

2019 IL App (1st) 171660-U
No. 1-17-1660
March 29, 2019

FIRST DIVISION

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee,)	
)	No. TH 606835
v.)	
)	Honorable
CESAR HERRERA,)	Clare J. Quish,
)	Judge Presiding.
Defendant-Appellant.)	

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* When a police officer, in the course of a valid *Terry* stop of a car, sees evidence that the driver is intoxicated, subsequent sobriety tests do not violate the driver's fourth amendment rights. The trial court did not abuse its discretion by admitting into evidence dash cam videos and the warnings to motorists an officer read to the defendant.

¶ 2 We have granted a petition for rehearing in this case. A jury found Cesar Herrera guilty of driving under the influence of alcohol. When we first reviewed the case, we affirmed the judgment because Herrera had not provided this court with a sufficient record. Herrera filed

a petition for rehearing and a supplemental record. We now address his arguments in light of the supplemental record.

¶ 3 Herrera argues that the trial court erred in its rulings (1) on his motion to quash arrest, (2) on questions posed on *voir dire*, (3) on evidentiary objections, and (4) on jury instructions. We hold that the officer properly stopped Herrera for a traffic violation, and the officer's testimony that he smelled alcohol on Herrera's breath and saw evidence of intoxication justified the trial court's denial of the motion to quash arrest. We also hold the trial court did not abuse its discretion by admitting into evidence the warnings to motorists and the dash-cam video recording of the arrest. Furthermore, we hold the court did not abuse its discretion when it denied Herrera's request for an irrelevant instruction and for a repetitive instruction. Finally, Herrera has informed this court that he remains unable to produce a transcript of *voir dire*, and he has produced no substitute record of the questioning, so we cannot find reversible error in that questioning. Accordingly, we affirm the trial court's judgment.

¶ 4 BACKGROUND

¶ 5 Shortly after midnight on August 23, 2015, Officer Jeffrey Kriv of the Chicago Police Department activated his in-car camera as he drove south on Ashland Avenue. Kriv turned on Ogden Avenue and pulled up next to Herrera's car, which was parked by a deserted tavern. Herrera and Hedry Velez were walking away from the car when Kriv asked them what happened. Herrera said the car had run out of gas. Kriv asked Herrera to perform several sobriety tests. The tests indicated that alcohol impaired Herrera's ability to drive. Kriv spoke to Velez, but Velez spoke only Spanish, and Kriv did not understand her. Velez handed Kriv the car keys. Kriv tried to start the car, and found that it had no gas.

¶ 6 Kriv arrested Herrera for driving under the influence of alcohol. At the police station, Kriv read to Herrera the warning to motorists form, indicating to Herrera that if he refused to blow into a breathalyzer, he would have his license suspended for at least 12 months. Herrera refused to have his breath tested.

¶ 7 Before trial on the charge of driving under the influence of alcohol, Herrera filed a motion to quash the arrest, arguing that Kriv had no reason to believe that Herrera had been driving. At the hearing on the motion, Kriv testified that he saw Herrera driving the car and coming to a stop with the car partially blocking the street. Kriv issued Herrera a citation for blocking traffic. When Kriv spoke to Herrera, he smelled a strong odor of alcohol on Herrera's breath, saw Herrera's bloodshot eyes, and heard his slurred speech. Kriv decided to test Herrera to determine whether Herrera had been driving under the influence of alcohol. Herrera's responses to the tests indicated intoxication.

¶ 8 Defense counsel sought to elicit evidence that Kriv actually saw Herrera sitting in the driver's seat, trying to determine why the car had stopped working while Velez was driving. Defense counsel asked whether Kriv saw the lights on the back of Herrera's car flash "[a]s if someone were trying to shift the gear from park to drive or neutral, or from neutral or drive back up to park." Kriv said he knew the driver had shifted the gear from drive to park. The transcript shows the following exchange:

"Q. *** But you don't know which direction the gear shift was being turned from your distance of 60 feet away at night, correct?

A. Actually I do.

Q. Do you have X-ray vision?

A. No, but I saw him drive up to that spot. And when she's driving there I know it's not a neutral or reverse."

¶ 9 The trial court denied the motion to quash the arrest.

¶ 10 Herrera filed a motion *in limine* to bar the prosecution from showing the jury the video from the police squad car camera. The trial court denied the motion.

¶ 11 On *voir dire*, defense counsel sought to question the venire as to "their attitudes about police fairness toward minorities." The court disallowed the question.

¶ 12 At trial, Kriv testified that as he turned his car from Ashland onto Ogden, he saw Herrera's car pull into the parking area, and he saw Herrera get out of the driver's side of the car. Kriv detailed all of the sobriety tests he used and how thoroughly Herrera failed the tests. When the prosecutor played the video for the jury, Kriv described the action. Kriv also testified about the warning to motorists he read to Herrera at the police station.

