2016 IL App (3d) 130971-U

Order filed January 11, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0971 Circuit No. 12-CF-2818
CHRISTOPHER J. GLASPER,	)	
Defendant-Appellant.	)	Honorable Daniel J. Rozak, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erroneously denied defendant's motion to suppress evidence because the search of a diaper bag, remaining in the automobile and outside of defendant's immediate possession, did not justify the search as a search incident to defendant's arrest. In addition, defendant's purported furtive movements toward the area near the diaper bag, while seated in the passenger seat of the vehicle, did not provide sufficient probable cause to search the vehicle that was stopped for speeding without either consent or a valid search warrant.

¶ 2 BACKGROUND

¶ 3 The State charged Christopher J. Glasper with possession of a controlled substance with intent to deliver (count I) and possession of a controlled substance (count II), both alleging that he knowingly possessed cocaine found by Illinois State Trooper Ricardo Zarate (Zarate) in a diaper bag on the passenger floorboard of his girlfriend's, Rhonda Jones, automobile on December 3, 2012. After the trial court denied defense's motion to suppress the cocaine evidence, a jury trial was held where the defendant was found guilty of both counts. The trial court sentenced the defendant to 25 years in the Illinois Department of Corrections. Defendant filed a timely notice of appeal.

¶ 4 On February 7, 2013, defendant filed a motion to suppress physical evidence, arguing that the evidence seized and being used against him was the result of an illegal search of the vehicle and the diaper bag. At the hearing, Zarate testified that on December 3, 2012, at approximately 10:44 a.m., he was on duty in a marked squad car patrolling the westbound lanes of I-80 near mile marker 124. At this time he observed a silver Oldsmobile exceeding the speed limit and effectuated a traffic stop. Upon his approach, Zarate observed three people in the car: Rhonda Jones (the driver), defendant Christopher Glasper (a passenger in the front seat), and a child in the backseat behind the passenger. After initial contact, Zarate communicated the passenger's and driver's names to dispatch. Zarate was alerted that the defendant had an active warrant for his arrest after he failed to appear for a pending Driving Under the Influence charge in La Salle County. Dispatch also alerted him that defendant was considered to be armed and dangerous due to his prior arrest and conviction record. After Illinois State Trooper Jason Shrake (Shrake) arrived to assist in the arrest, Zarate confronted defendant about the active

warrant. Defendant was aware of the warrant. Zarate asked him to step out of the vehicle, placed him in handcuffs, and arrested him.

¶ 5 After placing defendant under arrest, Zarate searched a diaper bag that was between the defendant's feet on the floor during the initial contact. Zarate did not have Glasper's or Jones' consent to search and there was no contraband in plain view. However, after Zarate picked up the bag, unzipped it, and moved a baby blanket inside the bag, he found a significant amount of cocaine – later determined to be 54.4[1] grams of cocaine. On cross-examination, Zarate testified that while he was issuing the driver, Rhonda Jones, a citation for speeding from his patrol car, he observed defendant making furtive movements within the vehicle. Specifically, he saw defendant reach down to the floorboard area where Zarate had previously observed the diaper bag. Zarate testified that he searched the diaper bag, not incident to arrest, but rather due to defendant's furtive movements toward the bag before his arrest. In his experience, such movements have been indicative of someone attempting to conceal contraband; however, there are also harmless and legal reasons why a person may be moving around in an automobile.

¶ 6 As the defense's final witness, defendant took the stand and testified that the diaper bag in the front seat was sealed and that no one gave Zarate consent to search. After a brief direct and no cross-examination, the defense rested and the State moved for a directed finding. The court found in favor of the State and denied defense's motion to suppress evidence citing the reliable testimony of Zarate who witnessed furtive movements. In his decision, the trial judge found that no matter if the defendant is cuffed, he still posed a risk, and thus, the trooper could search the

[1]At the motion to suppress hearing and subsequent jury trial, Trooper Zarate testified that the weight of the cocaine was 58.8 grams. For purposes of this appeal, we rely on the testimony of David Vanwingeren, the forensic scientist specializing in drug chemistry at the Illinois State Crime Lab who testified to the lab-verified weight of 54.4 grams of the seized cocaine.

bag. The defense immediately filed a motion to reconsider. The court heard and denied the motion.

