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2012 IL App (3d) 100968-U

Order filed February 8, 2012

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois
Plaintiff-Appellant,)	
v.)	Appeal No. 3-10-0968
)	Circuit No. 08-CM-1242
TERRENCE RUSSELL,)	Honorable
Defendant-Appellee.)	Brian E. Barrett, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* In a driving under the influence case, the appellate court held that the police lacked probable cause at the time they ordered the defendant to submit to testing. Accordingly, the appellate court affirmed the circuit court's grant of the defendant's motion to quash arrest and suppress evidence.

¶ 2 The defendant, Terrence Russell, was charged with driving under the influence (625 ILCS 5/11-501(a)(6) (West 2006)). He filed a motion to quash arrest and suppress evidence, which the circuit court granted after a hearing. On appeal, this court reversed and remanded with directions for the court to determine: (1) whether the defendant gave knowing and voluntary consent to

testing; (2) if not, whether section 11-501.2(c)(2) of the Illinois Vehicle Code (625 ILCS 5/11-501.2(c)(2) (West 2006)) and its "under the influence" language applies to cases charged under the strict liability offense contained in section 11-501(a)(6) of the Code (625 ILCS 5/11-501(a)(6) (West 2006)); and (3) if so, whether the police in this case had probable cause to order the defendant to submit to testing under section 11-501.2(c)(2). *People v. Russell*, No. 3-09-0783 (2010) (unpublished order under Supreme Court Rule 23).

¶ 3 On remand, the circuit court found that: (1) the defendant did not give knowing and voluntary consent; (2) section 11-501.2(c)(2) applied to cases charged under section 11-501(a)(6); and (3) the police lacked probable cause under section 11-501.2(c)(2). Accordingly, the court granted the defendant's motion to quash arrest and suppress evidence. The State appeals, arguing only that the circuit court erred when it found that the police lacked probable cause in this case.

¶ 4 **FACTS**

¶ 5 On March 26, 2008, the defendant was charged with driving under the influence (625 ILCS 5/11-501(a)(6) (West 2006)). The charging instrument alleged that on January 14, 2007, the defendant drove a vehicle while he had an amount of cannabis in his urine.

¶ 6 The defendant filed a motion to quash arrest and suppress evidence, claiming that the police lacked probable cause to seize him and order him to submit to drug testing. At the hearing on the motion, New Lenox police officer Brian Nolan testified that he responded to a personal injury accident at approximately 5:10 p.m. on January 14, 2007. Nolan did not observe any signs of impairment in the defendant, who was the driver of a vehicle that struck a pedestrian. The defendant was advised that he would have to submit to testing because "it was a Type-A crash

and the severity of the injuries received by the pedestrian." The defendant was driven from the scene by his father to a hospital for the test. Nolan witnessed the defendant sign a consent form. Prior to signing the consent form, the defendant told Nolan that he was nervous about taking the test because he had done some "partying" a few weeks before the accident.

¶ 7 Officer Brian Wojowski testified that he responded to the accident, but did not have contact with the defendant until he was at the hospital. Wojowski stated that the defendant told Nolan he was nervous about taking the test, and, "later that evening," the defendant made statements about having recently smoked marijuana.

¶ 8 The defendant testified that he was taken from the scene to the New Lenox police station, where Nolan gave the defendant a form to sign. Nolan then told the defendant that he would have to go to the hospital. The defendant's father drove the defendant to the hospital, where Nolan told the defendant that he would have to submit to a urine test due to the severity of the accident.

¶ 9 The defendant stated that prior to signing the consent form, he did not have any discussions with the police about "partying" or smoking marijuana. He did admit talking to the police about prior marijuana usage while at the hospital and prior to taking the test. The defendant said he told the police that he had smoked approximately three grams of marijuana at a party the night before the accident.

¶ 10 The circuit court granted the defendant's motion after finding that the police lacked the authority to take the urine sample because they had not issued the defendant a citation before the test.

¶ 11 On appeal, this court reversed the circuit court's judgment and remanded with directions.

Russell, No. 3-09-0783. This court held that the circuit court applied an incorrect statute and should have applied section 11-501.2(c)(2) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501.2(c)(2) (West 2006)). This court directed the circuit court to determine: (1) whether the defendant gave knowing and voluntary consent to testing; (2) if not, whether section 11-501.2(c)(2) and its "under the influence" language applies to cases charged under the strict liability offense contained in section 11-501(a)(6); and (3) if so, whether the police in this case had probable cause under section 11-501.2(c)(2). *Russell*, No. 3-09-0783.