¶ 13 Velez testified, through a Spanish translator, that she drove Herrera's car on August 23, 2015. When it stopped working, she brought it to a stop in a parking area. Herrera looked under the hood to see if he could determine what went wrong with the car, and then he got into the driver's seat to try to start the car. Herrera figured out that the car had no gas. Kriv drove up after Herrera got out of the driver's seat. Velez said to Kriv, "yo conduzco," meaning that she had been driving, but Kriv told her to shut up.

¶ 14 Defense counsel asked the court to instruct the jurors that they should judge the police officer's testimony the same way they judge the testimony of any other witness. Counsel also requested an instruction on the factors the jury should consider in evaluating identification testimony. The trial court refused both instructions.

¶ 15 The jury found Herrera guilty of driving under the influence of alcohol. The trial court denied Herrera's motion for a new trial and sentenced him to 18 months of conditional discharge. Herrera now appeals.

¶ 16 ANALYSIS

¶ 17 Herrera argues that the trial court should have granted his motion to quash the arrest, barred the prosecution from presenting to the jury the in-car video and the warning to motorists, permitted defense counsel to ask venire members about their attitudes concerning police treatment of minorities, and given the instructions defense counsel requested.

¶ 18 Motion to Quash Arrest

¶ 19 "A reviewing court will not disturb a trial court's ruling on a motion to quash arrest unless that finding is manifestly erroneous." *People v. Gacho*, 122 Ill. 2d 221, 234 (1988). Herrera contends that the trial court should have quashed the arrest because Kriv could not see who was driving the car, and Kriv exceeded the scope of the stop.

¶ 20 Herrera argues the dash-cam video contradicts Kriv's testimony that he saw Herrera driving the car before it came to a stop mostly in the parking area. Kriv explained that the camera did not record everything he saw because the camera only points forward, and Kriv can turn his head. Kriv testified that he turned his head to look down Ogden Avenue, and he saw the car entering the parking area. As Kriv drove up he saw Herrera get out of the driver's side of the car while Velez got out of the passenger side of the car.

¶ 21 Herrera also argues that Kriv admitted that he saw Velez, not Herrera, driving, as Kriv said, "I saw him drive up to that spot. And when she's driving there I know it's not a neutral or reverse." Even if we find an inconsistency in the testimony, we defer to the trial court's

resolution of the inconsistency and assessment of the witnesses' credibility. *People v. Kent*, 2016 IL App (2d) 140340, ¶ 26. We cannot say that Kriv's testimony "is so unreasonable, improbable, or unsatisfactory" that we must overturn the trial court's implicit factual finding that Kriv saw the car rolling to a stop, and then he saw Herrera get out of the driver's side of the car. *Id.*

¶ 22 Herrera does not contest the propriety of the initial stop to issue a citation for obstructing traffic. See *Martin v. State*, 529 So. 2d 1032, 1033 (Ala. Ct. Crim. App. 1988). Herrera argues that Kriv impermissibly exceeded the scope of the initial stop when he investigated Herrera's sobriety.

¶ 23 An officer's investigation following a proper traffic stop could violate the fourth amendment if the investigation exceeds the scope of the stop. *People v. Cosby*, 231 Ill. 2d 262, 275 (2008). The *Cosby* court set out the following analytical framework for deciding whether police questioning during a traffic stop violates the fourth amendment:

"First, with respect to *Terry's* scope requirement, a court must determine whether the questioning is related to the initial justification for the stop. If the questioning is so related, no fourth amendment violation occurs. If the questioning is not reasonably related to the purpose of the stop, the court must determine whether the officer had a reasonable, articulable suspicion that would justify the questioning. If so, there is no fourth amendment violation. In the absence of a reasonable, articulable suspicion, the court must consider whether, in light of the totality of the circumstances, the questioning impermissibly

prolonged the detention or changed the fundamental nature of the stop." *Cosby*,
Id. at 275.

¶ 24 We apply the *Cosby* framework to the evidence in this case. Kriv testified that he saw Herrera get out of the driver's side of the car, and when he approached Herrera, he smelled alcohol on Herrera's breath. He decided to run field sobriety tests because he suspected that Herrera had been driving under the influence of alcohol. We find that the evidence supports the trial court's conclusion that Kriv had a reasonable, articulable suspicion that justified his further investigation into Herrera's sobriety. We find no manifest error in the trial court's denial of the motion to quash the arrest.

