2020 IL App (2d) 190365-U
No. 2-19-0365
Order filed August 6, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. TERRY H. COLLINS, Defendant-Appellee.	))))))))))))	Appeal from the Circuit Court of Stephenson County. Nos. 18-CF-347 18-OV-615 18-TR-6339 18-TR-6340 18-TR-6341 Honorable James M. Hauser, Judge, Presiding.

JUSTICE BRIDGES delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting defendant's motion to suppress drugs found after a stop of his vehicle, where the court expressly found incredible the officer's testimony that he was able to see, in detail, a network of cracks in the vehicle's windshield as the vehicle turned into a driveway several feet ahead of the officer's squad car. The State forfeited its argument that the drugs would have been inevitably discovered by failing to raise it in the trial court.

¶ 2 The State appeals from an order by the circuit court of Stephenson County suppressing evidence stemming from a *Terry* stop (see *Terry v. Ohio*, 392 U.S. 1 (1968)) of defendant, Terry

H. Collins. The State contends that the circuit court used an improper standard when it ruled in favor of defendant on his suppression motion. We disagree, and we therefore affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant, Terry H. Collins, was charged by information with unlawful possession of a controlled substance, 15 to 200 pills of MDMA (ecstasy), with intent to deliver (720 ILCS 570/401(a)(7.5)(A)(ii) (West 2018)). An order of commitment shows that the State also brought three traffic cases against him: (1) "No DL"; (2) "uninsured"; and (3) "obstructed windshield." It also brought an ordinance violation case against him for "weapons."

¶ 5 Defendant moved to suppress the evidence against him in the controlled substance case; he asserted that the stop of him and his vehicle that led the police to discover the MDMA was without legal justification. The court held an evidentiary hearing on the motion. Officer Richard McElmeel of the Freeport Police Department was the sole witness.

¶ 6 McElmeel testified that, on November 7, 2017, he was conducting a "stationary patrol" from an unmarked patrol car parked in the lot of a funeral home on Galena Avenue in Freeport. He saw a blue 2003 Ford Escape drive past, which he recognized as one that he had seen during a prior drug investigation. On October 31, 2017, two other officers saw defendant using the Escape to engage in what appeared to be illegal drug sales. McElmeel did not see that activity, but he did see the Escape. Based on the Escape's association with drug sales, McElmeel decided to follow it. He trailed it along Galena Avenue and then onto South State Avenue. As the vehicle turned into a residential driveway on State Avenue, McElmeel saw cracks in the windshield: "I observed a crack in the windshield that was approximately one foot up from the bottom of the windshield that extended horizontally across the windshield. Then I observed there was another crack extending from that horizontal crack that went vertically down to the base of the windshield."

¶ 7 McElmeel activated his emergency lights when he saw the cracks. The driver got out of the car—allowing McElmeel to identify him as defendant—and walked towards the house. McElmeel shouted at him to stop, but defendant did not comply. McElmeel was uncertain whether he announced that he was a police officer. His uniform was jeans and a black hoodie with a vest marked "police" and "gang unit." McElmeel ran up to defendant and attempted to handcuff him. Defendant stiffened his arms at first but then allowed McElmeel and a backup officer to handcuff him. Once defendant was in the back of the patrol car, McElmeel asked him if he had proof of liability insurance; defendant did not. On checking Freeport records, McElmeel learned that another Freeport "public nuisance violation" existed for the vehicle; this gave McElmeel cause to have the Escape towed. (Three other people were in the Escape, including two teenagers.)

¶ 8 McElmeel started an inventory of the vehicle before the tow truck arrived, but, on approaching the vehicle, he "smell[ed] cannabis emitting [*sic*] from [it,] so [he] conducted a thorough search of the vehicle for any contraband." He discovered 35 blue or green pills, one of which field-tested positive for MDMA or methamphetamine.

¶ 9 McElmeel did not photograph the windshield of the Escape on November 7, 2017, but he went to the tow lot the next day to take a series of photographs. Those photographs show what appears to be a network of cracks in the windshield. A crack, which slants slightly downward from the passenger side to the driver's side, extends across most of the width of the windshield. In the middle of the windshield, that crack meets two nearly vertical cracks at the point about a third of the way up the windshield where those two cracks converge and terminate.

¶ 10 The court asked McElmeel what had drawn his attention to the Escape, noting that McElmeel's testimony implied that the vehicle had passed his patrol car in the right lane, which

placed it close to the patrol car. McElmeel said that he had looked up from a task just as the Escape was driving past; that was when he recognized it from the October 31, 2017, investigation.