¶ 12 On remand, the parties stipulated to the prior testimony and presented arguments. With regard to the first question, the circuit court found that the defendant did not give knowing and voluntary consent to the testing. With regard to the second question, the court found that the plain language of section "11-501.2(c)(2) does require probable cause to believe the defendant was under the influence." With regard to the third question, the court found:

"In this situation, we have an officer who testified credibly and honestly that there was no signs of indication -- no indication of intoxication. The defendant did testify that he admitted, and Officer Wojowski did testify that he heard the defendant say that he was worried because he had partied the night before, but that timing of that statement was well after any sort of written consent, well after -- it's at the hospital, well after everything. I think even possibly the test, although I'm not sure about that. Therefore, no probable cause could possibly exist absent a statement of the defendant that I had consumed cannabis at some reasonable amount of time prior to this accident."

¶ 13 Accordingly, the court found that the police lacked probable cause in this case, and the

court again granted the defendant's motion. The State appealed.

¶ 14

ANALYSIS

¶ 15 On appeal, the State does not challenge the circuit court's findings that: (1) the defendant's consent was involuntary; and (2) section 11-501.2(c)(2) applies to cases charged under section 11-501(a)(6). Rather, the State challenges the court's grant of the defendant's motion to suppress only on the ground that the court's finding that the police lacked probable cause under section 11-501.2(c)(2) was erroneous.

¶ 16 When reviewing a circuit court's decision on a motion to suppress, we accord great deference to the court's findings of historical fact and will not disturb those findings unless they are against the manifest weight of the evidence. *People v. Jones*, 215 Ill. 2d 261, 268 (2005). We are free to undertake our own assessment of the facts in relation to the legal issues presented by the case, and, as such, we review the court's ultimate ruling on the motion under the *de novo* standard. *Jones*, 215 Ill. 2d at 268.

¶ 17 Section 11-501.2(c)(2) of the Code provides:

"Notwithstanding any ability to refuse under this Code to submit to these tests or any ability to revoke the implied consent to these tests, if a law enforcement officer has probable cause to believe that a motor vehicle driven by or in actual physical control of a person under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof has caused the death or personal injury to another, the law enforcement officer shall request, and that person shall submit, upon the request of a law enforcement officer, to a chemical test or tests of his or her blood, breath or urine for the purpose of

determining the alcohol content thereof or the presence of any other drug or combination of both." 625 ILCS 5/11-501.2(c)(2) (West 2006).

¶ 18 The State's argument centers around the "definition" of probable cause contained in section 11-501.2(c)(2). Essentially, the State claims that section 11-501.2(c)(2)'s testing requirement should be read as requiring the police to have probable cause that the driver has committed a DUI offense, rather than requiring the police to have probable cause that the driver is under the influence of alcohol or drugs. The State's argument is immaterial on these facts, however, because it ignores the temporal aspect of the probable cause determination.

¶ 19 It is clear from the plain language of section 11-501.2(c)(2) that a law enforcement officer must have probable cause *at the time* he or she orders a driver to submit to testing under that section. 625 ILCS 5/11-501.2(c)(2) (West 2006). Here, the facts show that the police had no reason to suspect that the defendant was under the influence of alcohol or drugs before they ordered him to submit to testing under section 11-501.2(c)(2); Nolan even testified as such at the hearing. Anything the police may have learned with regard to the defendant "partying" or smoking marijuana—even if that knowledge could constitute probable cause in this case—would not legitimize the police conduct in this case because that knowledge was gained after they decided to order the defendant to submit to testing. Accord *People v. Lee*, 214 Ill. 2d 476, 484 (2005) (noting that the probable cause determination is based on facts that were known at the time of an arrest and that the arrest "cannot be justified by what is found during a subsequent search incident to the arrest").

¶ 20 On these facts, we hold that the police lacked probable cause under section 11-501.2(c)(2) such that it was improper to order the defendant to submit to testing. Accordingly, the circuit

court did not err when it granted the defendant's motion to quash arrest and suppress evidence.

¶ 21

CONCLUSION

¶ 22 The judgment of the circuit court of Will County is affirmed.

¶ 23 Affirmed.