

No. 1-11-1724

| | | |
|--------------------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court |
| |) | of Cook County |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 10 CR 06511 |
| |) | |
| JORGE BARREIRO, |) | Honorable |
| |) | Lawrence Flood, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in denying defendant’s motion to quash arrest and suppress evidence where defendant’s purported consent to the trooper’s request to search his car was invalidated by defendant’s illegal seizure. We therefore reverse the judgment of the trial court, vacate defendant’s conviction, and remand the cause for a new trial.

¶ 2 Following a bench trial, Jorge Barreiro was convicted of possession of a controlled substance (720 ILCS 570/401(a) (West 2010)) and was sentenced to two years’ probation. On appeal, defendant argues that the trial court erred when it denied his motion to quash arrest and suppress evidence where his consent to the trooper’s request to search his car was invalid as it was tainted by his illegal seizure. For the following reasons, we reverse the judgment of the trial

1-11-1724

court, vacate defendant's conviction, and remand the cause for a new trial.

¶ 3

BACKGROUND

¶ 4 Prior to trial, defendant filed a motion to quash arrest and suppress evidence. At the hearing on the motion, Illinois State Police Trooper Santos Orta testified that on March 12, 2010, he was patrolling in his unmarked squad car in the northbound lanes of I-94 near Caldwell.

Trooper Orta observed a silver Chevrolet merge in front of his car without signaling. Trooper Orta activated his lights and initiated a traffic stop. The car pulled over on the right shoulder of I-94 and Trooper Orta pulled up directly behind the vehicle.

¶ 5 Trooper Orta exited his squad car and approached the passenger's side of the silver Chevrolet for safety purposes. The passenger, who Trooper Orta later learned was Saul Ramos, rolled down his window. Trooper Orta was able to see that defendant was the driver of the vehicle, and he identified defendant in open court. Trooper Orta asked defendant for his license and registration and asked defendant to step back to his squad car. Trooper Orta testified that although defendant had not committed any crimes beside the traffic violation, he took defendant back to his squad car because "that is just the way I conduct my traffic stops." Defendant entered the car and was seated in the back seat. A cage separated the back seat of the car from the front seat and the rear doors could not be opened from the inside.

¶ 6 Trooper Orta ran defendant's information and it came back clear. He asked defendant where he was coming from and defendant replied that he was coming from Romeoville, a suburb outside of Chicago. After defendant told him where he was coming from, Trooper Orta exited the squad car and walked over to defendant's car and talked with Ramos. Ramos told Trooper

1-11-1724

Orta that he and defendant were coming from Chicago, but he stated that he wasn't very familiar with the area. Trooper Orta went back to his car and continued questioning defendant. He ultimately elected to write him a warning ticket.

¶ 7 While he was questioning defendant and writing the ticket, Trooper Orta asked defendant if he could search his car. Defendant responded, "Yes." Trooper Orta did not have defendant sign a written consent to search. Trooper Orta walked back to defendant's car and asked Ramos to step out. Trooper Orta did a protective pat-down of Ramos and noticed that he was trembling. Ramos was placed in the back of the Trooper Orta's car with defendant.

¶ 8 While Trooper Orta was searching defendant's car, another trooper pulled up. A search of the passenger side of the car revealed a white plastic Target bag that was protruding from underneath the passenger's seat. Trooper Orta recovered the bag and, after a field test, found that it contained four plastic bags containing what he suspected was cocaine. No other contraband was recovered from the car.

¶ 9 Trooper Orta testified that from the time he pulled defendant over until he placed him in the squad car about two minutes had passed. It took no more than five minutes to run defendant's information and several minutes to take the second trip back to defendant's car to speak with Ramos.

¶ 10 On cross-examination, Trooper Orta testified that when he approached defendant's car and asked him for his license and registration, defendant was "sweating profusely" and his hands were shaking. Ramos also appeared nervous and was breathing heavily and his hands were shaking as he handed Trooper Orta his identification. Trooper Orta asked defendant why he and

1-11-1724

Ramos stated that they were coming from different places. Defendant told him that they “made a stop in Chicago,” at a Target store. Trooper Orta was suspicious based on their demeanor and their inconsistent story, so he asked defendant if he had any illegal contraband in the car.

