

2011 IL App (2d) 100902-U
No. 2-10-0902
Order filed December 5, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of Kane County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 07-CF-956 |
| |) | |
| JAIME BARRAGAN, |) | Honorable |
| |) | Timothy Q. Sheldon, |
| Defendant-Appellant. |) | Judge, Presiding. |

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

ORDER

Held: (1) The State proved defendant guilty beyond a reasonable doubt of aggravated unlawful use of a weapon, as the driver of the vehicle in which defendant was riding testified that defendant possessed the gun in the vehicle, and the alleged weaknesses of the driver's testimony were matters for the trier of fact; (2) the trial court properly denied defendant's motion to suppress fingerprint exemplars that were allegedly the product of an illegal arrest: even if defendant was illegally arrested when he was handcuffed during a legal traffic stop, the subsequent discovery of a gun during the stop gave the police intervening probable cause and any misconduct was not flagrant; thus, the exemplars were attenuated from the illegality and were admissible.

¶ 1 Following a bench trial, defendant, Jaime Barragan, was convicted of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) (West 2006)) and sentenced to three years' imprisonment.

On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence and that he was not proved guilty beyond a reasonable doubt. For the reasons that follow, we affirm.

¶ 2

BACKGROUND

¶ 3 Defendant was charged with one count of reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2006)) and one count of aggravated unlawful use of a weapon. Defendant filed a motion to suppress evidence, alleging that his detention during a traffic stop was unlawful.

¶ 4 At the hearing on defendant's motion to suppress, Sergeant Joseph Weber of the Aurora police department testified as follows. While on patrol in a high-crime area of Aurora at approximately 1:45 a.m. on April 6, 2007, he observed a Ford Escort heading west on Downer, approaching the intersection of Downer and Jackson. Weber was driving north on Jackson. The Escort disobeyed the stop sign at the intersection of Downer and Jackson, turning to head south on Jackson. Weber made a U-turn and began to follow the Escort. The Escort then made a right turn onto Benton. Benton was a one-way street to the east, and by turning right onto it, the Escort was proceeding the wrong way. When Weber observed the Escort drive the wrong direction down Benton, he turned on the mars lights on his squad car. The Escort accelerated rapidly as it drove down Benton. As Weber turned onto Benton, the Escort was turning south onto Bevier. The Escort proceeded a block down Bevier and then turned east onto North, disobeying the stop sign at that intersection. As the Escort was making the turn, Weber observed the passenger-side door open a foot or two for a split second. Weber was approximately four or five houses behind the Escort and did not see anything thrown out the door when it opened. Nor did Weber observe anyone throw anything out the Escort's windows. When the door opened, Weber thought that someone was going to attempt to bail from the vehicle. Weber caught up to the Escort, and approximately two houses down North, the Escort pulled over and stopped.

¶ 5 Weber instructed the driver of the Escort to throw the keys out his window of the Escort, and the driver complied. Less than a minute later, Officer Chris Cox arrived on the scene, and the officers approached the Escort. There were three men in the vehicle. Defendant was the front-seat passenger. The officers removed the men one at a time. As the men were removed from the vehicle, they were handcuffed and searched. The officers did not locate anything during their pat-downs of any of the men. The officers also searched the Escort but did not find anything in it. The men were secured because of their attempt to flee and the erratic behavior of opening the car door. During questioning, defendant told Weber that the Escort's door opened because it malfunctioned. Weber had not observed defendant violate any laws when he placed him in handcuffs and patted him down, nor did Weber have a search or arrest warrant for defendant.

¶ 6 One or two other officers then arrived, and Weber informed them that he was going to walk the route the Escort had driven to see if anything had been thrown from the vehicle. Along the Escort's route, Weber found a gun lying in the street. Weber had not seen the gun come out of the Escort, and he had not seen defendant throw the gun. No more than five minutes had elapsed between the time the Escort pulled over and the time Weber found the gun. Defendant was then arrested and taken to the police station, where he was tested for gunshot residue and questioned by an investigator.

¶ 7 The trial court denied defendant's motion, finding that Weber had probable cause to stop the Escort and detain its occupants and that the officers had probable cause to take defendant to the police station for a gunshot-residue test based on the erratic driving, the discovery of the gun, the opening and closing of the vehicle's door, and the high-crime area.

