

**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).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Stephenson County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-CF-0201
	)	
TIMOTHY FOGEL,	)	Honorable
	)	Michael P. Bald,
Defendant-Appellant.	)	Judge, Presiding.

---

JUSTICE HUTCHINSON delivered the judgment of the court.  
Justices Zenoff and Jorgensen concurred in the judgment.

**ORDER**

¶ 1       *Held:* The stop of defendant's vehicle was not impermissibly prolonged because police had reasonable suspicion defendant was engaged in criminal activity; further, defendant voluntarily consented to the search of his person. The trial court thoroughly considered the defense of mistake of fact. The State presented sufficient evidence that defendant knew there was cocaine in the pockets of his pants to sustain defendant's conviction of unlawful possession of a controlled substance. We affirmed the judgment of the trial court.

¶ 2       Following a bench trial, defendant, Timothy Fogel was convicted of unlawful possession of less than 15 grams of a controlled substance (crack-cocaine) under section 402(c) of the Illinois Controlled Substances Act (the Act) (720 ILCS 570/402(c) (West 2010)) and sentenced to 24

months' probation. Defendant appeals from that order, contending that the consent he gave to officers to search him and his vehicle before his arrest was involuntarily given because the traffic stop was prolonged beyond its lawful purpose and because the officers acted improperly. Additionally, defendant contends that the trial court erred when it refused to consider his mistake of fact defense based on a mistaken reading of the requirements for this defense to apply. For the reasons that follow, we affirm.

¶ 3 On August 12, 2011, two undercover officers observed defendant drop off a passenger in front of a house in Freeport. After following defendant's vehicle for a few blocks and observing defendant turn left at an intersection without signaling, the officers conducted a traffic stop. The officers identified themselves and without asking for a license or insurance, began questioning defendant about the passenger he had dropped off. Defendant admitted that the identity of the passenger was "Spud," a known drug dealer in the area. Defendant further admitted that he knew Spud was a drug dealer. Upon finding out this information, the officers asked if they could search the vehicle. Defendant agreed to the search and stepped out of the vehicle. At some point during this conversation, a third officer (in uniform) showed up in his squad car. One of the officers asked the defendant if he could conduct a pat-down, to which the defendant again consented. After the pat down, the officer noticed a bulge in the defendant's shirt pocket. He asked the defendant what was in his pocket and the defendant pulled out his insurance card. Still seeing the bulge in the defendant's pocket, the officer asked what else was in the pocket. At this point, defendant removed a brown paper bag from his pocket containing a substance later determined to be crack-cocaine. Defendant was arrested for possession of crack-cocaine and charged with possession of a controlled

substance under section 402(c) of the Act (720 ILCS 570/402(c) (West 2010)). The case proceeded to a bench trial on April 23, 2012, during which the following testimony was presented.

¶ 4 At trial, defendant testified that he was a regular user of both cannabis and crack-cocaine. Defendant testified that he had given rides to Spud many times prior to the night of his arrest. In exchange for these rides, Spud would pay defendant with a small amount of drugs. While payment was frequently made with cannabis, defendant admitted that on at least one occasion prior, Spud had paid him for a ride with crack-cocaine. In his defense, defendant argued to the trial court that he was not guilty of possession of a controlled substance because the night of his arrest, he believed that Spud had paid him with cannabis, and that this mistake of fact precluded a finding that he “knowingly” possessed a controlled substance under section 402(c) of the Act. At the close of the hearing, the trial court addressed defendant’s mistake of fact defense, stating:

“THE COURT: Thank you. Thank you to both sides for the presentation to this case. It’s an interesting fact situation involved here. It involves a request for an affirmative defense, and it appears that the way it’s presented, it’s almost affirmative. In other words they’re not challenging as to whether he, in fact, possessed this. It’s alleging that it would have been a mistake of fact in regard to this.

\* \* \*

Now, the defense then asks for a finding of not guilty based upon a mistaken fact. It talks mistake under 720 ILCS 5/4-8, ignorance or mistake. A person’s ignorance or mistake as to a matter of either fact or law, except as provided in Section 43 \*\*\* is a defense if it negatives the existence of the mental state which the statute prescribes with respect to an element of the offense[,], and here that mental requirement [is] charged as knowingly and

unlawfully in his possession. I don't think you can knowingly and unlawfully have cannabis either; so it provides further the person's reasonable belief that his conduct does not constitute an offense is a defense if—and it goes on. But, again, reasonable belief; it doesn't constitute an offense. The possession of cannabis is also \*\*\* an offense. It's a crime to have either cannabis or cocaine.