¶ 11 At the close of evidence, defendant argued that McElmeel used the cracked windshield as a pretext to look for narcotics. He suggested that McElmeel was interested in the Escape because of its association with a prior drug transaction, not because of its cracked windshield, and therefore the court should view the stop with an increased level of skepticism. Defendant did not suggest that McElmeel had seen the crack only after he activated his emergency lights, but he did argue that McElmeel could not have reasonably believed, before stopping defendant, that the crack "materially impair[ed]" defendant's view, in violation of section 12-503(e) of the Illinois Vehicle Code (Code) (625 ILCS 5/12-503(e) (West 2018)).

¶ 12 The State argued that precedent supported the conclusion that *any* crack in a windshield gives an officer reasonable suspicion that a vehicle has an equipment violation. It further argued that a pretextual stop is acceptable provided that a proper basis for the stop exists.

¶ 13 The court issued a written order granting defendant's motion to suppress. In its findings of fact, the court noted McElmeel's testimony that he did not notice any cracks in the Escape's windshield when defendant drove past or while he followed the Escape. The court understood McElmeel as testifying that he first noticed the crack "as he pulled in behind the [Escape]." The court determined that the crack in the Escape's windshield "did not impair the driver's view." The court further noted that "[a]t no time did Defendant commit any traffic offenses or other crimes which would have been observable by McElmeel." "The only reason McElmeel followed the Ford Escape, parked on the wrong side of the street behind the Ford Escape, apprehended and detained Defendant, and searched his vehicle was the incident a week prior observed by another officer where Defendant may have been selling drugs out of the Ford Escape."

¶ 14 In its analysis section, the court framed the issue as whether McElmeel's stop of defendant was a valid *Terry* stop (see *Terry v. Ohio*, 392 U.S. 1 (1968)). It quoted *People v. Price*, 2011 IL App (4th) 110272, ¶ 21, for the relevant standard:

> "The police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the stop's] intrusion. [Citation.] In judging the police officer's conduct, we apply an objective standard: would the facts available to the officer at the moment of the seizure *** warrant a man of reasonable caution in the belief that the action was appropriate? [Citation.]" (Internal quotation marks omitted.)

¶ 15 The court ruled that the cracked windshield did not justify the stop:

> "The only reason McElmeel initiated this encounter and apprehended Defendant is that Defendant may have been observed by another officer engaging in a drug transaction a week prior to this arrest. Although McElmeel attempts to justify his actions by pointing to the Ford Escape's cracked windshield, this court finds that testimony incredible.
>
> The day following this arrest, McElmeel took photographs of the windshield. Those photos were entered into evidence at the hearing on Defendant's Motion to Suppress. Those photos show that the crack in the windshield did not impair the view of a driver of the Ford Escape.
>
> ***
>
> This court is aware of case[ ]law holding that a cracked windshield may provide a sufficient basis for a *Terry* stop. However, even if this court were to find McElmeel's testimony attempting to justify Defendant's apprehension based on the cracked windshield credible, that would still not provide a sufficient basis for McElmeel's actions as the crack

> in the windshield did not violate the [Code]. The crack in the windshield did not impair Defendant's view let alone *materially* impair his view. Had the legislature intended any cracked windshield to be a violation of the [Code] it would have said so. It did not as the statute provides that the defect must *materially* impair the driver's view. In this case, it did not.
>
> ***
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> Officer[] McElmeel's actions in this case were based entirely on events occurring a week prior and not observed by McElmeel. There were no facts to support probable cause for an arrest nor to support a reasonable, articulable suspicion of criminal activity to justify a *Terry* stop." (Emphases in original.)

¶ 16 The State moved for reconsideration. It argued first that, even if the cracks did not in fact "materially impair" defendant's view in violation of section 12-503(e) of the Code, McElmeel could have reasonably believed, from his vantage point, that the cracks did violate that section. The State alternatively proposed that McElmeel could have reasonably believed that defendant was in violation of section 12-101(a) of the Code (625 ILCS 5/12-101(a) (West 2018)), which provides in relevant part: "It is unlawful for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person or property."

¶ 17 The State also argued that the court had improperly applied a subjective standard in deciding the suppression motion. That is, the court focused on McElmeel's supposed real reason for initiating the stop, rather than recognizing that the issue was whether a reasonable officer with the facts available to McElmeel would believe that the stop was appropriate. It suggested that McElmeel's motivation for following defendant might not even be relevant.

