

NOTICE

Decision filed 01/06/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0039

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
)	Effingham County.
)	No. 08-CF-52
v.)	Honorable
)	Kimberly G. Koester,
CRAIG A. SNYDER,)	Judge, presiding.
Defendant-Appellant.		

JUSTICE SPOMER delivered the judgment of the court.
Justices Donovan and Wexstten concurred in the judgment.

R U L E 2 3 O R D E R

The defendant, Craig A. Snyder, appeals the order of the circuit court of Effingham County that denied his motion to suppress evidence. For the reasons that follow, we reverse the order of the circuit court, vacate the defendant's conviction, and remand for further proceedings.

FACTS

The defendant was convicted following a stipulated bench trial for possession of a controlled substance (720 ILCS 570/402(c) (West 2008)), and he was sentenced to a term of 24 months of probation and to pay fines and costs. Prior to the trial, the defendant filed a motion to quash his arrest and to suppress evidence. At a hearing on the motion, the defendant introduced into evidence a video recording of the traffic stop that led to his arrest. The defendant also called the arresting officer, Corporal Danny Lake of the Effingham city police K-9 team, as a witness.

Lake testified that on March 13, 2008, he stopped the defendant's vehicle at around

9:56 p.m. for driving without the headlamps illuminated. The defendant did not pull over immediately but rather drove approximately a quarter-mile and stopped at his residence. Although there was an overpass and no shoulder along the street the defendant was driving on when Lake initiated the traffic stop, there was a parking lot and a side street where a stop was possible. The stopped vehicle was occupied by the defendant and Jaxon Gill, who was seated on the front passenger side. Lake ran the license plates and driver's license of the defendant and was not informed of any issues concerning their validity or outstanding warrants.

Lake determined that he was going to perform a walk-around on the vehicle because although he initially thought the defendant was intoxicated, after speaking with him and not smelling alcohol, he "just felt that [the defendant] at that time was trying to hide something from [him]." A county unit arrived on the scene and Lake began a walk-around with his K-9 unit, Kilo, who was characterized as an "aggressive alert" dog that was "very handler protective" and was trained in tracking, apprehension, and the detection of heroin, cocaine, crack, methamphetamine, and marijuana. Lake described why Kilo was not used to detect narcotics on a person: "He is aggressive alert." Lake testified, "You don't want him to alert on a person." The defendant and his passenger were instructed to stay in their vehicle with the windows up because "Kilo has a habit of sticking his nose in the vehicle." Kilo was walked around the vehicle and alerted on the driver's and passenger's front door handles. Lake testified that a hit on the door handles could indicate either that someone who had just handled narcotics had touched the door handle or that the smell was coming from inside the vehicle but not necessarily that one of the occupants had a substance on their person.

Lake was given consent by the defendant to search his vehicle, but the search did not produce any contraband. Some marijuana was discovered on Gill. Lake saw that the defendant had his hands in his pockets, and Lake asked him if he had anything on him he was

not supposed to and told him to pull his hands out of his pockets. Another officer on the scene said, "He's got his hands—something in his pocket." Lake patted the defendant down and felt a cellophane bag in his pocket but nothing that indicated a weapon. Lake testified that cellophane was "a known way that most people put their drugs in," which "throws up a red flag you need to look further." Lake removed the cellophane from the defendant's pocket and found the cellophane to contain two Vicodin pills and one hydrocodone pill. The trial court denied the defendant's motion to suppress, and as described above, the defendant was convicted following a stipulated bench trial. This timely appeal followed.

ANALYSIS

The defendant raises one issue on appeal—that the trial court erred in denying the defendant's motion to suppress evidence, with two alternative arguments: (1) because the canine alert on the exterior door handles of the defendant's vehicle did not establish probable cause that the defendant possessed drugs and because there was no "reasonable suspicion" that the defendant was armed and dangerous, Lake's pat-down and search of the defendant's person violated the fourth amendment and (2) alternatively, Lake's pat-down search of the defendant, where Lake claimed that he felt a cellophane bag in the defendant's pants pocket, did not justify Lake reaching into the defendant's pocket and removing the bag, because there was no probable cause to believe that the bag contained drugs.