Now, there's some other interpretations of the statute; mistake as to whether a certain conduct constitutes an offense is not a defense, *People vs. Sevilla*, \*\*\* 132 Ill. 2d 113 \*\*\*. Again, it's strange because it reads a person's reasonable belief that his conduct does not constitute an offense. You have to almost have a feeling that it doesn't constitute an offense. It doesn't—it would constitute an offense even if he were to be in possession of cannabis; so I'm finding that it's a distinction without a difference really here, which was argued previously.

The evidence shows that this defendant knowing[ly] possessed a substance. He feeling [*sic*] it was cannabis did, in fact, possess it, intended to smoke it as payment for providing a ride. Instead it turns out it's cocaine. I'm finding that the State has met it's [*sic*] burden of proof. The statute under—in fact, the statute under the controlled substance 402 that this is written under indicates it's unlawful for any person knowingly to possess a controlled or a counterfeit substance or a controlled substance analog; so even if it was a counterfeit substance, it would be illegal. But here the defendant had in the past received cocaine for payment for providing a ride. The State has shown that, in fact, this was given in return for providing a ride; so I'm finding that the State has met its burden of proof. The defendant is found guilty of the offense of possession of a controlled substance.”

¶ 5 After this discussion, the trial court found defendant guilty of unlawfully possessing less than 15 grams of cocaine. Defendant was sentenced to 24 months' probation. Following the trial court's denial of his postsentencing motion, defendant filed a timely notice of appeal.

¶ 6 Defendant raises two issues on appeal. He contends that, (1) although he consented to a search of his car and person, the consent was tainted because the officers prolonged the traffic stop beyond its lawful purpose and was not voluntarily given based on the officer's actions, and (2) a new trial is warranted because the trial court refused to consider defendant's mistake of fact defense based on a mistaken reading of the requirements for this defense to apply.

¶ 7 Defendant's first contention is that, although he consented to a search of his car and person, the evidence of contraband should have been suppressed because the consent was tainted when the officers prolonged the traffic stop beyond its lawful purpose and because the consent was not voluntarily given based on the officer's actions.

¶ 8 In reviewing a motion to suppress on appeal, we are presented with mixed questions of law and fact. *People v. Terry*, 379 Ill. App. 3d 288, 292 (2008). "[The] trial court's findings of historical fact are reviewed for clear error, giving due weight to any inferences drawn from those facts by the [court]." *People v. Harris*, 228 Ill. 2d 222, 230 (2008). Great deference is accorded a trial court's factual findings, and those findings will be reversed only if against the manifest weight of the evidence. *People v. Cosby*, 231 Ill. 2d 262, 270-71 (2008) (citing *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006)). "A reviewing court, however, remains free to undertake its own assessment of the facts in relation to the issues and may draw its own conclusions when deciding what relief should be granted." *Luedemann*, 222 Ill. 2d at 542. Thus, we review *de novo* the trial court's ultimate ruling as to whether suppression was warranted. *People v. Oliver*, 236 Ill. 2d 448, 454 (2010).

¶ 9 The fourth amendment of the United States Constitution recognizes the “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 guarantees of the fourth amendment apply to states through the due process clause of the fourteenth amendment. *People v. James*, 163 Ill. 2d 302, 311 (1994). Reasonableness is the “ ‘central requirement’ ” of the fourth amendment. *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (quoting *Texas v. Brown*, 460 U.S. 730, 739 (1983)); see also *People v. Conner*, 358 Ill. App. 3d 945, 949 (2005).

¶ 10 In *People v. McDonough*, 239 Ill. 2d 260, 268 (2010), our supreme court recognized:

“Courts have recognized three theoretical tiers of police-citizen encounters. The first tier involves an arrest of a citizen, which must be supported by probable cause. [Citations.] The second tier involves a temporary investigative seizure conducted pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). In a ‘*Terry stop*,’ an officer may conduct a brief, investigatory stop of a citizen when the officer has a reasonable, articulable suspicion of criminal activity and such suspicion amounts to more than a mere ‘hunch.’ [Citations.] The third tier of police-citizen encounters involves those encounters that are consensual. An encounter in this tier involves no coercion or detention and, therefore, does not implicate any fourth amendment interests. [Citations.]” *Id.*