¶ 8 Defendant elected to proceed to a bench trial. At trial, Weber testified consistently with the testimony he offered at the hearing on defendant's motion to suppress. In addition, Weber gave the

following testimony at trial. The gun Weber found was a .38 Special Smith & Wesson revolver with one spent shell casing in the cylinder. Weber found the gun in the north gutter in front of 540 East Benton. Weber believed that the gun had been discarded recently because it did not have any dirt or debris on top of it, was not weathered, and was lying in an otherwise clean street.

¶9 Cox's testimony at trial was consistent with Weber's testimony. He also testified that Weber was gone for only a few minutes during his search of the Escort's route before he returned with the gun.

¶10 The testimony of other members of the Aurora police department established the following. Two fingerprints were found on the cylinder of the gun recovered by Weber. Those prints matched the fingerprint exemplars given by defendant when he was taken to the station. A gunshot-residue test was conducted on defendant, but the results were negative, indicating that defendant may or may not have fired a weapon.

¶11 Jonathan Efstathiou, the driver of the Escort on the night defendant was arrested, gave the following testimony at trial. On April 6, 2007, he, defendant, and Cory Frazier (the backseat passenger) had been at a party and were on their way to "Walmart or something." Defendant was giving Efstathiou directions. When Efstathiou got into the car with defendant, he did not know that defendant had a gun. However, at some point during the drive, defendant pulled the gun out and fired a shot out the open passenger window. Efstathiou did not remember specifically where in Aurora they were when defendant fired the shot, but he did remember that they were in a residential neighborhood. Once Weber began following them, defendant threw the gun out the passenger window, though Efstathiou did not know what street they were on when defendant did so. Efstathiou was a convicted felon, having been convicted of aggravated driving under the influence.

Efstathiou denied that he told Weber that he was driving erratically because someone had been chasing and trying to shoot them.

¶ 12 The parties stipulated that, at the scene of the incident, Efstathiou told Weber that he was driving erratically because someone was chasing and trying to shoot them. The parties also stipulated that, when asked by Weber why he did not stop when he passed Weber's squad car on the road, Efstathiou admitted that they were not being chased by anyone, but he did not offer any further explanation for his erratic driving.

¶ 13 Following arguments by the parties, the trial court found defendant not guilty of reckless discharge of a firearm but guilty of aggravated unlawful use of a weapon. Defendant's motion for a new trial was denied, and the trial court sentenced him to three years' imprisonment. Defendant filed a motion to reconsider the sentence, arguing that he was entitled to credit for the time he spent in presentencing custody. Upon agreement of the parties, the trial court awarded defendant 955 days' credit for time served. Defendant then brought this timely appeal.

¶ 14

ANALYSIS

¶ 15 On appeal, defendant contends that the trial court erred in denying his motion to suppress and that he was not proved guilty beyond a reasonable doubt. Because our determination on defendant's sufficiency-of-the-evidence contention will dictate whether we must address defendant's suppression claim, we will address it first.

¶ 16 A person commits aggravated unlawful use of a weapon when he or she knowingly:

“Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm[.]” 720 ILCS 5/24-1.6(a)(1) (West 2006).

In addition, the State must prove that the weapon was uncased, loaded, and immediately accessible at the time of the offense. 720 ILCS 5/24-1.6(a)(3)(A) (West 2006).

¶ 17 We review claims of insufficient evidence to determine “ ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant’s guilt. *Collins*, 106 Ill. 2d at 261. It is not the function of this court to retry the defendant. *Collins*, 106 Ill. 2d at 261. The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

¶ 18 Defendant contends that the State failed to prove him guilty beyond a reasonable doubt because it failed to prove that defendant was not “on his or her land or in his or her abode or fixed place of business” when he carried the gun. According to defendant, because Weber did not see anything thrown from the vehicle when the passenger door opened, and because the gun was found in good condition a distance from where Weber saw the passenger door open, it was not reasonable to infer that defendant threw the gun out of the vehicle. Without establishing a connection between the gun and defendant while he was in the vehicle, defendant argues, the State failed to establish that defendant’s possession of the gun took place when he was not on his land or in his abode or fixed place of business. We disagree.