A reviewing court must use a bifurcated standard when reviewing a trial court's denial of a defendant's motion to suppress evidence: the trial court's factual findings are held to a manifest-weight-of-the-evidence standard, but the ultimate ruling on whether the evidence should be suppressed is held to a *de novo* standard. *People v. Van Bellehem*, 389 Ill. App. 3d 1129, 1133 (2009). Because the defendant does not challenge the factual findings of the trial court, only the legal findings, this court shall review *de novo* the ruling on the ultimate issue of whether the motion to suppress should have been granted.

The fourth amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. The basic rule concerning the fourth amendment is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). Among those exceptions are probable cause, or facts that would lead "a reasonable person standing in the shoes of the police officers to conclude that a crime has been committed and the defendant was the person who committed the crime." *People v. Robinson*, 167 Ill. 2d 397, 405 (1995). The detection of narcotics by a trained dog is a permissible method of establishing probable cause. *People v. Reeves*, 314 Ill. App. 3d 482, 489 (2000). However, a police canine alert to a car's exterior that indicates the presence of a controlled substance does not, without more, provide probable cause to search the persons of the car's occupants. *People v. Fondia*, 317 Ill. App. 3d 966, 969 (2000).

The defendant argues that his fourth amendment rights were violated because neither the canine alert nor a reasonable fear of imminent danger justified a pat-down search of the defendant's person. The United States Supreme Court has determined that the "'clear and unquestionable authority of law'" (*Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891))), as it pertains to the warrantless search of a person who is not subject to arrest, is present either where an officer has a reasonable fear of imminent danger and conducts a search "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer" or where there exists probable cause that a crime has been committed. *Terry*, 392 U.S. at 29. Thus, the question before us is whether the warrantless pat-down search of the defendant was supported either by the officer's reasonable fear of

imminent danger or by sufficient probable cause that a crime had been committed.

We begin by noting that there is nothing in the record to indicate that the pat-down of the defendant was supported by Lake's reasonable fear of imminent danger. Lake did not testify that he believed he was in imminent danger, there were two other officers on the scene, and Lake knew that the defendant had no prior criminal history. Even if Lake had been in fear for his safety, he testified that the pat-down did not reveal anything which could be considered a weapon, so the search should have ended there. "[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry*, 392 U.S. at 18, "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Justice Fortas, concurring)). The pat-down only revealed the presence of cellophane in the defendant's pocket, not anything that the officer could reasonably have concluded was a weapon. Accordingly, we cannot conclude that the search of the defendant was justified based on an officer's reasonable fear of imminent danger.

We next consider whether there was probable cause to believe that a crime had been committed by the defendant. The State asserts that probable cause did exist to search the person of the defendant because a canine sniff indicated hits on both exterior door handles. However, a consent search on the interior of the vehicle turned up no contraband. The State further asserts that a sniff of the defendant's person to narrow the scope of the search was precluded due to the aggressive nature of the dog and that the discovery of drugs on the passenger and the passenger's prior drug-related police contacts served to heighten the level of probable cause to search the defendant. We do not agree.

The issue of whether an alert to the presence of narcotics by a police K-9 unit is sufficient to establish probable cause has been examined in Illinois on two separate occasions

by our colleagues in the Fourth District. In *People v. Fondia*, 317 Ill. App. 3d 966, 967-68 (2000), a K-9 search was conducted on the outside of a vehicle during a routine traffic stop. During the search, the K-9 alerted to the rear seam of the driver's side door. *Fondia*, 317 Ill. App. 3d at 968. The defendant, seated in the rear passenger side of the vehicle and one of four occupants, was subjected to a search of his pockets, which revealed the presence of a crack pipe. *Fondia*, 317 Ill. App. 3d at 968. The trial court denied the defendant's motion to exclude the evidence, and the defendant was subsequently found guilty at a stipulated bench trial. *Fondia*, 317 Ill. App. 3d at 968. On appeal, the appellate court held, "[A] police canine alert of a car's exterior indicating the presence of a controlled substance within the car does not, without more, provide the police with probable cause to search the persons of the car's occupants." *Fondia*, 317 Ill. App. 3d at 969. The *Fondia* court further stated that the officers placed themselves into a position of "willful ignorance" by not narrowing the scope of their search by having the dog sniff either the defendant's person or the interior of the car. 317 Ill. App. 3d at 970.