Defendant replied that he did not so Trooper Orta asked him if he could search the car. Once he found the cocaine, Trooper Orta placed defendant and Ramos into custody. Trooper Orta testified that the complete duration of the stop was 10 to 12 minutes. He also testified that the video camera in his car was not working because it had run out of tape earlier.

¶ 11 After hearing Trooper Orta’s testimony and argument on the motion, the court ruled that consistent with *People v. Oliver*, 236 Ill. 2d 448 (2010), “the stop was appropriate and the consent to search was appropriate, and therefore, the motion to quash and suppress will be denied.” It is from this ruling that defendant appeals.

¶ 12 At trial, the parties agreed to stipulate to Trooper Orta’s testimony at the hearing on the motion to quash arrest and suppress evidence. The parties also stipulated that the cocaine was properly inventoried and tested. The four bags tested positive for cocaine and weighed 111.3 grams. After hearing the stipulations, the trial court found defendant guilty of possession of a controlled substance and sentenced him to 2 years’ probation.

¶ 13 ANALYSIS

¶ 14 Defendant alleges that the trial court erred by denying his motion to quash arrest and suppress evidence. Specifically, defendant argues that the stop was impermissibly prolonged, that defendant was illegally seized, and that the illegal seizure invalidated his consent to Trooper Orta’s request to search his car.

1-11-1724

¶ 15 When reviewing a trial court’s decision regarding a motion to quash arrest and suppress evidence, we must accord great deference to the trial court’s factual findings and credibility assessments and will reverse those findings only if they are against the manifest weight of the evidence. *Oliver*, 236 Ill. 2d at 454. However, we review *de novo* the ultimate finding with respect to probable cause or reasonable suspicion. *Id.*

¶ 16 The fourth amendment to the United States Constitution protects persons from unreasonable searches and seizures. *People v. Jones*, 215 Ill. 2d 261, 268 (2005). As a general rule, a person is “seized” for fourth amendment purposes only when, “by means of physical force or a show of authority, his freedom of movement is restrained.” *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). Stated differently, a person has been “seized” within the meaning of the fourth amendment only if, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Id.* at 554. The fourth amendment is implicated in a traffic stop because stopping a vehicle and detaining its occupants constitute a seizure within the meaning of the fourth amendment, even if only for a brief period and for a limited purpose. *Jones*, 215 Ill. 2d at 270.

¶ 17 A court generally analyzes a fourth amendment challenge to the reasonableness of a traffic stop under the principles of *Terry v. Ohio*, 392 U.S. 1(1968). *People v. Cosby*, 231 Ill. 2d 262 (2008). Pursuant to *Terry*, a police officer may briefly stop a person for temporary questioning if the officer reasonably believes that the person has committed, or is about to commit, a crime. *Terry*, 392 U.S. at 22. A *Terry* analysis includes an inquiry into: (1) “whether the officer’s action was justified at its inception,” and (2) “whether it was reasonably related in

1-11-1724

scope to the circumstances which justified the interference in the first place.” *Terry*, 392 U.S. at 19-20.

¶ 18 The parties agree that with respect to the first inquiry, the reasonableness of the stop, the vehicle stop in this case was supported by probable cause and therefore was justified. Trooper Orta observed that defendant failed to signal a lane change.

¶ 19 With respect to the second inquiry, the scope of the stop, the court must consider whether the questioning impermissibly prolonged the detention if the questioning was unrelated to the initial justification for the stop. *Cosby*, 231 Ill. 2d at 276.