¶ 7 In August of 2013, Glasper proceeded to a jury trial. Shrake confirmed that he assisted in the arrest of defendant. Shrake testified that he was cuffing defendant when Zarate began searching the diaper bag. Defendant told the troopers there were no guns or drugs in the bag. Once the drugs were found, Shrake testified that defendant denied they were his drugs until Zarate implied that if they were not his, then his girlfriend would be arrested for possessing the drugs. Zarate testified consistently with his testimony at the motion to suppress hearing. Zarate also confirmed that when initially asked if the drugs were his, the defendant denied possessing them. Defendant did, however, after being given the Miranda warning, confess that the drugs were his. During Zarate's testimony, the State introduced his squad car video and published it to the jury. Per a pre-trial motion, the audio where defendant confirmed possessing the cocaine was suppressed and not heard by the jury or reviewed on appeal. The video showed Jones waiting in the car while Zarate and Shrake approached the passenger side of the silver Oldsmobile. Defendant stepped out of the car and Zarate began placing handcuffs on him in front of his body and patted him down. Zarate, however, passed this task to Shrake and began looking in the car and, presumably, the bag. At this point, Zarate found the cocaine and told Shrake to cuff defendant's hands behind his back. During the entire video, nothing was visible within the automobile due to a glare on the back window.

¶ 8 Finally, the State presented two experts to prove the weight, 54.4 grams, of cocaine being more than an amount for personal use. The State presented the testimony of David Vanwingeren, a forensic scientist with the Illinois State Police, who testified to the exact weight of the cocaine. Joliet Police Officer, Brian Prochaska, testified as an expert in narcotics

distribution and valuation. According to Prochaska, drug users in Joliet typically purchased .5 to 3.5 grams of cocaine for personal usage. Therefore, possession of 54.4 grams was not consistent with personal usage or consumption.

¶ 9 Finally, the State presented two Iowa police officers who, in September and October of 2008, observed defendant selling cocaine to an undercover informant. The jury was instructed to consider this evidence only on issues of intent and knowledge.

¶ 10 Defendant did not testify nor did the defense present any evidence. The jury began deliberating at 10:10 a.m. on August 15, 2013. At 3:00 p.m. that day, the jury submitted a note to the court asking "[I]f we decide there is a reasonable doubt to the circumstances of the confession, does that determine reasonable doubt as to the charges?" Over defense's objection to the first portion of the response, the court replied with a note reading "you are to consider all of the evidence in deciding your verdicts and you decide what reasonable doubt is." Again at 3:30 p.m. the jury sent out another note stating "we have come to an agreement on possession charge. We are not able to come to an agreement on intent to deliver charge." The court instructed the jury to continue deliberation. Finally, at 4:00 p.m. on August 15, 2013, the jury found the defendant guilty of possession of a controlled substance with intent to deliver and possession of a controlled substance. On December 19, 2013, defendant was sentenced to 25 years in the Illinois Department of Corrections. On that same day, defendant filed a motion to reconsider and it was immediately denied.

¶ 11 Defendant filed a timely notice of appeal.

¶ 12 ANALYSIS

¶ 13 Defendant raises four issues on appeal. First, defendant claims the trial court erred by denying defendant's motion to suppress evidence. Second, defendant submits the trial court

committed reversible error by telling the jury to "decide what reasonable doubt is." Third, defendant argues his 25-year sentence is excessive. Finally, defendant requests this court to correct defendant's mittimus to reflect a single conviction for possession of a controlled substance with intent to deliver.

¶ 14 We begin by reviewing the trial court's decision to deny defendant's motion to suppress the evidence discovered in the diaper bag located in the automobile. Defendant argues the search was not authorized as a search incident to his arrest and cannot be justified as a lawful automobile search based on probable cause.