¶ 19 Efstathiou testified that he observed defendant throw the gun out the window of the Escort. Although it is true that Efstathiou did not remember where on the route they were when defendant

threw the gun out the window, he did testify that it was while Weber was pursuing them. Based on this testimony and the fact that the gun was found along the route the vehicle traveled while Weber was in pursuit of it, the trial court could have reasonably inferred that defendant possessed the gun while he was in the vehicle, *i.e.*, not on his land or in his abode or fixed place of business.

¶ 20 Defendant contends that Efstathiou was not credible given that he was a convicted felon, gave contradictory statements to the police, had an interest in inculcating defendant, and gave testimony that was “inherently weak.” All of these factors go to the weight to be assigned to Efstathiou’s testimony. Such a task belongs to the trier of fact, and we are not in a position to substitute our judgment for that of the trier of fact. *Ortiz*, 196 Ill. 2d at 259.

¶ 21 Defendant also argues that the trial court erred in denying his motion to suppress the fingerprint exemplars. Again, we disagree. The fourth amendment to the United States Constitution guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const., amend. IV. Generally, a warrant is necessary to satisfy the reasonableness requirement of the fourth amendment. *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001).

“The temporary detention of an individual during a vehicle stop is a seizure within the meaning of the fourth amendment and is subject to the reasonableness requirement of *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906, 88 S. Ct. 1868, 1880 (1968). [Citations.] A *Terry* analysis requires a dual inquiry: ‘(1) whether the officer’s action was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place.’ [Citation.]” *People v. Cole*, 369 Ill. App. 3d 960, 965-66 (2007).

¶ 22 Defendant concedes that Weber's initial stop of the Escort was justified due to the traffic violations Weber observed. Defendant contends, however, that the lawful stop of the vehicle turned into an unlawful arrest when Weber handcuffed defendant. Defendant further contends that, even if his initial handcuffing did not constitute an arrest, his continued detention in handcuffs constituted an arrest after no contraband was found on the vehicle occupants or in the vehicle. Although the use of handcuffs indicates that the person is under arrest rather than merely the subject of an investigatory stop, the use of handcuffs during an investigatory stop does not *per se* mean that the subject is under arrest. *People v. Arnold*, 394 Ill. App. 3d 63, 70-71 (2009). In some circumstances, the use of handcuffs to restrain the subject of an investigatory stop might be necessary for the safety of the officer or the public. *Arnold*, 394 Ill. App. 3d at 71.

¶ 23 We need not decide whether Weber's handcuffing of defendant converted the traffic stop into an unlawful arrest, because even assuming that defendant was unlawfully arrested when he was initially handcuffed, the fingerprints were sufficiently attenuated from the unlawful arrest such that they should not have been suppressed.

¶ 24 A determination that defendant was unlawfully detained does not necessarily resolve the issue of whether subsequently obtained evidence is admissible. *People v. Johnson*, 237 Ill. 2d 81, 92 (2010). As the supreme court has explained:

“The relevant inquiry is whether the [evidence] bear[s] a sufficiently close relationship to the underlying illegality. [Citation.] Generally, courts resolve this question by considering whether the evidence was obtained ‘by means sufficiently distinguishable to be purged of the primary taint’ of illegality. [Citation.] However, this attenuation analysis is only appropriate where the evidence sought to be suppressed was actually obtained as a result of some illegal government activity.” *People v. Lovejoy*, 235 Ill. 2d 97, 130 (2009).

In determining whether evidence is sufficiently attenuated from an unlawful arrest to permit its admission, we are to focus on the causal connection between the illegality and the evidence. *People v. Parker*, 284 Ill. App. 3d 860, 864 (1996). The following factors should be considered: the temporal proximity between the arrest and the obtention of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Parker*, 284 Ill. App. 3d at 864; *People v. Smith*, 232 Ill. App. 3d 121, 129 (1992).

¶ 25 While the first factor—the temporal proximity between the illegality and the obtention of the evidence—is not helpful in this case because it is unknown how much time passed between defendant’s arrest and when he was fingerprinted, the other two factors support a determination that the fingerprint exemplars were sufficiently attenuated from any unlawful arrest that may have occurred.

