *Id.* Our supreme court held that, based on these facts, the officer witnessed the defendant soliciting unlawful business, and thus had probable cause to arrest him. *Id.* ¶ 15. In

so holding, our supreme court explicitly rejected the defendant's argument that the State was required to produce evidence of "traditional indicia of drug possession or sales" where an officer actually observes the offense take place. *Id.* ¶ 22. Thus, the evidence that the defendant only yelled "dro" twice, did not engage in any transactions, did not hold anything in his hands, and did not flee from police was not enough to render his actions "ambiguous or equivocal," and did not prevent a finding of probable cause. *Id.* ¶ 19.

¶ 24 Turning to the present case, Gallagly observed defendant yelling "rocks" at passing vehicles in an area known for drug activity. Through his experience as a police officer, Gallagly understood "rocks" to be a slang term for crack cocaine, an illegal narcotic. Under *Grant*, these facts alone establish probable cause to believe that defendant was soliciting unlawful business.

¶ 25 However, in order to violate prong two of the ordinance, a person must solicit unlawful business *and* that solicitation must be done in a way that interferes with or impedes traffic on a public way. Chicago Municipal Code § 10-8-515(a)(ii) (added Apr. 1, 1998). Thus, defendant's arrest is valid only if there was probable cause for both propositions. In this regard, defendant argues that it was unreasonable for Gallagly to believe that the two cars slowed down in response to defendant's yelling when, as Gallagly testified at trial, he knew that there was a speed bump on Walnut. However, innocent explanations of a defendant's conduct do not necessarily destroy probable cause. See *Grant*, 2013 IL 112734, ¶ 16 (rejecting the argument that "dro" referred to a person, not marijuana); see also *People v. Neal*, 2011 IL App (1st) 092814, ¶ 13. Rather, the standard remains whether a reasonable person would believe, based on the totality of the circumstances, that there was a "probability" that a crime occurred. *Gocmen*, 2018 IL 122388, ¶ 19. Here, Gallagly testified that he had to slow down while driving on Walnut because two cars

were either "stopped or rolling slowly" in front of the house at 3444 West Walnut. Then, he observed defendant standing on the porch and yelling "rocks" toward the street. Notwithstanding possible alternative explanations, it was not unreasonable for Gallagly to believe that the two events were causally related. Thus, there was probable cause to believe that defendant interfered with or impeded traffic in violation of the ordinance. Consequently, defendant did not sustain his burden to show that his arrest was illegal, and the circuit court did not err in denying his motion to quash arrest and suppress evidence.

¶ 26 Finally, defendant argues that his fines and fees order, which assessed a total of $449, should be corrected in several respects.

¶ 27 Although defendant failed to challenge his fines and fees in a postsentencing motion, he contends that we may review them pursuant to the plain-error doctrine or Illinois Supreme Court Rule 615 (Ill. S. Ct. R. 615 (eff. Jan. 1, 1967)). The State notes that defendant did not preserve this issue for appeal, but agrees that we may nevertheless review the fines and fees. The State has thereby forfeited any forfeiture argument. *People v. Brown*, 2018 IL App (1st) 160924, ¶ 25.

¶ 28 We also note that, after this case was fully briefed, the Illinois Supreme Court adopted new Rule 472, which sets forth the procedure by which a criminal defendant may challenge "the imposition or calculation of fines, fees, and assessments or costs" and the "application of *per diem* credit against fines." Ill. S. Ct. R. 472 (a)(1), (2) (eff. Mar. 1, 2019). Specifically, Rule 472 provides that the circuit court retains jurisdiction to correct the errors enumerated in the rule at any time following judgment in a criminal case, and that "[n]o appeal may be taken" based on such errors unless the issue "has first been raised in the circuit court." Ill. S. Ct. R. 472 (a), (c) (eff. Mar. 1, 2019); *People v. Barr*, 2019 IL App (1st) 163035, ¶¶ 5-6.

¶ 29 Here, defendant did not raise his challenge to the fines and fees order in the circuit court. However, defendant filed his notice of appeal prior to the effective date of Rule 472, and this court has found that the rule applies prospectively. *Barr*, 2019 IL App (1st) 163035, ¶¶6, 8, 15. Accordingly, we address the merits of his arguments. Our review is *de novo*. *Id.* ¶ 16.

¶ 30 First, defendant argues, and the State concedes, that the $5 "Electronic Citation Fee" should be vacated. We agree, as this assessment does not apply to felonies. 705 ILCS 105/27.3e (West 2014); *People v. Smith*, 2018 IL App (1st) 151402, ¶ 12. Accordingly, we vacate the $5 "Electronic Citation Fee."