¶ 15 Relying on the recent decision from our Supreme Court in *People v. Cregan*, 2014 IL 113600, the State argues this particular search of the diaper bag was a proper search incident to a valid arrest warrant. In addition, the State contends the search was supported by independent probable cause based on defendant's furtive movements while seated in the front seat of the vehicle.

¶ 16 When reviewing a trial court's decision granting or denying a motion to suppress, the findings made by the trial court are accorded deference and will be upheld unless they are against the manifest weight of the evidence. *People v. Gherna*, 203 Ill. 2d 165, 175 (2003) (citing *People v. Crane*, 195 Ill. 2d 42, 51 (2001)). However, questions of law are reviewed *de novo* concerning the ultimate legal question of whether suppression was appropriate. *People v. Smith*, 2015 IL App (1st) 131307, ¶ 20 (citing *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001)).

¶ 17 The United States and Illinois Constitutions protect citizens from unreasonable searches and seizures. U.S. Const. amends. IV, XIV; Ill. Const. Art I, § 6. A valid fourth amendment search generally requires a warrant supported by probable cause. *People v. Flowers*, 179 Ill. 2d 257, 262 (1997). A search conducted without a warrant "is *per se* unreasonable under the fourth

amendment, subject only to a few specific and well-defined exceptions." *People v. Bridgewater*, 235 Ill. 2d 85, 93 (2009) (citing *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

¶ 18 I. Search Incident to Arrest

¶ 19 One exception to the search warrant requirement arises for searches that are incident to an arrest, which "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Gant*, 556 U.S. at 338. Searches incident to arrest fall within two avenues of analysis: "search of the person of the arrestee and search of the area under the control of the arrestee." *Cregan*, 2014 IL 113600, ¶ 25 (citing *United States v. Robinson*, 414 U.S. 218, 224 (1973)). This search incident to arrest exception has additionally been expanded to allow certain warrantless searches of vehicles as a proper search incident to arrest when the following two conditions exist: (1) the arrestee is unsecured and within reaching distance of the vehicle at the time of the search; or (2) it is "reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant*, 556 U.S. at 351.

¶ 20 The State argues based on *Cregan*, 2014 IL 113600, that the search of the diaper bag in this case was warranted as a vehicle search incident to arrest. In that case, the Illinois Supreme Court affirmed the appellate court's finding that the police officer's search of the defendant's bags, incident to arrest, was proper because the bags were in the actual physical possession of the defendant at the time of the arrest. *Id.* at ¶ 60. The court found that the search was proper because the items searched in that case were associated with the defendant's person. *Id.* We note that *Cregan* did not involve the search of a vehicle incident to defendant’s arrest and also emphasize the defendant in *Cregan* was personally carrying one laundry bag over his shoulder and held the rolling suitcase in his hand when the officers approached him to place him under

arrest. *Id.* at ¶ 5. The facts in the case at bar are distinguishable because this search involved a vehicle search yielding a bag that contained contraband which defendant was not carrying on his person, outside the vehicle, before he was handcuffed.

¶ 21 Nonetheless, *Cregan*, provides helpful guidance for the disposition in the case at hand. In *Cregan*, our Supreme Court noted the difference between the rule for search of the person incident to arrest and the search of the area within his control, such as the vehicle. *Id.* at ¶ 28-29. The court emphasized that a defendant who might leave belongings in an automobile at the time of his arrest is governed by *Gant*, 556 U.S. 332 (2009). *Cregan*, 2014 IL 113600 at ¶ 32. The decision in *Cregan* notes that *Gant* narrowed the initial *Belton* rule, 453 U.S. 454, to allow searches of a vehicle incident to arrest, as an area under the control of the arrestee, if it is justified by the "possibility that the arrestee might gain possession of a weapon or destroy evidence." *Cregan*, 2014 IL 113600, ¶ 32 (citing *Arizona v. Gant*, 556 U.S. 332, 339 (2009); *Chimel v. California*, 395 U.S. 752, 762-65 (1969)).