¶ 26 First, as the State argues, the discovery of the gun provided intervening probable cause for defendant’s arrest. Although intervening probable cause does not necessarily require a finding of attenuation, it is an important factor in the attenuation analysis. *Johnson*, 237 Ill. 2d at 94. Upon finding the gun, probable cause existed to arrest defendant. “Probable cause exists when the totality of the facts and circumstances known to the officers is such that a reasonably prudent person would believe that the suspect is committing or has committed a crime.” *People v. Montgomery*, 112 Ill. 2d 517, 525 (1986). After finding the gun, Weber knew that defendant was the passenger in a vehicle whose driver committed numerous traffic violations while attempting to flee from Weber. The vehicle was traveling in a high-crime neighborhood in the early morning hours. The passenger door of the vehicle opened during the flight and then quickly closed. The gun was found along the route the vehicle traveled as it fled from Weber, and it appeared to have been recently discarded, as it was not covered with any dirt or debris and did not appear weathered. From this, Weber had

probable cause to place defendant under arrest. See *People v. Holman*, 402 Ill. App. 3d 645, 650 (2010) ("The amount of time that had passed and the proximity of defendant to the bushes render reasonable the inference that defendant possessed the cocaine.")

¶ 27 Moreover, the discovery of the gun took place while the lawful traffic stop of the vehicle was still underway. Even if defendant had not been handcuffed and thus arguably placed under arrest, as a passenger in a vehicle stopped for a traffic violation he was subject to being detained for the duration of the traffic stop (see *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) ("The temporary seizure of driver and passengers [during a lawful traffic stop] ordinarily continues, and remains reasonable, for the duration of the stop.")), during which time Weber would have found the gun. Weber's search of the Escort's path did not unduly prolong the traffic stop, as the evidence establishes that only five or so minutes elapsed between when the Escort pulled over and when the gun was found. See *Johnson*, 555 U.S. at 333 ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."); *People v. Starnes*, 374 Ill. App. 3d 329, 334 (2007) (explaining that the Illinois Supreme Court "acquiesced in the [United States] Supreme Court's holding that, if a traffic stop is proper, police action that does not unreasonably prolong the stop or independently trigger the fourth amendment is permissible even if it goes beyond the scope of the stop"). As the supreme court has explained:

"Had the officers decided at this time that defendant's initial detention was illegal, they could have released him and then, based upon probable cause that developed independently of his initial arrest, immediately arrested him again. Under this scenario, there would be no question that defendant's statements and confession would be admissible.

It follows, then, that the probable cause that would support a second arrest only minutes after defendant's first arrest also serves to break the causal connection between defendant's first illegal arrest and the statements defendant gave six hours later. As our appellate court has noted, it would place an unreasonable burden on the police to require officers to release an illegally arrested defendant and then, based upon probable cause obtained after the illegal arrest, arrest him again when he reached the sidewalk." *People v. Morris*, 209 Ill. 2d 137, 159 (2004).

¶ 28 Finally, any misconduct by the officers in this case was not flagrant, nor does the record show that they had an illicit purpose in placing defendant under arrest prematurely. Officer misconduct is considered flagrant when it is "carried out in such a manner as to cause surprise, fear, and confusion, or when it has a quality of purposeful or intentional misconduct." *Johnson*, 237 Ill. 2d at 94. The record does not demonstrate that defendant was surprised, fearful, or confused when he was placed in handcuffs. Nor does the record indicate any intentional misconduct. Weber observed the vehicle attempting to elude him in the early morning hours and in a high-crime neighborhood. He observed the passenger door open and shut. Based on that, we conclude that Weber was not on a fishing expedition when he searched the occupants and searched the Escort's route to see if anything had been discarded.

¶ 29 In sum, we conclude that the State presented sufficient evidence to support defendant's conviction. In addition, we conclude that the fingerprint exemplars were sufficiently attenuated from any unlawful arrest that may have occurred, such that the trial court properly denied defendant's motion to suppress. We emphasize that, in so concluding, we are passing no judgment on the question of whether the initial handcuffing or continued handcuffing of defendant converted the lawful traffic stop into an unlawful arrest.

¶ 30

CONCLUSION

¶ 31 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 32 Affirmed.