

2011 IL App (2d) 101056-U
No. 2—10—1056
Order filed August 2, 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 Boone County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 09—CF—376
)	
JOSE P. GONZALEZ,)	Honorable
)	Fernando L. Engelsma,
Defendant-Appellee.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

Held: The trial court erred in granting defendant's motion to quash and suppress: once the purpose of the initial traffic stop was completed, the police had reasonable suspicion to justify a brief prolongation to investigate defendant for underage drinking; they knew that defendant was underage, they detected the odor of alcohol, and they observed defendant exhibit some indicia of consumption.

ORDER

¶ 1 The State appeals an order quashing the arrest of defendant, Jose P. Gonzalez, and suppressing evidence seized from him after a traffic stop. We reverse and remand.

¶ 2 Defendant was charged with armed violence (720 ILCS 5/33A—2(a) (West 2008)); aggravated unlawful use of a weapon (720 ILCS 5/24—1.6(a)(1) (West 2008)); unlawful possession

of cocaine (720 ILCS 570/402(c) (West 2008)); and unlawful consumption of alcohol by a minor (235 ILCS 5/6—20(e) (West 2008)). Defendant moved to quash his arrest and suppress evidence. We summarize the evidence from the hearing on his motion.

¶ 3 Belvidere police officer Robert Kozlowski testified on direct examination as follows. On October 18, 2009, at 3:22 a.m., a Chevy van drove past his squad car in the opposite direction. Because the van was going 77 miles per hour in a 55 miles per hour zone, Kozlowski turned around, followed the van, and stopped it. Kozlowski exited his car and approached the van's driver's side. Four people were in the van; defendant was in the front passenger seat. Kozlowski asked the driver, Ojeda, for his license and proof of insurance. Ojeda produced his license. He and defendant started to look for Ojeda's insurance card. Detecting the odor of an alcoholic beverage coming from inside the van, Kozlowski asked Ojeda whether he had been drinking. Ojeda said no. Kozlowski noticed that Ojeda was "disshoveled [*sic*]."

¶ 4 Defendant then volunteered that it was his fault that Ojeda had been speeding, as "they were trying to get [defendant] home for curfew, before curfew." This struck Kozlowski as odd, as curfew would have been four hours ago. Kozlowski asked defendant for his name, address, and date of birth. Defendant said that he was "Jose Gonzalez," gave his address, and said that his birthday was September 19, 1990. At that point, Kozlowski realized that defendant was not "underage for curfew," so he asked him about his statement about the curfew. Defendant "said he had curfew," and Kozlowski was "confused as to what [defendant] was referring to." Kozlowski could not recall asking defendant whether he was referring to "a curfew with his parents or where he live[d]." Defendant could not provide any identification.

¶ 5 Kozlowski returned to his squad car and ran a check on Ojeda. Because defendant had said that he was violating his curfew, Kozlowski also checked his status. The check on Ojeda revealed

a valid license and no warrants. The check on defendant revealed no information; he had no record. Kozlowski wrote the speeding ticket. As he finished, Officer Tony Martin pulled up. Kozlowski told Martin that Ojeda had “a note on the computer indicating caution for violence.” Martin said that he would stay on the scene. Recounting his talk with Martin, Kozlowski testified:

“A. *** I told him I wasn’t sure what I had yet and the people seemed confused, disshoveled [*sic*], and I don’t know who has been drinking inside that car.

Q. When you say ‘confused, disshoveled [*sic*],’ you are talking about the driver?

A. The driver being disshoveled [*sic*], yes, and the passenger being confused and not sure who he is. He did tell me he had probation issues. So I thought there would be a record for him.”

¶ 6 The examination continued:

“Q. And you stated that you weren’t sure what you had at that point, but at that point it was just a speeding ticket for Mr. Ojeda?

A. And possible curfew violation for the passenger.

Q. You ran his date of birth which was—

A. I ran a date of birth. I wasn’t sure it was his date of birth.

Q. Okay. And after writing the ticket, did you return to the vehicle?

A. Yes.”

¶ 7 Kozlowski testified that, upon returning to the van, he made contact with Ojeda on the driver’s side. Martin approached on the passenger’s side. Kozlowski told Ojeda that he was citing him for speeding. He was still unsure of defendant’s date of birth, so he ordered him out of the car.

¶ 8 The examination continued:

“Q. Why would you have him get out of the car?