¶ 11 “When a police officer observes a driver commit a traffic violation, the officer is justified in briefly detaining the driver to investigate the violation.” *People v. Ramsey*, 362 Ill. App. 3d 610, 614 (2005). A stop of a vehicle and the detention of its occupants constitutes a “seizure” under the fourth amendment. *People v. Jones*, 215 Ill. 2d 261, 270 (2005). To be constitutionally permissible, a vehicle stop must be reasonable under the circumstances, and the stop will be deemed reasonable

“ ‘where the police have probable cause to believe that a traffic violation has occurred.’ ” *Ramsey*, 362 Ill. App. 3d at 615 (quoting *Whren v. United States*, 517 U.S. 806, 810 (1996)).

¶ 12 In *Harris*, our supreme court looked to *Illinois v. Caballes*, 543 U.S. 405 (2005), in analyzing the conduct of police officers during a lawful traffic stop. *Harris*, 228 Ill. 2d at 239. “First, a seizure that is lawful at its inception can become unlawful ‘if it is prolonged beyond the time reasonably required’ to complete the purpose of the stop. [Citation.] Second, so long as the traffic stop is ‘otherwise executed in a reasonable manner,’ police conduct does ‘not change the character’ of the stop unless the conduct itself infringes upon the seized individual’s ‘constitutionally protected interest in privacy.’ [Citation.]” *Id.* “Thus, police conduct occurring during an otherwise lawful seizure does not render the seizure unlawful unless it either unreasonably prolongs the duration of the detention or independently triggers the fourth amendment.” *People v. Baldwin*, 388 Ill. App. 3d 1028, 1033 (2009).

¶ 13 In the present case, defendant was seized when police stopped his vehicle. See *Harris*, 228 Ill. 2d at 231. Additionally, the officers’ decision to stop the defendant’s vehicle was reasonable and, accordingly, the initial seizure lawful, because they had probable cause to believe that defendant had committed a traffic violation. See *Whren*, 517 U.S. at 810; *Harris*, 228 Ill. 2d at 232. Defendant argues that the traffic stop was unreasonably prolonged by the officers and as a result, the seizure and his subsequent consent were unlawful. To determine whether a traffic stop was unreasonably prolonged, we look to the totality of the circumstances, the length of the stop, and whether the officer acted diligently. See *People v. McQuown*, 407 Ill. App. 3d 1138, 1143 (2011).

¶ 14 In the present case, we conclude the stop was not unreasonably prolonged by the officers. At the outset, the entire traffic stop took approximately two-and-one-half minutes. This is well

within the time reasonably required to complete the initial purpose of the stop. See *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 18 (holding that the traffic stop lasting seven to eight minutes was reasonable). Here, the officers acted both reasonably and diligently when they pulled the vehicle over, approached, and asked some brief questions. After asking who the defendant had just dropped off and discovering it was a known drug dealer in the area, the officers developed a reasonable suspicion that drugs were involved. See *McQuown*, 407 Ill. App. 3d at 1145 (finding that a seizure based on a reasonable suspicion must be diligently pursued in a way that is likely to confirm or dispel police suspicion quickly).

¶ 15 In *Muehler v. Mena*, 544 U.S. 93 (2005), the occupants of a house where police were executing a search warrant were detained and questioned. The police had reason to believe that a gang member who had been involved in a drive-by shooting was residing in the house. The warrant authorized a search of the premises for deadly weapons and evidence of gang membership. An Immigration and Naturalization Service (INS) officer accompanied the police officers. During this period of detention, the INS officer asked Mena for her name, date of birth, place of birth, and immigration status; he also asked for documentation of her immigration status, which confirmed she was a permanent resident of this country. *Id.* at 96. The Court noted its repeated prior holding that “ ‘mere police questioning does not constitute a seizure.’ ” *Id.* at 100 (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). The Court quoted *Bostick* further, stating that, “ ‘even when officers have no basis for suspecting a particular individual, they may \*\*\* request consent to search his or her luggage.’ ” *Muehler*, 544 U.S. at 100 (quoting *Bostick*, 501 U.S. at 434-35). Applying this rule to Mena, the Court concluded that, because her detention was not prolonged by the questioning, “there was no additional seizure within the meaning of the Fourth Amendment.” Thus, the officer

“did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status.” *Muehler*, 544 U.S. at 101.