¶ 25 *Voir Dire*

¶ 26 Herrera challenges the trial court's refusal to ask the venire about their attitudes concerning police treatment of minorities. The trial court said it would ask some questions about the relationships of the venire members with police, and the court would allow further probing if a venire member's responses indicated a possible source of bias. "When we review a trial court's denial of a party's request to question prospective jurors on a particular viewpoint, our standard of review is whether the court abused its discretion. *** A trial court properly refuses questions designed to educate the jurors on the defendant's theory of defense and ensure the selected jurors are receptive to that defense." *People v. Reeves*, 385 Ill. App. 3d 716, 729-30 (2008).

¶ 27 Herrera has explained that he could not obtain a transcript of jury selection. We cannot determine from this record whether the trial court permitted sufficient questions to probe an area of potential bias. Because we cannot determine whether the alleged error in *voir dire*

affected the fairness and impartiality of the jury, the questioning of the venire does not give us grounds for reversal. See *People v. Zehr*, 103 Ill. 2d 472, 477-78 (1984) (prejudicial error in *voir dire* required reversal).

¶ 28 Evidentiary Rulings

¶ 29 Herrera objected to the trial court's rulings admitting into evidence the warning to motorists and the video recording of the arrest. "Generally speaking, evidentiary motions, such as motions *in limine*, are directed to the trial court's discretion. A trial court's ruling on such motions will not be disturbed on review absent an abuse of that discretion." *In re Leona W.*, 228 Ill. 2d 439, 460 (2008).

¶ 30 The video recording provides relevant evidence of what Kriv saw and how Herrera and Velez responded to Kriv's questions. Our supreme court said:

"[T]he use of video recordings as evidence at trial has become a common practice to allow a defendant the opportunity to present an effective defense and to further the truth-seeking process. We recently reaffirmed the general admissibility of such evidence (citation), and courts across the country are increasingly relying on video recordings to present an objective view of the facts in a case." *People v. Kladis*, 2011 IL 110920, ¶ 28.

The trial court did not abuse its discretion by admitting the video recording into evidence.

¶ 31 Illinois courts have also found the warnings to motorists admissible where the defendant refuses to take a breath test. See *People v. Romanowski*, 2016 IL App (1st) 142360, ¶ 26. The jury had a fair opportunity to assess Herrera's argument and evidence that he refused the test because he had not driven the car. The argument did not detract from the relevance of

the warnings. The trial court did not abuse its discretion by admitting the warnings to motorists into evidence.

¶ 32

Jury Instructions

¶ 33

Finally, Herrera contends that this court should reverse the trial court's judgment due to errors in the instructions. "The purpose underlying jury instructions is to communicate to the jury the correct principles of law relating to the evidence presented to enable it to reach a correct conclusion regarding the defendant's guilt or innocence based on the law and evidence. [Citation.] A trial court may exercise its discretion and tender to the jury non-pattern instructions 'if they are accurate, simple, brief, impartial, nonargumentative statements of the law.' [Citation.] The adequacy of tendered jury instructions should not be determined in isolation, but 'should be examined in light of the overall charge.' [Citation.] This court will not disturb the trial court's tendered jury instructions absent an abuse of discretion." *People v. Nash*, 2012 IL App (1st) 093233, ¶ 26, quoting *People v. Ramey*, 151 Ill. 2d 498, 536-37 (1992).

¶ 34

Herrera contends that the trial court should have given a modified pattern instruction on credibility to instruct the jurors to assess a police officer's credibility the same way they judge the credibility of any other witness. When the court refused the instruction, the court said it instructed venire members on the issue in *voir dire*. As Herrera has not included a transcript of *voir dire* in the record on appeal, we have no reason to doubt the court's assertion. Considering the instructions to the jury as a whole, we cannot say that the trial court abused its discretion by refusing to repeat the instruction on the credibility of police officers.

¶ 35 Herrera also objects to the trial court's refusal to instruct the jury on the reliability of identification testimony. See Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000). Velez's testimony at trial confirmed that Kriv arrested Herrera at the scene after Herrera got out of the driver's side of the car. The case presents no question of whether Kriv correctly identified Herrera as the person he saw get out of the car. The instruction on factors bearing on the reliability of identification testimony have no bearing on Herrera's defense, that Kriv saw Herrera get out of the car after Herrera checked the car to find out why it stopped moving. The trial court did not abuse its discretion when it refused the tendered identification instruction.

¶ 36

CONCLUSION

¶ 37

Testimony at the hearing on the motion to quash arrest adequately supported the trial court's decision to deny the motion to quash. The trial court did not abuse its discretion when it allowed into evidence the warning to motorists and the video recording of the arrest. The trial court did not abuse its discretion when it refused an irrelevant and a repetitive instruction Herrera requested. We cannot review the alleged error on *voir dire* because the record on appeal does not include the transcript of *voir dire*. Accordingly, we affirm the trial court's judgment.

¶ 38

Affirmed.