A. Because I was talking through the window on the driver side, talking through the passenger's side.

Q. You could have walked around to the passenger's side at that point?

A. I could have.

Q. But you asked Mr. Gonzalez to get out of the vehicle?

A. Right, so I could speak with him.

Q. To just ask him about his date of birth?

A. Confirm any suspicion that I had that he might be under age either violating curfew or the odor of alcoholic beverage was coming from him [*sic*].”

¶ 9 Kozlowski added that one reason that he ordered defendant out of the van was “to try to figure out where the odor [of alcohol] was coming from.” When he told defendant to step out of the van, he was “pretty sure” that the alcoholic odor was not coming from Ojeda but “was coming from somebody.” Also, he was trying to figure out why defendant had said that he had a curfew, and it appeared that “there was something wrong with [defendant].” Kozlowski did not know “if he was under the influence and nervousness, lack of being able to provide information such as the insurance card, hopping around on the seat. He seemed a little nervous.”

¶ 10 Asked whether, other than the alcoholic odor, he had had any indications that defendant had been drinking, Kozlowski mentioned “the nervousness, the fidgeting around.” Defendant did not have slurred speech; his eyes were “glassy, [but] not bloodshot.” The backseat passengers had been quiet and still throughout. Defendant had no apparent trouble exiting the van. As he did so, he took off his jacket and put it down on the front seat. This struck Kozlowski as odd, since it was extremely cold outside. Kozlowski walked around to the passenger side and Martin walked in front of the van. After defendant stepped out of the van, Kozlowski noticed an open bottle of malt liquor just in front

of the rear passenger's-side seat. The occupant, Molina, who was not underage, admitted to drinking. He was not ordered out of the van.

¶ 11 Kozlowski testified that, as soon as defendant was outside the van, Kozlowski could smell an alcoholic odor emanating from him. Both officers spoke to defendant. Defendant quickly admitted that he had been drinking alcohol. Asked his name and date of birth, he gave the same answers as before. Kozlowski was still not sure that the information was correct. Kozlowski gave defendant a breath test, which yielded a blood-alcohol reading of 0.82. Kozlowski arrested defendant for underage drinking and placed him into his squad car. Kozlowski then returned to the van. He wanted to issue Molina a ticket for illegally transporting open alcohol and to retrieve defendant's jacket, as it was standard police procedure to make sure that an arrestee had all of his belongings. Taking the jacket from Ojeda, Kozlowski felt what he recognized as a pistol inside one of the pockets. Kozlowski had Ojeda exit the van, and he handcuffed him. More officers arrived. Martin found a second gun in the backseat.

¶ 13 Kozlowski testified on cross-examination as follows. When he stopped the van, he noticed an odor of alcohol, indicating that someone inside had been drinking. Because defendant had said that he was on probation, Kozlowski had expected that the check on him would show "some sort of driver license status or an indication that he was on probation." He found neither and therefore suspected either that defendant had misinformed him or that he had recorded defendant's information incorrectly.

¶ 14 Kozlowski testified that his squad car's camera had recorded the stop. The video was admitted into evidence, and the judge watched it.

¶ 15 Martin then testified as follows. After he heard about the stop, he went to the scene. There, Kozlowski told him that there were "a few people in the vehicle," so Martin agreed to back him up.

Kozlowski added that he had run a check on defendant but had come up with no information. He told Martin that defendant might be under the legal drinking age; that Kozlowski “had smelled alcohol in the vehicle”; and that there was “some issue about [defendant] being out after curfew.”

¶ 16 Martin testified that, at some point, he and Kozlowski approached the van on opposite sides. Kozlowski issued Ojeda a speeding ticket. He then had defendant exit the van. Up until then, Martin had noticed nothing peculiar, such as odd movements, inside the vehicle. Before exiting the van, defendant removed his jacket and placed it on the front seat. Kozlowski moved to the passenger’s side of the van so that both officers were with defendant. Kozlowski asked defendant his name and date of birth. Asked whether Kozlowski asked defendant about “anything with his curfew or probation,” Martin answered, “I believe at that point he was asking him about possibly drinking or consuming alcohol.” Defendant admitted having drunk alcohol. Kozlowski administered the breath test to defendant and arrested him for underage drinking. Martin testified consistently with Kozlowski’s testimony about the breath test, defendant’s arrest, the retrieval of defendant’s jacket, and the discovery of the second gun.