¶ 18 The court denied the motion for reconsideration with a minimum of analysis, stating, "I've considered the written submissions from the State, as well as the legal authority presented, and the motion to reconsider is denied. This is a bad *Terry* stop." The State filed a certificate of impairment and a timely notice of appeal.

¶ 19 II. ANALYSIS

¶ 20 On appeal, the State argues that Illinois courts have "repeatedly and uniformly held" that a cracked window is justification for a traffic stop under section 12-503(e) of the Vehicle Code (625 ILCS 5/12-503(e) (West 2018)). That section, in relevant part, provides: "No person shall drive a motor vehicle when the windshield, side or rear windows are in such defective condition or repair as to materially impair the driver's view to the front, side or rear." 625 ILCS 5/12-503(e) (West 2018). The State further contends that the trial court erred as a matter of law when it took into account the likelihood that the *motivation* for McElmeel's stop of defendant was McElmeel's knowledge that other officers had seen defendant involved in activity suggestive of drug dealing. Next, it contends that the trial court used the wrong standard for whether the crack was a sufficient basis for the stop: it argues that the court seemed to require proof of guilt, not simply facts supporting a reasonable suspicion of a violation. Finally, the State argues that the inevitable discovery doctrine would make exclusion improper even if the cracked windshield did not justify the stop. It asserts that, with the Escape stopped in the driveway, McElmeel would have inevitably learned that the vehicle had a prior public nuisance violation such that the vehicle was subject to towing.

¶ 21 In response, defendant rejects the suggestion that the trial court found the stop invalid based on what it believed were McElmeel's motives. Rather, defendant proposes that only after the court rejected all proffered objective grounds for the stop did the court conclude that McElmeel was

motivated by his knowledge that the Escape was previously involved in suspected drug activity. Defendant alternatively asserts that, even if the stop was proper, the court was still justified in granting suppression because defendant "made a *prima facie* showing that the search [of his vehicle] was unconstitutional" and the State failed to meet its burden to show that the vehicle's search and impoundment were lawful. In this connection, defendant asserts that the State waived its inevitable-discovery argument by failing to raise it in the trial court.

¶ 22 The State, in reply, argues that the court clearly accepted defendant's legally erroneous argument at the suppression hearing that the stop was improper *because* of McEmeel's actual motives. The State does not dispute that it failed to raise an inevitable-discovery argument below, but rather observes that defendant has likewise argued for the first time on appeal that, even if the stop was valid, the subsequent search was not. The State submits that if its argument is forfeited, then so is defendant's.

¶ 23 We hold that the court did not err in excluding the evidence.

¶ 24 A " '*Terry* stop' " is "a brief, investigatory stop of a citizen [that may occur] when the officer has a reasonable, articulable suspicion of criminal activity and such suspicion amounts to more than a mere 'hunch.' " *People v. McDonough*, 239 Ill. 2d 260, 268 (2010) (quoting *Terry*, 392 U.S. at 27). Our supreme court "has concluded that a *Terry*-type stop must be justified at its inception, and the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (Internal quotation marks omitted.) *People v. Colyar*, 2013 IL 111835, ¶40

¶ 25 A court reviewing the propriety of a *Terry* stop should "apply an objective standard to decide whether the facts available to the officer at the time of the incident would lead an individual of reasonable caution to believe that the action was appropriate." *Colyar*, 2013 IL 111835, ¶ 40.

For instance, in *People v. Moss*, 217 Ill. 2d 511, 529 (2005), our supreme court commented that a particular state trooper's "routine practice of patting down every person who is outside a vehicle at a traffic stop would be unlikely to withstand the scrutiny of *Terry* in the abstract." The court noted, however, that courts "judge the reasonableness of the search *** only by its particular facts and circumstances." *Moss*, 217 Ill. 2d at 529. "An officer's subjective feelings may not dictate whether a pat-down search is valid or invalid." *Moss*, 217 Ill. 2d at 529.

¶ 26 When a higher court reviews a trial court's grant of a suppression motion, it applies a two-part standard of review. *People v. Brooks*, 2017 IL 121413, ¶ 21. The court will reverse a trial court's factual findings only if they are against the manifest weight of the evidence. *People v. Brooks*, 2017 IL 121413, ¶ 21. "This deferential standard is grounded in the reality that the circuit court is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve conflicts in their testimony." *McDonough*, 239 Ill. 2d at 266. The reviewing court reviews *de novo* the trial court's "ultimate legal ruling" to suppress the evidence. *Brooks*, 2017 IL 121413, ¶ 21.