¶ 20 The State argues that *Oliver*, 236 Ill. 2d 448, the case on which the trial court based its decision to deny defendant’s motion to suppress, is dispositive. In *Oliver*, the defendant was pulled over for following another car too closely in a construction zone. While the officer ran the defendant’s driver’s license information, the officer had the defendant sit in the passenger seat of his squad car. *Id.* at 451. The officer discovered that the defendant did not have a valid driver’s license but that the passenger did. *Id.* The officer then returned defendant’s identification card and explained that he wasn’t going to arrest the defendant for driving without a license if the passenger drove the vehicle. The officer then asked the defendant if he had any weapons or contraband inside the vehicle. The defendant replied that he did not. The officer asked defendant if he was sure, to which defendant replied, “If you want to search it, go ahead.” *Id.*

¶ 21 The officer returned to the defendant’s vehicle and explained to the passenger that the defendant had consented to a vehicle search. The officer then searched the vehicle for 10 to 15 minutes. During the search, the officer had the defendant stand at the front of the vehicle and the

1-11-1724

passenger at the rear of the vehicle. The officer found no contraband inside the vehicle.

After completing the interior search, the officer asked the defendant and the passenger if there was any contraband in the trunk. They replied that the trunk contained only clothing. The officer then asked to search the trunk and the defendant and the passenger consented. The officer recovered a plastic bag of cocaine from the trunk and arrested the defendant and the passenger. *Id.* at 452.

¶ 22 The defendant filed a pretrial motion to quash arrest and suppress evidence arguing that he was subjected to an illegal seizure. The court denied his motion finding that the traffic stop was justified and did not constitute an illegal detention. *Id.* at 453. This court reversed. Our supreme court granted the State's petition for leave to appeal. *Id.*

¶ 23 On appeal to the Illinois Supreme Court, the State challenged the appellate court's reversal of the trial court's order denying defendant's motion to suppress the evidence recovered from his trunk. *Id.* at 454. The State argued that defendant's seizure during the traffic stop terminated when the officer told the defendant that he was free to leave and the officer's request to search the trunk after searching the interior of the vehicle did not constitute a subsequent unconstitutional seizure. The defendant responded that while he did consent to a search of the interior of his vehicle, his subsequent consent to search the trunk was involuntary because he was unconstitutionally seized by the time the officer requested his consent to search the trunk. *Id.* at 455.

¶ 24 Our supreme court began by noting that the parties agreed that the traffic stop was proper. The parties also agreed that the initial traffic-stop seizure ended before the officer sought consent

1-11-1724

to search the interior of the vehicle. The issue presented for resolution then was, whether the defendant was seized within the meaning of the fourth amendment when the officer asked to search the trunk after the valid traffic stop and consensual search of the interior of the vehicle.

¶ 25 Citing *People v. Cosby*, 231 Ill., 2d 262 (2008), the court noted that in that case, it used the *Mendenhall* standards to determine whether the driver of a vehicle was seized when, after the traffic stop ended, the police officer sought consent to search the vehicle. *Oliver*, 236 Ill. 2d at 456 (citing *Cosby*, 231 Ill. 2d at 276); See also *Mendenhall*, 446 U.S. 544. Under *Mendenhall*, a person has been seized when, considering the totality of the circumstances, a reasonable person would believe he was not free to leave. The *Mendenhall* Court outlined four factors to be considered when analyzing whether a seizure has occurred: “(1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person; or (4) using language or tone of voice compelling the individual to comply with the officer’s request.” *Oliver*, 236 Ill. 2d at 456 (citing *Mendenhall*, 446 U.S. at 554). The *Oliver* court found that all of the *Mendenhall* factors were absent, but noted that the *Mendenhall* factors are not meant to be exhaustive. *Oliver*, 236 Ill. 2d at 457.

¶ 26 Notwithstanding the *Mendenhall* factors, the defendant argued that the fact that the officer sought consent to search the trunk only after he spent 10 to 15 minutes searching the interior and the defendant was not free to leave because the officer chose the defendant’s waiting location, established that he was illegally seized when he was asked for consent to search the trunk. *Id.* at 457. The court rejected this argument stating, “[i]n our view, it was entirely reasonable for [the officer] to direct defendant and his passenger to stand at opposite ends of the

1-11-1724

vehicle parked safely along the roadside after receiving consent to search.” *Id.* at 458. Citing reasonableness as the touchstone of the fourth amendment, the court concluded that “defendant had to wait somewhere while [the officer] conducted the consensual interior search of his vehicle.” *Id.* at 458.