¶ 16 In the present case, therefore, when officers diligently pursue a reasonable suspicion within the time it takes to complete the purpose of a traffic stop, the totality of the circumstances tend to show that the stop was not unduly prolonged. Here the officers, after developing a reasonable suspicion based on defendant’s passenger, followed up on their contraband suspicions, asked questions of defendant, and asked for consent to search, all within a few minutes. There were no delays, and all of the questioning was done diligently and was related to their suspicion. Therefore, the stop was not unduly prolonged.

¶ 17 In support of his argument, defendant relies on *People v. Al Burei*, 404 Ill. App. 3d 558 (2010). In *Al Burei*, the defendant was a passenger in his own vehicle being driven by his friend; the defendant’s driver’s license had been suspended. *Id.* at 560. A police officer stopped the vehicle, as the vehicle had a cracked windshield and the driver had almost hit another vehicle. *Id.* at 560-61. The officer asked the driver to step out of the vehicle, and then he asked the driver some questions. After about five minutes, the officer asked the defendant to exit the vehicle, and then he asked the defendant why he was not driving his own vehicle; the defendant responded that he was on his cell phone. *Id.* at 561. The officer asked the defendant for permission to search the vehicle, and the defendant consented. *Id.* The officer discovered five boxes of cigarettes that did not bear Illinois stamps. *Id.* The driver was issued a citation for the cracked windshield and a verbal warning for his driving; the defendant was charged with the offenses of transportation of unstamped cigarettes with the intent to evade the cigarette tax; transportation of unstamped cigarettes without a permit; and

possession of unstamped cigarettes with the intent to sell. *Id.* at 560-61. The defendant filed a motion to suppress, and the trial court granted the motion. *Id.* at 560.

¶ 18 On appeal by the State, the court reflected on the circumstances of *Cosby* and *Oliver* and found them distinct from the case on review. Returning the paperwork signals the end of a traffic stop. *Al Burei*, 404 Ill. App. 3d at 565 (citing *Cosby*, 231 Ill. 2d at 276). In *Al Burei*, there was no mention that the driver received his license back; the officer did not issue a ticket at the scene, but rather, at the police station. *Al Burei*, 404 Ill. App. 3d at 565. The reviewing 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 its purpose, namely, to issue the appropriate traffic citations to the driver. *Id.* at 566.

¶ 19 In the present case, there was no second seizure because the officers had not concluded the business portion of the stop. Contrary to the facts in *Al Burei*, in which the officers had no articulable and reasonable suspicion that the driver was engaged in any illegal activity when it engaged in questioning the defendant passenger, the facts in the present case reflect that the officers had grounds for the reasonable suspicion of drug activity by defendant. *See, e.g., Muehler*, 544 U.S. at 101. Therefore, the officers in the present case did not unreasonably prolong the traffic stop when they had reasonable grounds to inquire into the drug activity.

¶ 20 Alternatively, defendant contends that his consent to the searches was involuntary because under the totality of the circumstances, the presence of three armed officers at the scene with squad lights activated was a coercive environment in which defendant felt obligated to comply with the show of authority. “Generally, reasonableness in the fourth-amendment context requires a warrant supported by probable cause.” *Terry*, 379 Ill. App. 3d at 296. However, an exception to the fourth

amendment's warrant requirement is a search conducted pursuant to consent. *People v. Starnes*, 374 Ill. App. 3d 329, 336 (2007).

¶ 21 A defendant's consent is invalid "unless it is voluntary, and, to be voluntary, consent must be given freely without duress or coercion (either express or implied)." *People v. Green*, 358 Ill. App. 3d 456, 462 (2005). " 'Consent must be received, not extracted 'by explicit or implicit means, by implied threat or covert force.' " *People v. Anthony*, 198 Ill. 2d 194, 202 (2001) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). " 'In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.' " *Id.* " 'The voluntariness of the consent is a question of fact determined from the totality of the circumstances, and the State bears the burden of proving the consent was truly voluntary.' " *Id.*

