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2011 IL App (4th) 100636-U

Filed 12/2/11

NO. 4-10-0636

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Livingston County
MARK C. ZALOUDEK,)	No. 09CF227
Defendant-Appellee.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Presiding Justice Turner and Justice McCullough concur in the judgment.

ORDER

¶ 1 *Held:* The court affirmed the trial court's judgment granting defendant's motion to suppress evidence where the duration of defendant's seizure after a routine traffic stop was unreasonable notwithstanding his status as a parolee.

¶ 2 In February 2010, the trial court granted defendant Mark C. Zaloudek's motion to suppress evidence. In March 2010, the State filed a motion to reconsider. In July 2010, the court denied the State's motion to reconsider. The State appeals, arguing defendant's seizure was reasonable based on defendant's status as a parolee. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In August 2009, the State charged defendant with one count of unlawful possession with intent to deliver cannabis (30 to 500 grams) (720 ILCS 550/5(d) (West 2008)).

In January 2010, defendant filed a motion to suppress evidence. The trial court set the motion for

hearing in February 2010, and the only evidence presented at the hearing was the testimony of the arresting officer, which showed the following.

¶ 5 Livingston County deputy sheriff David Netter testified he pulled defendant over on the evening of August 26, 2009, because defendant was not wearing his seatbelt. Netter stated he was behind defendant's vehicle when a passing car's lights illuminated the interior of defendant's vehicle, making it "very obvious" defendant was not wearing a seatbelt. Though the rear window was tinted, Netter stated he could clearly see into defendant's vehicle. Netter did not recall how far he was behind defendant's vehicle at the time. Defendant did not violate any other traffic laws.

¶ 6 Netter initiated a traffic stop and defendant pulled over in the parking lot of an apartment complex where his mother lived. When Netter approached the driver's side door, defendant was not wearing his seat belt. Netter stated defendant did not seem nervous but his passenger, Jenna Jordan, "appeared very nervous." Upon Netter's request, defendant produced his driver's license and insurance card. Defendant also informed Netter he was on parole.

¶ 7 Netter returned to his squad car to verify defendant's information and determined defendant's license and insurance were valid. Netter also confirmed defendant was currently on mandatory supervised release (MSR). In addition, Netter testified he was familiar with defendant's name because another deputy, Chris Chambers, had informed him defendant might be involved in drug sales in the area. Netter telephoned Chambers and confirmed defendant was the person Chambers had mentioned in connection with local drug sales. Chambers had no information regarding Jordan. Netter then called for backup but did not write a traffic citation for defendant. Netter was unsure how long defendant had been detained to that point but stated it

typically took 5 to 10 minutes to issue a routine traffic citation.

¶ 8 Netter reapproached defendant's vehicle on the passenger side and asked Jordan to exit the vehicle so he could speak with her. He did not return defendant's license or insurance card. Netter spoke to Jordan "briefly" to determine why she was so nervous. He asked where Jordan and defendant were coming from, what they had been doing, and whether she was employed. Jordan told Netter she and defendant just watched a movie at her house, and she was unemployed. Netter asked Jordan whether there was anything illegal in the car, and Jordan said "no" but added that if there was anything illegal in the car she and defendant were unaware of it. Netter considered this response "unusual," and he secured Jordan in the back of his squad car while he reapproached defendant's vehicle.

¶ 9 When he reapproached the vehicle, Netter asked defendant to exit, and defendant complied. Netter asked defendant where he and Jordan were coming from, what they had been doing, and whether he was employed. Defendant told Netter he and Jordan were "just chilling" at Jordan's house, and he was unemployed. Netter found it significant that defendant failed to mention watching a movie at Jordan's house, though he admitted "just chilling" could encompass watching a movie. When asked whether defendant appeared nervous, Netter stated "[defendant] spoke with his arms drawn about his chest."

¶ 10 Netter asked defendant's permission to conduct a pat down of his person "[b]ased on his parole status" and believed defendant gave his consent. Netter was familiar with Illinois case law stating individuals on MSR are subject to search "at any time." During the pat down, Netter found \$370 in defendant's back pocket. Netter stated it was odd because defendant told him he was unemployed. After the money was discovered, defendant told Netter he mowed

lawns for his brother. While Netter was conducting the pat down, other officers arrived.

¶ 11 Netter asked defendant if he could search his vehicle, and informed defendant he had the right to search it because defendant was on parole. Defendant consented. Netter searched defendant's vehicle but did not find any contraband.