¶ 27 Defendant contends that *Oliver* is factually inapposite to this case. Defendant asserts that unlike the defendant in *Oliver*, he was still unquestionably seized as a result of the traffic stop when Trooper Orta requested permission to search his car and he gave that permission while locked in the cage in the back of the squad car. We agree.

¶ 28 The question presented in *Oliver* was whether, once the traffic stop concluded, a second impermissible seizure occurred as a result of the officer’s request to search the defendant’s trunk. In this case, unlike *Oliver*, the traffic stop was not concluded before Trooper Orta requested permission to search defendant’s car. The testimony at trial established that defendant was still in the caged back seat of Trooper Orta’s unmarked squad car, and had not signed the written warning when Trooper Orta requested defendant’s consent to search. Thus, the question presented here is whether defendant’s seizure was impermissibly prolonged beyond the time reasonably required to complete its purpose.

¶ 29 A seizure that is lawful in its inception can become unlawful “if it is prolonged beyond the time reasonably required” to complete the purpose of the stop. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). In addition, as long as the traffic stop is executed in a reasonable manner, police conduct does not change the character of the stop unless it independently triggers the fourth amendment. *Id.* at 408; *People v. Baldwin*, 388 Ill. App. 3d 1028, 1033 (2009). If the

1-11-1724

conduct violates either principle, the conduct must have independent fourth amendment justification to avoid rendering the seizure unlawful.

¶ 30 In this case, defendant asserts that the stop was impermissibly prolonged beyond the time necessary to issue the appropriate traffic citations. There has been no bright line rule adopted to indicate when a stop has been unreasonably prolonged. *Baldwin*, 388 Ill. App. 3d at 1034. Rather, we consider the totality of the circumstances, including the brevity of the stop and whether the police acted diligently during the stop. *People v. Koutsakis*, 272 Ill. App. 3d 159 (1995).

¶ 31 Defendant likens the facts of this case with those in *People v. Al Burei*, 404 Ill. App. 3d 552 (2010). In *Al Burei*, after a valid traffic stop, the officer requested the driver's license. When the officer questioned the driver as to why he was nervous, the driver responded that it was the first time he had been stopped by the police. The officer asked the driver if there was anything illegal in the van and the driver responded that he did not know because the van belonged to the defendant, who was his passenger. A second officer appeared and waited with the driver while the officer spoke with the defendant. The officer asked the defendant to step out the van and identify himself. The defendant did not produce a license, but did identify himself. The defendant explained that he was not driving because he was on his cell phone. The officer then asked the defendant if there was anything illegal in the van, and the defendant responded not that he knew of, and gave the officer consent to search the van. The officer instructed the defendant to go to the back of the van with the other officer while he searched the van. Inside the van, the officer found five boxes filled with cartons of cigarettes, with Kentucky tax stamps,

1-11-1724

which defendant admitted he bought in Kentucky and sold them in Illinois without proper Illinois tax stamps. After the defendant and the driver of the van were taken to the police station, the driver was written a citation for having a cracked windshield. Based on these facts, the court granted the defendant's motion to quash and suppress. The State appealed.

¶ 32 Noting that the return of the identification and paperwork signals the end of a traffic stop, the court distinguished the case from *Cosby* and *Oliver* because there was no mention in the record that the passenger received his license back or that a ticket was issued at the scene. *Id.* at 565 (citing *Cosby*, 231 Ill. 2d at 276). In other words, there was no evidence in *Al Burei* to establish that the traffic stop had ended. The court held that while the initial seizure of the defendant was lawful, it became unlawful when it was prolonged beyond the time reasonably required to complete the purpose of issuing appropriate traffic citations. *Id.* at 566. "When the officer questioned the driver as to why he was nervous, the driver responded with the perfectly plausible answer that it was the first time he had been stopped by the police. That should have ended the conversation, and the officer should have proceeded to issue the appropriate traffic citations." *Id.*

¶ 33 We agree with defendant that *Al Burei* is instructive here. Like the officer in *Al Burei*, Trooper Orta improperly prolonged the seizure of defendant beyond the time necessary to issue the warning. Trooper Orta testified that the encounter leading up to the consent to search lasted "about six or seven" minutes. Upon pulling defendant over, he placed defendant in the locked back seat of his squad car and began asking him questions. Trooper Orta then left the squad car and went to speak with the passenger. When he came back, he decided to write a warning ticket.