¶ 17 Recalled to testify, Kozlowski stated that, while defendant looked for Ojeda’s insurance card, he appeared nervous and was moving around. However, defendant never reached for the jacket or made any unusual movements toward it. Nobody else made any movement toward the jacket.

¶ 18 The hearing proceeded to arguments. Defendant contended that, although the initial stop of the van for speeding had been proper, Kozlowski had improperly extended it. Specifically, defendant asserted, Kozlowski had no justification for ordering defendant out of the van; defendant could have repeated his name and date of birth without leaving. Defendant argued further that the mere odor of alcohol coming from within a vehicle with four passengers did not create a reasonable suspicion that defendant had been consuming alcohol. Moreover, Kozlowski could have cleared up

his confusion over defendant's reference to a curfew simply by asking him to explain his statements. Finally, once defendant had been secured in the squad car, the arrest could not support searching the van, as there was no basis to believe that evidence of the offense of arrest would be found there.

¶ 19 In response, the State argued that, by the time that Kozlowski ordered defendant out of the van, he had both smelled the odor of an alcoholic beverage and learned that defendant was under the legal drinking age. Also, even after defendant was arrested and secured in the squad car, the police could search the van incident to the arrest, because they had probable cause to believe that they would find evidence of defendant's offense, such as an alcoholic beverage container.

¶ 20 The trial judge commented as follows. The stop of the van for speeding was proper. More problematic were Kozlowski's actions toward defendant:

“But he's ordering him out, and it's—from his testimony, it was after the defendant was out of the vehicle that he then smells alcohol on the defendant.

So now he has a legitimate place [*sic*] that his earlier suspicion about smell—whatever that suspicion was, there was nothing illegal at that point unless it was from the defendant who said that he was 19.

But he didn't smell it on the defendant until the defendant was out. ***”

¶ 21 The judge expressed concern about whether the legitimate traffic stop had been unreasonably prolonged by Kozlowski's decision to investigate defendant's possible consumption of alcohol. The hearing was continued.

¶ 22 When the hearing resumed, the judge explained his decision as follows. Both witnesses had been credible and unimpeached, so there was no issue of credibility. When Kozlowski first approached the van's driver's side, he smelled an odor of alcohol. After learning that defendant was 19 years old, Kozlowski “at that point knew that curfew was not an issue.” When Kozlowski

returned to the van after checking on Ojeda and defendant and writing the traffic ticket, he smelled the odor of alcohol but realized that it was not coming from Ojeda, so he had no basis to investigate possible driving under the influence. At that point, the stop for the traffic violation “was concluded.” However, Kozlowski ordered defendant out of the van. Upon speaking to defendant outside the van, Kozlowski smelled an alcoholic odor on defendant’s breath. Defendant took the breath test and was arrested for underage drinking.

¶ 23 The judge stated that the key consideration was that, when Kozlowski ordered defendant out of the van, the purpose of the traffic stop had been fulfilled, yet the stop was prolonged—how many minutes was not clear, but also not dispositive if the delay was unjustified. The judge continued:

“The reason he had the defendant exit the vehicle was *** the I.D. [*sic*] situation. In reality, Officer Kozlowski himself admits in testimony that when he broadcast or he talked to Sergeant Martin, he testified that what was said was, ‘I don’t know what I have here.’ Therein lies the problem with the additional actions by Kozlowski upon completing the writing of the speeding ticket.

What we have is an ungeneralized suspicion, a real hunch, if you will, that something was up with the passenger, something was going on with the passenger, but nothing particularized, that is there is no observation that the passenger had done anything wrong.”

¶ 24 The judge stated that, lacking “reasonable articulable suspicion,” Kozlowski had impermissibly extended the traffic stop by ordering defendant out of the van.¹ However, had

¹The judge noted the established rule that “on a stop in general, an officer can order passengers *** out of the car,” but that here, Kozlowski did not do so “until after the stop was essentially over, that is the speeding citation was actually written and done.” The judge was correct

defendant's arrest been proper, the search of the van and defendant's coat would have been permissible, as Kozlowski had had probable cause to believe that he would find evidence of defendant's drinking (such as an open bottle of alcohol in the coat).

¶ 25 The trial court granted defendant's motion. The State moved to reconsider. The court denied the motion, and the State timely appealed (see Ill. S. Ct. R. 604(a)(1) (eff. July 1, 2006)).

