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2012 IL App (3d) 110368-U

Order filed April 20, 2012

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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,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-11-0368
	)	Circuit No. 09-CF-2232
JEREMY A. CARROLL,	)	
	)	Honorable
Defendant-Appellant.	)	Sarah F. Jones,
	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justice O'Brien concurred in the judgment.  
Presiding Justice Schmidt dissented.

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**ORDER**

- ¶ 1 *Held:* The trial court erred by not granting the defendant's motion to suppress where the State failed to establish that the defendant's consent was freely and voluntarily given. The defendant initially refused to consent to a search, and his ambiguous statement of "do what you have to do" could be interpreted as mere acquiescence to authority as opposed to voluntary consent.
- ¶ 2 After a stipulated bench trial, the defendant, Jeremy A. Carroll, was convicted of possession of a controlled substance (720 ILCS 570/402(c) (West 2008)) and sentenced to 24 months' of

Treatment Alternatives for Safe Communities (TASC) probation. On appeal, he argues that the trial court erred by not granting his motion to suppress. Because we find that the defendant's consent was not freely and voluntarily given, we reverse and remand for further proceedings.

¶ 3

#### FACTS

¶ 4 The hearing on the defendant's motion to suppress took place on June 2, 2010. The defendant testified that on September 21, 2009, he was pulled over by police officers. He stated that one officer approached him on the driver's side, one officer was on the passenger's side, one sat in front of the defendant's car in his squad car, and a final police officer was sitting in his squad car behind him. The officer that approached the driver's side asked for the defendant's driver's license and insurance information, which the defendant provided. The officer left for approximately four to five minutes, then returned and said "you are free to leave but your vehicle is not." When the defendant asked the officer what he meant, he replied "either you consent to a search or we call the dogs." The defendant tried to leave, but he was told to step back behind the car and wait for the officers to search the vehicle. The defendant denied ever consenting to a search of his vehicle.

¶ 5 Officer Timothy Lunz testified that he was the officer that pulled the defendant over on September 21, 2009. He stated that police dispatch had "received a call for some type of drug activity on the 300 block of east 13th Street and I happened to be approaching." When asked to describe the anonymous call from dispatch, Lunz stated that the tipster was someone who "lived above where the activity was going on" and there was "some kind of a renting agreement." The caller did not provide a description of the individuals or of the alleged drug transaction.

¶ 6 Lunz found a vehicle that matched the description provided by the tipster. He followed the vehicle, and noticed that the driver was speeding. He also noticed that there was an object hanging

from the rearview mirror that was obstructing the view, and he pulled the vehicle over.

¶ 7 Lunz informed the driver, identified as the defendant, that he had been stopped because of the obstructed view and because he was coming from the 300 block of 13th Street, where there had been a phone call about possible drug activity. In the meantime, a backup officer arrived on the scene. The backup officer asked if that was the vehicle that came off the dispatch call, and Lunz confirmed that it was.

¶ 8 Lunz returned to the defendant and told him that he was going to issue him a warning for the obstructed view. He wrote the warning and told the defendant that he was free to go. Lunz then described the following exchange:

"I asked him if he wouldn't mind if I took a look inside the car to ease my mind.

Defendant stated 'if I'm free to go I don't really feel comfortable with you looking around in my car.'

I said, 'that's fine.' I said, 'It would ease my mind if I could take a look inside your car.'

At that point he said, 'Do what you have to do, Officer.'

I repeated myself again. I said, 'Sir, you don't mind if I step inside your car to take a look.' And he said, 'Do what you have to do, Officer.' "

¶ 9 Upon searching the vehicle, Lunz found eight or nine individual baggies of cocaine.

¶ 10 The trial court listened to oral arguments, and later denied the motion to suppress without making any factual findings. The defendant appealed.

¶ 11 ANALYSIS

¶ 12 On appeal, the defendant argues that: (1) the anonymous tip did not provide probable cause

to justify a search of his vehicle; and (2) he did not voluntarily consent to the search. The State concedes that the police did not have probable cause to search the vehicle. Therefore, the only issue for this court to consider is whether the defendant consented to a search.

¶ 13 Ordinarily, when reviewing a trial court's decision on a motion to suppress evidence, we grant great deference to the trial court's findings of fact and will disturb those findings only if they are against the manifest weight of the evidence. *People v. Jones*, 215 Ill. 2d 261 (2005). However, "[d]e novo review \*\*\* is appropriate when neither the facts nor the credibility of witnesses is disputed." *People v. Anthony*, 198 Ill. 2d 194, 201 (2001).

¶ 14 When the State seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving that the consent was freely and voluntarily given. *People v. Redman*, 386 Ill. App. 3d 409 (2008). Consent is determined from the totality of the circumstances. *People v. Ciccio*, 236 Ill. App. 3d 265 (1992). "[M]ere acquiescence to apparent authority is not necessarily consent[.]" *Anthony*, 198 Ill. 2d at 202 (quoting *People v. Kelly*, 76 Ill. App. 3d 80, 87 (1979)). Where there is a single, ambiguous act "subject to dual inferences[.]" then we will not find that the defendant voluntarily consented. *People v. Terry*, 379 Ill. App. 3d 288, 297 (2008).

¶ 15 We note that the trial court did not make any specific factual findings or credibility determinations. However, assuming that the trial court found Lunz to be more credible than the defendant, we hold that the defendant did not consent to a search of his vehicle. In this case, the defendant initially refused to consent to a search, stating that, if he was free to go, he was not comfortable with the officer looking into his vehicle. *People v. Cardenas*, 237 Ill. App. 3d 584 (1992) (holding that initial refusal to consent is a factor in determining whether consent is voluntary).

¶ 16 More importantly, the defendant's subsequent statements of "[d]o what you have to do,

Officer" are ambiguous, and it is unclear whether the defendant voluntarily consented to the search or was merely acquiescing to the officer's authority. *Anthony*, 198 Ill. 2d at 203 (not finding voluntary consent where defendant's message to armed and uniformed police officer was essentially "[d]o what you have to do"). Because an "equally valid inference from the defendant's ambiguous gesture" is that he simply submitted to police authority, the State failed to meet its burden that the consent was freely and voluntarily given. *Id.* Accordingly, we hold the trial court erred in denying the motion to suppress, and we reverse and remand for further proceedings.

¶ 17

#### CONCLUSION

¶ 18 For the foregoing reasons, the judgment of the circuit court is reversed, and the cause is remanded for further proceedings.

¶ 19 Reversed and remanded.

¶ 20 PRESIDING JUSTICE SCHMIDT, dissenting:

¶ 21 I am unclear as to which standard of review the majority is applying, although it looks as though the majority is applying *de novo* review. There was conflicting testimony at the suppression hearing. Both the defendant and the police officer testified. Their versions of events differed. I believe that the trial court's finding of consent is a finding of fact entitled to great deference; it should only be disturbed if it is against the manifest weight of the evidence. *People v. Jones*, 215 Ill. 2d 261 (2005).

¶ 22 The trial court found that the defendant gave voluntary consent. I suppose reasonable people can disagree with that. However, for all the reasons that we normally grant deference to the trial judges, who had an opportunity to see the witnesses and watch their manner in testifying, I do not find the trial court's ruling in this case against the manifest weight of the evidence and, therefore, would affirm.

¶ 23 The majority cites *People v. Anthony* in paragraphs 13, 14 and 16. I think the majority overlooks an important factor and that is, in the *Anthony* case, the supreme court applied *de novo* review because the arresting officer was the only witness to testify at the suppression hearing. *Anthony*, 198 Ill. 2d at 201.

¶ 24 I respectfully dissent from the majority's order.