¶ 12 Netter returned to the squad car and again spoke to Jordan while one of the other officers detained defendant. Netter testified defendant was not free to go at that time. During his second conversation with Jordan, she at first denied any knowledge of anything illegal on her person or in defendant's vehicle. Eventually, Jordan admitted she had cannabis on her person and pulled the contraband out of her pants. Jordan also stated there was cannabis in the vehicle but insisted defendant did not know about it. Netter then searched the vehicle again and found cannabis where Jordan told him it would be. Netter did not obtain defendant's consent to conduct the second search of his vehicle. Defendant and Jordan were arrested and handcuffed.

¶ 13 During closing arguments, defense counsel argued Netter unreasonably extended the stop by retaining defendant's license and insurance card absent reasonable suspicion of criminal activity and following a parole search that failed to yield contraband. The State argued defendant's detention was reasonable because his parolee status subjected him to searches without reasonable suspicion. Defense counsel countered defendant could not be detained after officers completed the parole search and found no contraband.

¶ 14 The trial court granted defendant's motion to suppress. While the court found the stop was lawful, it expressed concern over Netter's actions, stating:

"[I]f I had evidence that suggested that as soon as the officer found out the [defendant] was a parolee he searched [defendant] and then

searched the vehicle and then let them go or found something, that's one thing. But I don't think that was really the main reason behind the search I guess.

First of all, this is way beyond a seatbelt stop. Deputy Netter testified that, and he was rather cavalier I think in his testimony, that he felt he was within his rights to detain [defendant] and [Jordan] as long as he felt was appropriate to I guess find something.

The problem is he didn't write the seatbelt ticket or write a seatbelt warning in a timely reasonable time. He instead chose to engage in what I would say was very unreasonable detention of [defendant], and I guess I won't comment on the passenger at this time, but an unreasonable detention of [defendant] because Officer Netter didn't immediately take [defendant] out of the vehicle and search him. He wasn't, that wasn't the purpose. I'm not sure what he was trying to do except harass [defendant], but he didn't do anything right.

If he wanted to search the vehicle, *** he didn't immediately take [defendant] out of the car, tell him [']I'm searching you because you're on parole and I'm searching your vehicle.['] He didn't do that.

Instead he engages in this long, drawn out investigation,

interrogation actually is a better word. He separates [Jordan] from [defendant]. He puts [Jordan] in a car. He hangs onto [defendant's] driver's license, his insurance. He then questions [Jordan]. He then questions [defendant]. He then questions [Jordan] again. He then searches the driver, then searches the vehicle and finds nothing. And even if up to that point that was okay, which I'm not convinced that it was, but even if it was, he surely didn't have the right to then question [Jordan] again and then search the vehicle again.

Just because [defendant] is on parole doesn't mean he can be unlawfully detained for as long as the officers want. *** There might have to be a search; but there certainly isn't this unlawful detention of somebody without a warrant, without reasonable belief that [defendant] has done something.

I don't buy this [']passenger was nervous['] stuff because if that's the case, I'm not even convinced that that's the case, number one, but even if the passenger was nervous, Deputy Netter questioned her, searched the vehicle not based upon [defendant's] status as a *** parolee *** but based upon the statements made by [Jordan] that there were drugs in the car on the second or third interrogation. That wasn't the reason [Netter] gave. He didn't

search the vehicle until after he interrogated [Jordan] and wouldn't let them leave.

And what was also disturbing is Deputy Netter cannot recall how long this took. *** Now, if he is going to do a search without a warrant, *** [h]e better know how long that stop is. And quite frankly, I suspect based upon what I'm hearing from him that this whole thing had to be at least a half hour if not longer. Probably closer to 45 minutes would be my guesstimate based on what he's telling me. *** There just was nothing to support what happened here, and I quite frankly think it went way beyond what is appropriate and certainly what is required by the constitution.

The motion to suppress is granted. The State will not be able to use the evidence seized in support of its case."

¶ 15 In March 2010, the State filed a motion to reconsider, arguing the search was lawful based on defendant's parolee status. In July 2010, the trial court denied the State's motion to reconsider.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, the State argues defendant's seizure was reasonable based on his parolee status. We disagree.