1-11-1724

While writing the ticket, he asked defendant if he had any illegal contraband in the car, to which defendant said no. Trooper Orta then asked defendant for his consent to search the car. All of this occurred while defendant was seated in the backseat of Trooper Orta's squad car, where he was unable to open the doors from the inside. Trooper Orta estimated that the complete duration of the stop until he recovered the contraband was 10 or 12 minutes.

¶ 34 In addition to *Baldwin*, further support for our conclusion comes from *People v. McQuown*, 407 Ill. App. 3d 1138 (2011), and *People v. Ruffin*, 315 Ill. App. 3d 744 (2000). In *Baldwin*, 388 Ill. App. 3d 1028, a traffic stop was held unreasonable when it was extended by 10 minutes after the purpose of the stop had been concluded. In *McQuown*, 407 Ill. App. 3d 1138, the court held that a seizure exceeded its scope when a traffic stop was prolonged by 38 minutes while officers waited for a canine unit to arrive and search the defendant's vehicle. In *Ruffin*, 315 Ill. App. 3d 744, the scope of a traffic stop was unreasonable where the officer prolonged the stop in an attempt to elicit incriminating information from the defendant. As in *Baldwin*, *McQuown*, and *Ruffin*, Trooper Orta prolonged the stop beyond the time reasonably required to complete its purpose. To reiterate, after locking defendant in the cage in the back of the squad car, Trooper Orta then requested and received defendant's purported consent to search defendant's car. Under such circumstances, however, defendant's consent was invalid because defendant's freedom of movement was restrained, and no reasonable person would have believed that he was free to leave. *Mendenhall*, 446 U.S. at 553-54. Accordingly, the trial court erred in denying the defendant's motion to quash arrest and suppress evidence.

¶ 35 We also must address the State's argument that Trooper Orta had probable cause to

1-11-1724

conduct a traffic stop and arrest because Trooper Orta witnessed defendant change lanes without signaling. The State claims that pursuant to *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001), Trooper Orta properly arrested defendant based on his traffic infraction and therefore the search of defendant's car was a proper search incident to arrest. Indeed, *Atwater* stands for the proposition that "[i]f an officer had probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.* However, the State's argument fails because the evidence in this case hardly supports the contention that Trooper Orta arrested defendant. In fact, on recross-examination during the hearing on defendant's motion to suppress, Trooper Orta testified that defendant was not under arrest "the entire time" defendant was in the back of the squad car.

¶ 36 Finally, we must address the double jeopardy issue that arises. The double jeopardy clause of the United States Constitution bars the State from retrying a defendant once it has been determined that the evidence introduced at trial was insufficient to sustain a conviction. *People v. Lopez*, 229 Ill. 2d 322, 367-368 (2008) (citing *People v. Mink*, 141 Ill. 2d 163, 173-74 (1990)). It should be noted, however, that "retrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted, and for the purposes of double jeopardy all evidence submitted at the original trial may be considered when determining the sufficiency of the evidence." (Emphasis added.) *People v. Olivera*, 164 Ill. 2d 382, 393 (1995) (citing *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988)).

¶ 37 In this case, defendant's conviction was set aside because of trial error. Consequently we consider whether all of the evidence presented at trial, including the improperly admitted

1-11-1724

evidence, was sufficient to convict. *Lopez*, 229 Ill. 2d at 367 (citing *Olivera*, 164 Ill. 2d at 393).

The relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* (citing *Olivera*, 164 Ill. 2d at 396).

¶ 38 Viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found defendant guilty beyond a reasonable doubt. Accordingly, there is no double jeopardy impediment to retrial, and we therefore remand the cause to the trial court for that purpose. This finding, however, does not indicate this court's determination as to defendant's guilt or innocence.

¶ 39

CONCLUSION

¶ 40 For the foregoing reasons, the trial court's order denying defendant's motion to quash and suppress is reversed, defendant's conviction is vacated, and this case is remanded for a new trial.

¶ 41 Reversed and remanded.