¶ 31 Defendant further argues that the remaining assessments imposed against him are all fines that should be offset by his presentence incarceration credit. A defendant who is incarcerated on a bailable offense is allowed a $5-per-day credit to offset fines assessed against him. 725 ILCS 5/110-14(a) (West 2014). Here, defendant spent 364 days in presentence custody, and is thus entitled to a credit of up to $1820.[3]

¶ 32 The State agrees with defendant that he is entitled to apply his presentence incarceration credit against the $15 "State Police Operations Fee" (705 ILCS 105/27.3a(1.5) (West 2014)) and the $50 "Court System" charge (55 ILCS 5/5-1101(c) (West 2014)). Although the fines and fees order denominates these assessments as "fees," we agree with the parties that these charges are, in fact, fines. See *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30 (the "Court System" fee is actually fine); *People v. Milsap*, 2012 IL App (4th) 110668, ¶ 31 (the "State Police Operations

[3] Although the fines and fees order indicates that defendant spent 600 days in presentence custody, the court stated at sentencing that it would credit defendant for 364 days. See *People v. Moore*, 301 Ill. App. 3d 728, 735 (1998) (when a written sentencing order conflicts with the court's oral pronouncement, the oral pronouncement controls). The mittimus also reflects that defendant received credit for 364 days of presentence custody.

Fee" is actually a fine). Accordingly, these assessments are offset by defendant's presentence incarceration credit.

¶ 33 In his initial brief on appeal, defendant also argued that the $190 "Felony Complaint Filed, (Clerk)" charge (705 ILCS 105/27.2a(w)(1)(A) (West 2014)); the $25 "Document Storage (Clerk)" charge (705 ILCS 105/27.3c (West 2014)); the $25 "Automation (Clerk)" fee (705 ILCS 27.3a(1) (West 2014)); the $2 "Public Defender Records Automation Fee" (55 ILCS 5/3-4012 (West 2014)); and the $2 "State's Attorney Records Automation Fee" (55 ILCS 5/4-2002.1(c) (West 2014)), although designated as fees, are actually fines that should be offset by his presentence incarceration credit. However, our supreme court has recently held that these assessments are properly designated as fees, and are not offset by a defendant's presentence incarceration credit. *People v. Clark*, 2018 IL 122495, ¶ 51. Similarly, the $25 "Court Services (Sheriff) Fee" (55 ILCS 5/5-1103 (West 2014)) is also a fee, not a fine, and therefore not subject to the presentence incarceration credit. *Smith*, 2018 IL App (1st) 151402, ¶ 15. In his reply brief, defendant correctly concedes that he is not entitled to offset the foregoing assessments.

¶ 34 Lastly, defendant expresses concern that his fines were not offset by his presentence incarceration credit. In addition to the charges discussed above, defendant was assessed a $10 "Mental Health Court" fine (55 ILCS 5/5-1101(d-5) (West 2014)); a $5 "Youth Diversion/Peer Court" (55 ILCS 5/5-1101(e) (West 2014)) fine; a $5 "Drug Court" fine (55 ILCS 5/5-1101(f) (West 2014)); and a $30 "Children's Advocacy Center" fine (55 ILCS 5/5-1101(f-5) (West 2014)). He argues, and the State concedes, that these are all fines that should be offset by defendant's *per diem* credit. We agree. See *People v. Mullen*, 2018 IL App (1st) 152306, ¶ 58 (applying the defendant's presentence incarceration credit to these assessments).

¶ 35 We also agree with defendant that his fines and fees order does not reflect whether he received presentence incarceration credit. Although the order includes the preprinted statement that "Allowable credit toward fine will be calculated," we cannot discern from the order itself whether defendant actually received credit to offset his fines. To ensure that he receives his due credit, we correct the fines and fees order to reflect the calculation. See *id.* (ordering modification of the fines and fees order where this court was unsure whether the absence of a calculation on the order affected whether a defendant received the proper credit).

¶ 36 In sum, we affirm the circuit court's denial of defendant's motion to quash arrest and suppress evidence, and vacate the $5 "Electronic Citation Fee." In addition, we find that the $10 "Mental Health Court" fine, $5 "Youth Diversion/Peer Court" fine, $5 "Drug Court" fine, $30 "Children's Advocacy Center" fine, $15 "State Police Operations Fee," and $50 "Court System" charge are offset by the *per diem* credit for presentence incarceration. The total amount of fines, fees, and costs is therefore reduced from $449 to $329. We correct the fines and fees order accordingly.

¶ 37 Affirmed; fines and fees order corrected.