



¶ 4 In June 2011, at approximately 10:15 p.m., defendant was driving northbound on I-55, when he was stopped by Illinois State Trooper Eric Payne for speeding. After issuing defendant a warning citation for speeding, Trooper Payne searched defendant's vehicle and found a handgun. Defendant was charged with unlawful possession of a weapon by a felon, subsequent offense (720 ILCS 5/24-1.1(a) (West 2010)). Specifically, the State alleged defendant possessed a .38-caliber Rohm snub-nose revolver after having been convicted in Wisconsin of two drug-related offenses in 1983 and 1992 and of possession of a firearm by a felon in 1999.

¶ 5 In August 2012, defendant moved "to quash arrest and suppress evidence." In his motion to suppress, defendant alleged he did not consent to the search by Trooper Payne and he had been unlawfully detained.

¶ 6 In October 2012, the trial court held a hearing on defendant's motion. At the hearing, the court observed a digital video disc (DVD) recording of defendant's traffic stop, and both Trooper Payne and defendant testified.

¶ 7 The video footage reveals the following: After the vehicles stopped and pulled to the side of the interstate, Trooper Payne approached defendant's vehicle on the passenger side. He asked defendant, "What's going on?" Defendant responded he was driving to Wisconsin. He acknowledged he was speeding and apologized. Trooper Payne told defendant he needed "to slow down a little bit." He then asked defendant where he "was coming from." Defendant told Trooper Payne he left Oklahoma, where he had been staying with his mother, who took care of him while his injured knee was healing. Defendant stated he had his brace "back here" and his "crutch right here." He told the officer he lived in Wisconsin. After telling defendant he would "be right back," Trooper Payne returned to his vehicle.

¶ 8 According to the video, while in his squad car, Trooper Payne ran a LEADS search and found defendant had a criminal history. Among defendant's arrests were arrests for drug- and gun-related offenses, including an arrest for possession of narcotics in 2009. Trooper Payne exited his vehicle and approached defendant's vehicle from the passenger side. Trooper Payne leaned into the front passenger window, told defendant he was writing him a warning citation, and cautioned defendant to slow down. Trooper Payne told defendant he needed his signature on line 26 of the warning.

¶ 9 The video shows the following conversation immediately followed:

"TROOPER PAYNE: Hey, I was looking over your criminal history. You look like you got a—er, it looks like you got a little bit of a rap sheet.

DEFENDANT: Yeah, but that was like almost 13 years ago. I haven't been in trouble for 13 years.

TROOPER PAYNE: Yeah, you kind of gave that lifestyle up?

DEFENDANT: Yeah.

TROOPER PAYNE: Anything in the vehicle I need to be concerned about? Any drugs, guns, weapons, or anything like that?

DEFENDANT: No, no.

TROOPER PAYNE: You know, with you coming from Oklahoma, you know, going up to Wisconsin, you know —

DEFENDANT: Right.

TROOPER PAYNE: I just want to make sure there is nothing, uh, being transported. You know what I mean?

DEFENDANT: No. Yeah, yeah.

TROOPER PAYNE: Okay. Can I search the vehicle?

DEFENDANT: What you want? You want to look in the back?

TROOPER PAYNE: Um, I want to search the whole vehicle.

DEFENDANT: The whole vehicle?

TROOPER PAYNE: Yeah. Is there anything in here?

DEFENDANT: Um, not that I know of.

TROOPER PAYNE: Just be, just be straight up with me.

DEFENDANT: I got no drugs or nothing like that.

TROOPER PAYNE: Well, what about guns?

DEFENDANT: I don't know, uh, uh, uh.

TROOPER PAYNE: Don't reach back there, I mean, I--

DEFENDANT: Naw, I just, I just got my brace right here. That's all I got right here.

TROOPER PAYNE: Okay.

DEFENDANT: Okay, McDonald's bag. Trying to think. I know there ain't nothing in my clothes.

TROOPER PAYNE: Well, you want to sit in my car?

DEFENDANT: Uh —

TROOPER PAYNE: I mean, how's your knee?

DEFENDANT: Kind of, kind of bad.

TROOPER PAYNE: I'll let you sit in my car. It won't take very long.

DEFENDANT: Well, I can sit here, can't I?

TROOPER PAYNE: Well, I'm going to have you step out. If you mean you want to stand along the shoulder but, ah, you know, if you wanted to sit, I'll just, you know, you don't even have to close the door. You can just sit in the front seat if you want.