¶ 19 When examining a trial court's decision regarding a motion to suppress, the

reviewing court gives great deference to the trial court's factual findings but reviews *de novo* the court's ultimate decision on whether suppression is warranted. *People v. Luedemann*, 222 Ill. 2d 530, 542, 857 N.E.3d 187, 195 (2006). On a motion to suppress evidence, defendant, as the moving party, has the burden of proving the search and seizure were unlawful. *People v. Hoskins*, 101 Ill. 2d 209, 212, 461 N.E.2d 941, 942 (1984).

¶ 20 The fourth amendment to the United States Constitution prohibits unreasonable searches and seizures which violate the right of the people to be secure in their persons, houses, papers, and effects. U.S. Const., amend. IV. Similarly, the Illinois Constitution guarantees the people the "right to be secure in their persons, houses, papers[,] and other possessions against unreasonable searches, seizures, [and] invasions of privacy." Ill. Const. 1970, art. I, § 6. Illinois courts have interpreted the search and seizure language of the Illinois Constitution in a manner consistent with the United States Supreme Court's fourth-amendment decisions. See *People v. Caballes*, 221 Ill. 2d 282, 313-14, 851 N.E.2d 26, 44-45 (2006).

¶ 21 "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (Internal quotation marks omitted.) *United States v. Knights*, 534 U.S. 112, 118-19 (2001). Warrantless searches and seizures are generally unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One exception to the prohibition on warrantless searches and seizures is the investigative detention. See *Terry*, 392 U.S. 1, 20 (1968). Another exception is where the individual subject to search and seizure is a parolee. See *Samson v.*

California, 547 U.S. 843, 857 ("[T]he Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee."); see also *People v. Wilson*, 228 Ill. 2d 35, 40-41, 885 N.E.2d 1033, 1037 (2008) ("[P]arolees enjoy a greatly diminished expectation of privacy" and are subject to warrantless searches.).

¶ 22 Section 3-3-7(a)(10) of the Unified Code of Corrections (730 ILCS 5/3-3-7(a)(10) (West 2008)) provides:

"The conditions of every parole and mandatory supervised release are that the subject:

(10) consent to a search of his or her person,
property, or residence under his or her control."

Though parolees are subject to warrantless searches, the search must be reasonable. *Wilson*, 228 Ill. 2d at 40, 885 N.E.2d at 1037. "In determining the reasonableness of a warrantless search, a court must examine the totality of the circumstances and assess, on the one hand, the degree to which the search intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* The court in *Wilson*, 228 Ill. 2d at 50-52, 885 N.E.2d at 1042-43, went on to conclude suspicionless, warrantless searches of parolees are reasonable under the fourth amendment due to the parolee's diminished privacy interests and the State's interest in monitoring parolees. Although parolees have a diminished privacy expectation, they still enjoy some fourth-amendment protection. See *Samson*, 547 U.S. at 850 n.2 ("Nor *** do we equate parolees with prisoners for the purpose of concluding that parolees, like prisoners, have no Fourth Amendment rights.").

¶ 23 Both the United States and Illinois Supreme Courts have determined that, because

temporary detention during a traffic stop is a seizure of the occupants, the stop must meet the fourth amendment's reasonableness requirement. *Whren v. United States*, 517 U.S. 806, 809-10 (1996); *People v. Bunch*, 207 Ill. 2d 7, 13, 796 N.E.2d 1024, 1029 (2003). An officer's actions in connection with a traffic stop are judged objectively based on what a reasonable person would do in the same situation. *People v. Close*, 238 Ill. 2d 497, 505, 939 N.E.2d 463, 467 (2010). A traffic stop is reasonable at its inception where police have probable cause to believe that a traffic violation has occurred. *People v. McQuown*, 407 Ill. App. 3d 1138, 1144, 943 N.E.2d 1242, 1247 (2011). However, a lawful seizure can become unlawful if it is prolonged beyond the time reasonably required to complete the purpose of the stop. *Id.*

¶ 24 In *McQuown*, 407 Ill. App. 3d at 1144-45, 943 N.E.2d at 1248, this court stated:

"In looking at the length of the stop, no bright-line rule has been adopted to indicate when a stop has been unreasonably prolonged. [Citation.] Instead, the duration of the stop must be justified by the nature of the offense and the ordinary inquiries incident to such a stop. [Citations.] Courts employ a contextual, totality of the circumstances analysis that includes consideration of the brevity of the stop and whether the police acted diligently during the stop. [Citation.]" (Internal quotation marks omitted.)