¶ 27 A defendant bears the burden of proof at a hearing on a suppression motion. *Brooks*, 2017 IL 121413, ¶ 22. He or she has the initial burden to make a *prima facie* case that the evidence resulted from illegal search or seizure by establishing the "factual and legal bases for the motion to suppress." *Brooks*, 2017 IL 121413, ¶ 22. A defendant makes a *prima facie* showing that a *Terry*-type stop was improper by showing that he or she was doing nothing unusual to justify the stop. *E.g.*, *People v. Bianca*, 2017 IL App (2d) 160608, ¶ 21. The burden of going forward then shifts to the State. *Bianca*, 2017 IL App (2d) 160608, ¶ 21. However, "the ultimate burden of proof remains with the defendant." *Brooks*, 2017 IL 121413, ¶ 22.

¶ 28 The trial court made findings of fact equivalent to stating that defendant made his *prima facie* case: "At no time did Defendant commit any traffic offenses or other crimes which would have been observable by McElmeel," and "the crack in the windshield did not violate the [Code]." Therefore, the burden of going forward shifted to the State. However, because McElmeel was not credible, the State could not meet that burden. As the trial court ruled, McElmeel "claim[ed]" that he saw the cracked windshield, and, "[a]lthough McElmeel attempt[ed] to justify his actions by pointing to the Ford Escape's cracked windshield, *** that testimony [was] incredible."

¶ 29 The court's conclusion that McElmeel was not credible was consistent with the manifest weight of the evidence. McElmeel claimed that, as defendant's vehicle turned in front of his patrol car into the driveway, he "observed a crack in the windshield that was approximately one foot up from the bottom of the windshield that extended horizontally across the windshield." He then "observed there was another crack extending from that horizontal crack that went vertically down to the base of the windshield." McElmeel took several photographs of the windshield the next day. The photos were taken from a close distance, but given the effect of light reflection and refraction, no single photograph managed to depict all the cracks. The lone photograph taken at the scene shows that the sky at the time was heavily overcast. The light was diffused. Thus, there was no direct sunlight to highlight the cracks. The court could have reasonably believed, based on the photos, that McElmeel would not have been able to make detailed observations of the cracks from his vantage point several feet away when the Escape pulled into the driveway.

¶ 30 The State suggests that the trial court invalidated the stop not because it found McElmeel not credible but because McElmeel's actual motive for stopping defendant was to look for drugs.

In other words, the State contends that the court improperly used a subjective standard to decide the propriety of the stop. We reject the State's position.

¶ 31 The State recognizes that a reviewing court must start with the presumption that a trial court knows and has followed the law. See *People v. Jordan*, 218 Ill. 2d 255, 269 (2006) ("We must presume that a trial judge knows and follows the law unless the record demonstrates otherwise."). However, it argues that the language of the decision rebuts that presumption. In particular, it points to the following section of the decision as showing that the trial court invalidated the stop because it was pretextual:

> "The only reason McElmeel initiated this encounter and apprehended Defendant is that Defendant may have been observed by another officer engaging in a drug transaction a week prior to this arrest. Although McElmeel attempts to justify his actions by pointing to the Ford Escape's cracked windshield, this court finds that testimony incredible."

¶ 32 We do not agree that this language shows that the trial court applied a subjective standard. To be sure, these sentences are ambiguous taken alone: the court's use of the phrase "The only reason" could be read to be a judgment about McElmeel's state of mind. However, the sentences' ambiguity dissipates when we read them in the context of the trial court's statement that it was applying an objective standard. The court disbelieved McElmeel about more than just his motivation for the stop; according to the court, McElmeel only "claim[ed]" to have seen the cracked windshield when the Escape pulled into the driveway.

¶ 33 The State contends that to read the court as discrediting McElmeel's observations is to ignore the court's general reliance on McElmeel's testimony about the circumstances of the stop. It argues that "the trial court expressly relied upon Officer McElmeel's testimony (and thus found him to be a credible witness)" and made "no explicit credibility determination in its written order."