¶ 22 We conclude that the trial court's finding that consent existed was not against the manifest weight of the evidence. Defendant voluntarily consented to the searches, and the police presence did not have a coercive influence on his consent. Although defendant was not able to drive away as a result of a traffic stop when he consented to the search, he was not yet under arrest. Defendant was not handcuffed or restrained, and the testimony did not reflect any physical coercion or touching by the officers prior to defendant's consent. The officers did not draw or even reach for their firearms at any point. After the initial pat down of defendant, there is no evidence that defendant "assumed the position" of an arrestee. See *Anthony*, 198 Ill. 2d at 203. Finally, the record reflects that none of the officers ordered the defendant to do anything or used a commanding tone of voice. See *People v. Walter*, 374 Ill. App. 3d 763, 772 (2007) (finding no indication the officer's tone of voice, or any

other quality of his request, indicated to the defendant that compliance with his request was compelled). The facts show that the defendant reached into his own pocket and removed the drugs on his own volition in response to the officer's questions. Therefore, defendant's consent was not tainted by an intimidating police presence or coercion.

¶ 23 Defendant's second contention is that he should be afforded a new trial because the trial court refused to consider his defense of mistake of fact based on an erroneous reading of the requirements for this defense to apply. Specifically, defendant argues that the trial court failed to consider the defense of mistake of fact when it ruled that possession of either cannabis or cocaine was a "distinction without a difference."

¶ 24 In a bench trial, the court is presumed to know the law, and this presumption may only be rebutted when the record affirmatively shows otherwise. *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 41. "The trier of fact in a bench trial is not required to mention everything—or, for that matter, anything—that contributed to its verdict." *People v. Mandic*, 325 Ill. App. 3d 544, 546 (2001). If the record contains facts that support the trial court's finding, the reviewing court may consider those facts to affirm the finding, even if the trial court did not state specifically that it relied on them. *Id.*

¶ 25 To prove defendant's guilt of possession of a controlled substance, the State was required to prove beyond a reasonable doubt that defendant knew the substance was present, and that he had immediate and exclusive control of the substance. See 720 ILCS 570/402(c) (West 2010). The defendant's knowledge of the presence of the controlled substance is an element that may be proved by means of circumstantial evidence. *People v. Brown*, 2012 IL App (2d) 110640, ¶ 15 (citing *People v. Ortiz*, 196 Ill. 2d 236, 260 (2001)). Whether a defendant knew that he was in possession

of drugs is a question for the trier of fact. See *Brown*, 2012 IL App (2d) 110640, ¶ 15 (citing *People v. Schmalz*, 194 Ill. 2d 75, 81 (2000)).

¶ 26 This case is similar to this court's recent decision in *Brown*. In *Brown*, the defendant was found guilty of possession of cocaine in violation of section 402(c) of the Act. *Brown*, 2012 IL App (2d) 110640, ¶ 15. The defendant claimed he put his brother's pants on at a time before his arrest and was unaware that there was cocaine in the pocket. *Id.* ¶ 16. This court, viewing the evidence in the light most favorable to the State, rejected that argument, finding that a rational trier of fact could reject the defendant's testimony that he was wearing his brother's pants for lack of credibility based on the circumstances. *Id.* ¶ 17.

¶ 27 In the present case, it is clear that the trial court, in its fact-finding capacity, took all of the circumstances into account, weighed the credibility of those circumstances, and ultimately considered defendant's argument that he was mistaken about what was in his pocket. Like the holding in *Brown*, it would be inappropriate to say here the trial court's finding that defendant knew he possessed cocaine was against the manifest weight of the evidence. Defendant admitted that he smoked crack-cocaine over the past 10 years. Defendant admitted that he had been paid in both cannabis and crack-cocaine in the past through the arrangement with Spud. Finally, defendant admitted to giving Spud a ride that night. Taken together, this circumstantial evidence presented a strong factual basis for the trial court to find that defendant knew he had possession of cocaine.

¶ 28 It is also clear by the record that the trial court considered the mistake of fact defense and applied the law correctly in this case. A defendant's belief in a "mistaken fact" must be reasonable. *People v. Bauer*, 393 Ill. App. 3d 414, 423 (2009). The record reflects that the trial court considered defendant's mistake of fact defense and ultimately rejected the defendant's argument that he did not

know the substance in his pocket was crack-cocaine. Defendant was a user of crack-cocaine. Defendant had received crack-cocaine from Spud as payment in the past. In considering all of these facts and making a finding that the defendant did possess knowledge that the substance in his pocket was crack-cocaine, the record is clear that the trial court considered the defendant's mistake of fact defense. Therefore, the record clearly reflects that the trial court did not misapply the law.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Stephenson County.

¶ 30 Affirmed.