DEFENDANT: Over here or over back [inaudible]?

TROOPER PAYNE: Back at my car.

DEFENDANT: Here, I can get out of this door. Can you open that door?

TROOPER PAYNE: Well, you don't have to crawl over. I'll direct traffic. You don't have to crawl over, man."

¶ 10 The video shows Trooper Payne then walked around the front of the vehicle to the driver's door. Trooper Payne opened the door and held it open for defendant. Trooper Payne directed traffic with his flashlight. Trooper Payne did not touch defendant. Defendant stepped toward the squad car, but he turned back and asked, "Do you want me to pop this thing?" Trooper Payne responded he would do it later. Trooper Payne asked defendant if he wanted "to

sit back here?" Trooper Payne walked ahead of defendant toward the passenger side of his squad car. As defendant was walking toward the squad car, he paused and started to turn back toward his vehicle. Trooper Payne said, "C'mon, man. Back here." Defendant walked to the passenger side of the squad car. Trooper Payne said, "here you go." Once in the squad car, defendant stated it was cold in the car. Trooper Payne stated he would turn off the air conditioner. The following conversation ensued:

"TROOPER PAYNE: Um, be straight up with me, man. Is there anything in there? Do you think there's anything in there?"

DEFENDANT: No, I got, I got, uh, my bag, my medicine—

TROOPER PAYNE: Would, would —

DEFENDANT: —my clothes.

TROOPER PAYNE: Would anybody else have anything in there?

DEFENDANT: Uh, I don't know. My little brother and my big brother was driving my car. I know my big brother [inaudible].

TROOPER PAYNE: Nothing big or anything like that?

DEFENDANT: They both live in Oklahoma with my ma, too.

TROOPER PAYNE: Okay, well, this will just take a few moments, okay?

DEFENDANT: Alright."

¶ 11 Defendant testified when Trooper Payne asked him if he could search the vehicle,

he responded by telling the officer he did not want to exit the vehicle because his leg was broken and he did not want to be on the highway. At the time, defendant's leg was broken. It was in a steel brace. When Trooper Payne asked him a second time if he could search the vehicle, defendant responded by stating, "I didn't understand why he was, you know—I'm really not sure of the whole conversation, you know, but I'm positive I didn't give him permission to search."

¶ 12 On cross-examination, defendant was asked, "while you didn't say yes, you never told him no, did you, either?" Defendant responded, "When I told him that my leg was broke, I figured I told him I didn't want to get out of the car."

¶ 13 Trooper Payne testified, upon initiating the traffic stop, he observed defendant appeared "very nervous." Because of this nervousness, Trooper Payne questioned whether defendant had any illegal substances or weapons in the vehicle. After getting a positive response on defendant's criminal history, Trooper Payne asked defendant if he could search his vehicle. Trooper Payne testified defendant "was very hesitant and wasn't sure really how to proceed forward with my request." Defendant did not indicate he did not want his vehicle searched. Defendant exited the vehicle, indicating to Trooper Payne he could search it.

¶ 14 On cross-examination, Trooper Payne testified defendant "was avoiding [his] request" to search the vehicle. Trooper Payne stated, "Every time I would ask him to search the car and I would bring up the search, he would be talking about something else, like a bag in the back, and he wouldn't answer the question directly." Trooper Payne stated defendant "attempted to crawl over the center console" to exit the vehicle.

¶ 15 The trial court, citing this court's decision in *People v. Terry*, 379 Ill. App. 3d 288, 883 N.E.2d 716 (2008), determined the State did not satisfy its burden of proving defendant

voluntarily consented to the search. The court observed defendant testified he did not give permission to Trooper Payne to search his car. The court found it was the State's burden to prove defendant consented. The court stated defendant's statement of "alright" was "probably the closest thing we have to whether the defendant actually consented to a search verbally." The court observed defendant exited the vehicle and did not tell the officer he could not search his vehicle. Defendant did not object and offered to open something for the search. The court found the case "really close," but concluded the State had not met its burden of proving consent. The court concluded it appeared "defendant was acquiescing more than he was consenting." Regarding Trooper Payne, the court stated "[h]e was following up on his instincts, on his suspicions, and there is nothing wrong with what he did." The court granted defendant's motion to suppress, but denied his "motion to quash arrest."