¶ 26 Before reaching the merits of the appeal, we must note that we do so with great reluctance. Indeed, the State's presentation is so glaringly deficient that we would be within our prerogative to strike the State's brief and affirm the trial court's order without reaching the merits.

¶ 27 We have often stated, and must again state, that this court is not a depository into which an appellant may dump the burden of argument and research. *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 208 (2007); *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1994). A court of review is entitled to be presented with cohesive arguments that are supported by citations to pertinent authority. *Obert v. Saville*, 253 Ill. App. 3d 667, 682 (1993). If an appellant

about the general rule and its limitations (although we find error in other respects). “[A]n officer making a traffic stop may order passengers to get out of the car *pending completion of the stop*.” (Emphasis added.) *Maryland v. Wilson*, 519 U.S. 409, 415 (1997). Thus, *Wilson* by itself neither validates nor defeats Kozlowski's action of ordering defendant out of the van. As we explain later, because Kozlowski reasonably suspected that defendant had committed underage drinking, he could properly extend the stop, and, because ordering defendant out of the van was proper to investigate his suspicion, he could do that as well. We need not decide whether *Wilson* would have allowed Kozlowski to order defendant out of the van even were it wholly unnecessary to investigate the possible underage drinking.

fails to meet this fundamental requirement, or otherwise disregards the supreme court rules for appellate briefs, the reviewing court is within its prerogative to consider the appellant's contentions of error forfeited (*id.*) or to strike the appellant's brief and dismiss the appeal (*Alderson v. Southern Co.*, 321 Ill. App. 3d 832, 845 (2001)).

¶ 28 Here, the State's appellate brief violates two supreme court rules. The first rule is that an appellant's brief must contain a statement of facts that "shall contain the facts necessary to an understanding of the case ***." Ill. S. Ct. R. 341(h)(6) (eff. July 1, 2008). The State's brief statement of facts recounts the procedural history of the case and the testimony from the hearing on defendant's motion, and it does so at great length; yet it omits any mention of the trial court's factual findings or legal basis for its ruling. (This deficiency is remedied somewhat later on in the brief.) This omission is remarkable enough, but it is far from the most serious.

¶ 29 The second rule is that the argument section of an appellant's brief must "contain the contentions of the appellant and the reasons therefor, with citation of [1] the authorities and [2] the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). The rule requires citing *pertinent* authorities. *Obert*, 253 Ill. App. 3d at 682. Of course, it is most helpful if the brief also explains *why* these authorities are pertinent.

¶ 30 The State's argument is grossly deficient in both respects [1] and [2]. It cites a handful of Illinois opinions but with little or no mention of why these opinions are pertinent to any potential claim of error. It also cites a South Dakota case without explaining why this foreign authority has any bearing here (which, we note, it does not). Finally, the argument cites *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695 (2009), and urges that its "underlying principles against applying the exclusionary rule" apply here. The argument does not explain *why* this is so, other than to state, "The officers' actions here were eminently reasonable." *Herring* holds that the exclusionary rule

does not automatically require the exclusion of evidence obtained in reliance on a search warrant that had been recalled, if, as a result of an isolated clerical error, the police reasonably and in good faith believed that the warrant was still outstanding. *Id.* at 698. Obviously, *Herring* has no bearing at all on whether the evidence seized as a result of the warrantless detention of defendant must be suppressed.

¶ 31 The State’s argument also violates the requirement that it cite the pages of the record on which its contentions rely. The problem is not that the argument fails to cite the record to support a given assertion. Indeed, it is exactly the opposite—in support of most of its assertions of error, the argument cites essentially the *entire* report of proceedings. Such a blanket citation is, of course, as useless as no citation to the record at all.

¶ 32 The deficiencies in citation to legal authority and the record—serious and inexcusable though they are—are not, however, the gravest problem with the State’s argument. The fundamental difficulty is not that the State’s contentions of error receive insufficient support, but that the contentions *themselves* are all but meaningless. Nowhere does the State directly argue that, for a specific reason, the trial court erred in holding that the police unreasonably prolonged the traffic stop. Instead, referring to “issues arising from the odor of alcohol in the vehicle and other potential offenses,” the State tells us that Kozlowski “had a reasonable articulable suspicion that he was potentially facing several possible violations of Illinois law.” Later, we read that, “Based on the highly ambiguous facing [*sic*] them and the totality of the circumstances surrounding this traffic stop, the officers had more than sufficient articulable suspicions of one or more violations of Illinois law

to justify their actions herein.” These passages say nothing—albeit in a great many words. The State’s argument consists almost entirely of vague hints.²