¶ 22 Guided by the analysis in *Cregan*, we conclude *Gant* governs propriety of the search in this case because the defendant was in a vehicle when he was apprehended and his bag remained in the automobile during his arrest. Here, it is undisputed that defendant was handcuffed and standing outside the vehicle when the officers searched the contents of the car. Therefore, at the time of his arrest, there was no possibility that defendant could gain access to a weapon or destroy evidence in the diaper bag. Consequently, we conclude the vehicle did not constitute a proper search incident to defendant's arrest under the circumstances of this case.

¶ 23 II. Probable Cause Based On Defendant's Furtive Movements

¶ 24 Next, we consider the State's position that defendant's furtive movements, when seated in the passenger seat of the car stopped for speeding, gave rise to independent probable cause to

search the diaper bag without consent and without a search warrant. We recognize the "automobile exception" to the requirement for a search warrant allows a warrantless search of an automobile if the officer has "probable cause to believe that the automobile contains evidence of criminal activity that the officers are entitled to seize." *People v. James*, 163 Ill. 2d 302, 312 (1994). Sufficient probable cause to satisfy the automobile exception must be justified by more than a mere hunch, unparticularized suspicions, or furtive movements that can be viewed as innocent. *People v. Baldwin*, 388 Ill. App. 3d 1028, 1035 (3d Dist. 2009) (citing *People v. Ruffin*, 315 Ill. App. 3d 744, 748 (2000)); *People v. Creagh*, 214 Ill. App. 3d 744, 747-48 (1991). The case law provides that " '[T]o constitute probable cause for an arrest or search, a 'furtive gesture' such as a motorist's act of bending over inside his car must be invested with guilty significance either by specific information known to the officer or by additional suspicious circumstances observed by him.' " *People v. Collins*, 53 Ill. App. 3d 253, 255 (5th Dist. 1977) (quoting *Gallik v. Superior Court of Santa Clara County*, 5 Cal. 3d 855, 859 (1971)).

¶ 25 In *Collins*, the defendant was charged with possession of cannabis after a traffic stop for failing to stop at a traffic safety control device. *Id.* at 253-54. During the motion to suppress hearing, the Officer testified that he observed the defendant lean forward and to the right, reaching over the passenger seat. *Id.* at 254. After approaching the vehicle, the officer asked the defendant to step out of the car and stand near the rear of the vehicle while he looked inside. *Id.* He observed a brown paper bag, which he grabbed, opened and found three bags of cannabis. *Id.* The trial court suppressed the cannabis evidence. *Id.* at 253. On appeal, the appellate court affirmed concluding that the "defendant's car was searched only because he bent down after stopping. If we were to hold that such conduct constituted probable cause, then almost every

motorist stopped for a violation of the traffic laws would be subject to having his person and automobile searched by the arresting officer." *Id*. at 256.

¶ 26 Similarly in a more recent case, *Smith*, the defendant was convicted of aggravated unlawful use of a weapon and unlawful use of a weapon by a felon. *Smith*, 2015 IL App (1st) 131307, ¶ 1. The appellate court, guided by *Collins*, found that because the officer only observed the defendant reach toward the rear of the passenger seat – no weapon in plain view and no suspicious behavior – was insufficient, under an objective review, to support probable cause to search the defendant's vehicle. *Id* at ¶¶ 34-36.

¶ 27 In this case, Zarate claimed that once dispatch alerted him about defendant's prior drug convictions and 'armed and dangerous' status, the "furtive movements" Zarate witnessed created probable cause to search defendant's personal effects in the car. Guided by the decisions in *Collins* and *Smith*, we conclude defendant's movements toward a diaper bag, when the automobile contained a young child, did not create probable cause to search the diaper bag without first obtaining consent or obtaining a search warrant.

¶ 28 Based on the foregoing reasons, we reverse the trial court's denial on the motion to suppress evidence. The State cannot prevail on remand without the suppressed evidence. Thus, we reverse the defendant's convictions and vacate his sentence. See *People v. Smith*, 331 Ill. App. 3d 1049, 1056 (2002).

¶ 29 CONCLUSION

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

¶ 31 Judgment reversed.