¶ 25 Here, neither party disputes that the traffic stop was valid where Netter reasonably believed defendant failed to wear his seatbelt. Nor is it disputed that Netter could reasonably search defendant's person and his vehicle due to defendant's status as a parolee. Instead, it is the duration of defendant's seizure that is problematic.

¶ 26 Netter testified he approached defendant's vehicle, obtained his information, and verified it in a timely manner. This information included the fact defendant was currently on MSR. While he was confirming defendant's information, Netter also contacted Chambers to verify defendant's suspected involvement in local narcotics sales but stated the conversation with Chambers was brief. Upon returning to the vehicle, Netter removed Jordan and briefly questioned her before securing her in his squad car. Netter then reapproached defendant's vehicle, asked him to exit, patted him down, and searched the vehicle. Up to this point, Netter had not unreasonably prolonged the stop in any way. Accordingly, we hold the search of defendant's person and the initial search of defendant's vehicle were reasonable warrantless searches under *Wilson*, based on defendant's parolee status.

¶ 27 Once Netter's initial search of the vehicle failed to yield any contraband, defendant's seizure should reasonably have ended. Though the terms of defendant's MSR subjected him to a warrantless, suspicionless search, the holding in *Wilson* does not stand for the proposition that officers can seize a parolee and subject him to a search of unlimited duration. *Wilson*, 228 Ill. 2d at 44, 885 N.E.2d at 1039 (Noting parolees, unlike prisoners, maintain some fourth-amendment rights, though those rights are diminished). Similar to other exceptions to the prohibition against warrantless searches, parolee searches must be subject to limitations. We find Netter's parolee search of defendant's vehicle became unreasonable when defendant was detained after the initial search failed to yield contraband. See *People v. Seymour*, 84 Ill. 2d 24, 35, 416 N.E.2d 1070, 1075 (1981) (A search reasonable at its inception "may violate the fourth amendment by virtue of its intolerable intensity and scope.") Netter's subsequent questioning of Jordan and second search of defendant's vehicle unreasonably extended defendant's seizure and

any evidence recovered as a result was properly suppressed.

¶ 28 Though the record does not contain evidence regarding how long defendant was actually detained, we do not find this problematic. It is well established no absolute time limit exists regarding when the duration of a seizure becomes unreasonable. Nor do we accord the trial court's finding the stop must have taken 30 to 45 minutes persuasive, where nothing in the record indicates the duration of defendant's seizure. Under the totality of the circumstances, Netter had no reason to detain defendant or Jordan after his initial search of the vehicle failed to yield any contraband, regardless of how long the seizure lasted to that point. At that time defendant and Jordan should have been allowed to return to the vehicle, and Netter should have disposed of the seatbelt violation. Instead, officers detained defendant while Netter again questioned Jordan regarding contraband in the vehicle, unreasonably extending the duration of the seizure.

¶ 29 The State argues Netter had a reasonable suspicion of criminal activity after initiating the traffic stop based on Jordan's nervousness, defendant's status as a suspected drug dealer, and Jordan's "unusual" answer to Netter's question regarding the presence of any illegal substances in the vehicle. However, the trial court found Netter's testimony regarding Jordan's nervousness unreliable, and we are not in a position to disagree with the court's determinations regarding Netter's credibility. See *Best v. Best*, 223 Ill. 2d 342, 350-51, 860 N.E.2d 240, 245 (2006) (A reviewing court will not substitute its judgment for that of the trial court regarding the credibility of witnesses unless the court's determinations go against the manifest weight of the evidence.). Further, any warrantless search based on reasonable suspicion of criminal activity still must be reasonable under the totality of the circumstances, and the State's arguments only

validate the initial search of defendant's vehicle. To put it another way, Netter's continued suspicion cannot be seen as reasonable after he conducted a search and found no contraband. See *Close*, 238 Ill. 2d at 510, 939 N.E.2d at 470 ("An officer *** may not ignore facts which would dispel suspicion of criminal wrongdoing.") Even assuming Netter had a reasonable suspicion of criminal activity at some point, he certainly could not have reasonably maintained that suspicion after conducting the search and finding nothing illegal.

¶ 30

III. CONCLUSION

¶ 31 For the foregoing reasons, we affirm the trial court's judgment granting defendant's motion to suppress evidence.

¶ 32 Affirmed.