¶ 33 We are loath to tolerate the State’s flagrant disregard of basic procedural rules, and we would be well within our prerogative to strike the State’s brief and affirm the trial court without reaching the merits. Nonetheless, we also have the discretion to disregard violations of the rules if we deem it necessary to do so in the interests of justice. See *Alderson*, 321 Ill. App. 3d at 845. Here, at one point, the State does at least indirectly allude to the ground on which we decide this case. Also important, this case does involve several serious criminal charges, the record is not long, and the applicable law is not complex. Therefore, we elect to reach the merits.

¶ 34 On an appeal from the grant of a motion to quash and suppress, we accept the trial court’s factual findings unless they are against the manifest weight of the evidence, but we review *de novo* the court’s ultimate decision on the motion. *People v. Close*, 238 Ill. 2d 497, 504 (2010). Here, the pertinent facts, including the reasonable inferences to be drawn from the evidence, appear undisputed. Therefore, we address a question of law that we review *de novo*. See *id.*

¶ 35 A traffic stop that is legal at its inception can become illegal if it is unreasonably prolonged past the time needed to complete its purpose. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). Here, the trial court held that, although the stop for speeding was proper, it was unreasonably prolonged past the time needed to cite Ojeda. Specifically, the court held, Kozlowski proceeded to investigate defendant, acting on a mere “hunch.” The court thus concluded that the delay caused by this new

²The State’s reply brief is no better than its opening brief. Indeed, most of it repeats verbatim, or nearly so, parts of the opening brief. One thing is new: Kozlowski has now become “Kowalski.”

investigation, although only a few minutes, was unreasonable. Although we acknowledge that the case is a close one, we hold that the delay was permissible because—and *only* because—Kozlowski reasonably suspected that defendant had committed underage drinking.

¶ 36 The delay at issue was relatively slight. According to the videotape, Kozlowski stopped the van at 3:22 a.m.; he returned to issue the speeding ticket to Ojeda at 3:34:20 a.m; and defendant exited the van no later than 3:38:10. Thus, it took less than three minutes in all for Kozlowski to issue the speeding ticket *and* to order defendant out of the van. Although not dispositive by itself, the brevity of the delay is an important factor in deciding its reasonableness. See *People v. Ruffin*, 315 Ill. App. 3d 744, 749 (2000). As important, however, the additional investigation was supported by reasonable suspicion.

¶ 37 It is illegal for anyone under 21 years of age to consume alcohol. 235 ILCS 5/6—20(e) (West 2008). Shortly after stopping the van, Kozlowski learned that defendant was 19 years old. Before he finished processing the traffic ticket, Kozlowski also had detected an odor of alcohol coming from inside the van, meaning that *at least* one person inside had been drinking recently. Kozlowski concluded that Ojeda had not been drinking. That left one or more of Ojeda’s three passengers as the possible source(s) of the odor. Defendant had been moving about and had made apparently illogical references to a “curfew.” Kozlowski noticed that defendant’s eyes were “glassy,” which he recognized as suggesting alcohol consumption. We stress that Kozlowski did not need a reasonable suspicion that defendant was intoxicated—only that he had consumed *any* alcohol.

¶ 38 We note that the basis of the trial court’s decision was not that Kozlowski ordered defendant out of the van, but that Kozlowski impermissibly extended the traffic stop. In any event, we would hold that Kozlowski’s decision to order defendant out was reasonable, as it enabled him to discern whether defendant was the source of the odor of alcohol—and thus whether defendant had been

consuming alcohol illegally. Also, Kozlowski's statement to Martin that he "didn't know what [he] had" is simply not germane to whether Kozlowski impermissibly extended the traffic stop. Answering that question depends on assessing *all* of the pertinent circumstances.

¶ 39 We conclude that, given all of the facts known to the police at the time, the short delay to investigate whether defendant had committed underage drinking was reasonable. Therefore, on this ground, the trial court erred in granting defendant's motion to quash and suppress. We stress that our decision is limited to this ground and that we do not address any other issues related to the grant of defendant's motion.

¶ 40 For the foregoing reasons, the interlocutory order of the circuit court of Boone County is reversed, and the cause is remanded.

¶ 41 Reversed and remanded.