This argument is incorrect on both points. To be sure, the trial court did accept *much* of McElmeel's testimony, but it nonetheless expressly rejected his testimony in which he (as the court paraphrased it) "attempt[ed] to justify his actions by pointing to the Ford Escape's cracked windshield." The State suggests that, when the court found McElmeel's testimony "incredible," the court essentially meant "incredible as to his subjective motivation," and thus the court must have been repudiating its unambiguous embrace of the objective standard. But we presume that the court followed the law. We are sure that the court knew the law; it accurately set out the objective standard that applies to a challenge to a *Terry* stop. We will not conclude that it then failed to follow the law based merely on some ambiguous language.

¶ 34 We note that our interpretation of the court's reasoning aligns with its questioning of McElmeel about the positioning of his squad car in the funeral home lot relative to defendant's vehicle. The court's questions may have indicated skepticism that McElmeel could have seen the cracks as the Escape turned into the driveway, but not when he first saw it. He would have had a near head-on view of the vehicle from his parked squad car—in any event, enough of a view that he could recognize it from the earlier investigation—and yet did not see the cracks. But he claimed that he could see every crack in the windshield when his line of sight was from the back and side. As we noted, the photographs of the cracks supported the court's skepticism.

¶ 35 The State contends that, inconsistent with the reasonable-suspicion standard for a *Terry* stop, the court's decision "seemingly applied the beyond[-]a[-]reasonable[-]doubt standard as to whether defendant's crack[ed] windshield could be a valid basis for the traffic stop." It contends that, contrary to the court's statement of the law, it required the State to show that the crack *actually* violated the Code and that this error led the court to make an improper ruling. We do not agree. First, the court's recognition that no *actual* violation that McElmeel could see had occurred was

an essential part of the *Terry* stop analysis. That recognition was an acknowledgment that defendant had made his *prima facie* case. The court did not use that precise language, but that appears to have been the gist of what it meant when it found that "[a]t no time did Defendant commit any traffic offenses or other crimes which would have been observable by McElmeel." Second, given that the court found McElmeel "incredible," regardless of the standard, the State could not meet its burden of going forward. McElmeel testified that, at the moment the Escape turned, he saw the full network of cracks in the windshield. As we have explained, that claim seems unlikely under the conditions. Once the court recognized that unlikelihood, it had no reason to assume that McElmeel had in fact seen something more plausible that nevertheless justified a stop.

¶ 36 The preceding analysis leaves us with one statement by the trial court that appears to support the State's argument. The trial court concluded:

> "However, even if this court were to find McElmeel's testimony attempting to justify Defendant's apprehension based on the cracked windshield credible, that would still not provide a sufficient basis for McElmeel's actions as the crack in the windshield did not violate the [Code]."

¶ 37 In other words, the court seems to say that, if McElmeel actually had seen the whole network of cracks as the vehicle turned, he should have known that those cracks could not obscure the driver's vision. Of course, this assumes that McElmeel would have known that he was seeing *all* of the cracks, something of which a credible observer would not have been certain.

¶ 38 As the State notes, a line of authority holds that a stop is supported when an officer sees even slight cracking. See, *e.g.*, *People v. Al Burei*, 404 Ill. App. 3d 558, 562-63 (2010) (so holding). Thus, had the court deemed McElmeel's testimony credible, it probably should have

ruled that a basis existed for the stop. But it did not deem him credible, and that determination was not against the manifest weight of the evidence.

¶ 39 The State argues that, even assuming that the trial court was correct that the cracked windshield did not justify McElmeel's stop of defendant, the suppression was nevertheless error under the inevitable-discovery doctrine. It contends that, because defendant's vehicle was subject to impoundment under Freeport ordinances, McElmeel would have inevitably discovered the evidence at issue when he called to have the parked vehicle towed.[1] Defendant contends that the State forfeited this argument by failing to raise it before the trial court.[2] We agree. The State, like any other party, typically forfeits its right to raise an issue on appeal when it fails to raise the issue in the trial court. *People v. Haywood*, 407 Ill. App. 3d 540, 551 (2011). The State does not ask us to overlook the forfeiture under the plain-error doctrine. See *People v. Bowden*, 2019 IL App (3d) 170654, ¶ 18 (collecting cases on whether the plain-error doctrine applies in State appeals). Therefore, we hold the State to the forfeiture of its inevitable-discovery argument.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the judgment of the circuit court of Stephenson County.

¶ 42 Affirmed.

[1] The trial court having essentially ruled that it was not an improper search but an improper seizure and therefore there was no basis to tow the vehicle as the car should not have been stopped in the first place.

[2] In addition, the State failed to present any evidence of what would have happened had McElmeel not seen the cracks, so whether it would have inevitably been discovered rests on speculation.