Our colleagues in the Fourth District revisited the issue two years later in *People v. Staley*, 334 Ill. App. 3d 358 (2002). In *Staley*, the defendant was a passenger in a vehicle pulled over for a routine traffic violation at 2 a.m. 334 Ill. App. 3d at 360. Prior to the stop, the officer had observed the vehicle parked for a short period of time in a fire lane outside of a known drug house. *Staley*, 334 Ill. App. 3d at 360. The defendant briefly went into the drug house and then returned to the car. *Staley*, 334 Ill. App. 3d at 360. During the stop, the defendant, who was seated on the front passenger side, behaved suspiciously in that he did not make eye contact with the officer but rather looked straight ahead out the windshield. *Staley*, 334 Ill. App. 3d at 360. Consent was given by the driver to search the vehicle, and a K-9 sniff was conducted, resulting in a hit on the front driver's side interior door handle and the front passenger's side interior door panel. *Staley*, 334 Ill. App. 3d at 361. The officer

testified that the K-9, Lump, was an "aggressive-alert dog," in that when he detected narcotics in an area, he would scratch and bite the area of detection. *Staley*, 334 Ill. App. 3d at 361. No sniff was conducted on the defendant's person because the officer testified that as an aggressive-alert dog, Lump might have attacked the defendant had he detected narcotics on him. *Staley*, 334 Ill. App. 3d at 364. A search was conducted on the defendant's person that revealed a small plastic bag containing a substance later identified as rock cocaine. *Staley*, 334 Ill. App. 3d at 361.

The *Staley* court distinguished the case before it from *Fondia*, concluding that "indicia of suspicion particular to the defendant" were present in *Staley*. 334 Ill. App. 3d at 368. These included the defendant's very short visit at 2 a.m. to a known drug house, his return to a vehicle that was allegedly parked in an unusual manner, and his suspicious conduct during the traffic stop, coupled with Lump's alerting on the passenger-side interior panel door, rather than on the exterior of the vehicle. *Staley*, 334 Ill. App. 3d at 368.

When viewed through the lens of *Fondia* and *Staley*, it is clear that sufficient probable cause did not exist to perform the pat-down search of the defendant in the case at bar. There were no indicia of suspicion specific to the defendant that would have eliminated the requirement of *Fondia* to narrow the scope of the search prior to the pat-down. The dog hit on the passenger and driver's side door exterior door handles, but no sniff was conducted on the interior of the vehicle. Although Lake testified that he did not use the dog to search the interior of the vehicle for fear that the dog would damage the interior, that justification does not account for his failure to use the dog to sniff the interior door panels, as was done with the aggressive dog in *Staley*.

Moreover, the circumstances leading to the stop did not establish probable cause to search the defendant's person. Although it might be unusual for a person to continue driving after they see that an officer is attempting to execute a traffic stop, in this case that does not

rise to the same level of suspicion as in *Staley* to justify an intrusive search upon a person's body. The defendant only drove approximately a quarter-mile to his home, and the recording of the stop shows that it took less than a minute from the time the officer originally turned on his lights.

Finally, the State's assertion that the discovery of drugs on the passenger and the prior drug-related police contacts with the passenger established probable cause is at odds with the United States Supreme Court's holding in *Ybarra v. Illinois*, which stated as follows:

"Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." 444 U.S. 85, 91 (1979).

Moreover, the mere fact that the defendant had his hands in his pockets did not justify a frisk of his person. See *People v. Dotson*, 37 Ill. App. 3d 176, 177 (1976).

When reviewed *de novo*, the ultimate issue decided by the trial court—that the motion to suppress evidence should not have been granted—was made in error. The officer was not justified in performing the pat-down either by a reasonable fear of imminent danger or by a probable cause to believe that the defendant had committed a crime. The dog sniff on the exterior of the vehicle, by itself, did not create a sufficient "indicia of suspicion" particular to the defendant to establish probable cause. The alleged nervousness of the defendant, the discovery of contraband on the passenger, and the defendant's placement of his hands in his pockets did not give rise to a reasonable fear that the officer was in imminent danger.

CONCLUSION

For the foregoing reasons, we reverse the trial court's denial of the defendant's motion to suppress, vacate the defendant's conviction, and remand for further proceedings not

inconsistent with this order.

Order reversed; conviction vacated; cause remanded.