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 A. Standard of Review

¶ 19 The parties disagree regarding the appropriate standard of review. Typically, on review of a decision regarding a motion to suppress, the appellate court gives great deference to the factual findings of the trial court but reviews the court's ultimate decision as to whether suppression is warranted *de novo*. *People v. Luedemann*, 222 Ill. 2d 530, 542, 857 N.E.2d 187, 195 (2006).

¶ 20 The State maintains this court should review the issue *de novo*. The State argues, because the interaction between Trooper Payne and defendant was recorded, this court is in the same position as the trial court to view and judge the evidence to determine whether an objec-

tively reasonable police officer would infer consent from defendant's actions. The State argues when the evidence before the trial court consists solely of documentary evidence, the court of review is not bound to accept those findings and may review the evidence *de novo*. See *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453, 905 N.E.2d 747, 752 (2009).

¶ 21 Defendant argues both standards enunciated in *Luedemann* apply. Defendant emphasizes this case involves witness testimony, which the trial court considered and accepted.

¶ 22 We find the *de novo* standard applies. Although two witnesses testified, their testimony was not inconsistent. While the trial court could have found either or both witnesses were not credible, it did not do so. The facts are thus undisputed, leaving this court with only the ultimate decision of whether suppression in these circumstances is warranted, to which the *de novo* standard applies. See *Luedemann*, 222 Ill. 2d at 542, 857 N.E.2d at 195 (holding the ultimate legal ruling on whether suppression should be granted is reviewed *de novo*); see also *Terry*, 379 Ill. App. 3d at 292-93, 883 N.E.2d at 720 (concluding the *de novo* standard applied when no party challenged the trial court's factual determinations).

¶ 23 B. Consent

¶ 24 The State argues the trial court erroneously applied an outdated subjective standard in evaluating whether defendant consented to the search of his vehicle. The State maintains the proper test, whether an objectively reasonable police officer would conclude the defendant consented, originated in *United States v. Drayton*, 536 U.S. 194 (2002). The State further contends the application of this objective test to these facts reveals defendant consented to the search and the motion to suppress should have been denied.

¶ 25 Defendant argues the trial court did not err. Defendant maintains he did not

consent to the search of his vehicle and any action seeming to be consent, such as exiting his vehicle, was mere acquiescence to Trooper Payne's ordering him to exit. Defendant further maintains the court's judgment, even if its reasoning is deemed incorrect, should be affirmed.

¶ 26 In its opening brief, the State presents a lengthy discussion of the history of the transition of the courts in determining whether consent was given, from a subjective standard, as in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), to the objective standard in *Drayton*. The State further concludes this court, in *Terry*, applied the proper objective test when it determined, from the defendant's words and conduct, the searching officer was objectively reasonable in believing the defendant consented. See *Terry*, 379 Ill. App. 3d at 297, 883 N.E.2d at 724. Defendant avoids the lengthy discussion but does not dispute that *Terry* was properly decided.

¶ 27 We need not summarize or address the history set forth by the State. *Terry* is precedent of this court. The *Terry* decision postdates the decisions in *Schneckloth* and *Drayton*, as well as the Illinois Supreme Court's decision in *People v. Anthony*, 198 Ill. 2d 194, 201, 761 N.E.2d 1188, 1192 (2001), a decision cited by both parties. *Terry* remains good law, and we will follow the same approach. We further note we need not examine the trial court's rationale for alleged error but may affirm the court's judgment on any basis appearing in the record. *People v. Keys*, 375 Ill. App. 3d 459, 461, 874 N.E.2d 577, 579 (2007).

¶ 28 Under the fourth amendment, individuals have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. The Illinois Constitution provides the same protection. Ill. Const. 1970, art. I, § 6. We are to interpret the search-and-seizure clause of the Illinois Constitution consistent with the jurisprudence of the United States Supreme Court on the fourth amendment. See *Terry*, 379 Ill.

App. 3d at 296, 883 N.E.2d at 723 (citing *Anthony*, 198 Ill. 2d at 201, 761 N.E.2d at 1192).

¶ 29 A search is permitted under the fourth amendment if it is conducted with "the voluntary consent of the person whose person or property is searched." *Terry*, 379 Ill. App. 3d at 296, 883 N.E.2d at 723. Consent is valid if it is voluntary; it must be given freely without express or implied duress or coercion. *People v. Green*, 358 Ill. App. 3d 456, 462, 832 N.E.2d 465, 471 (2005). The standard for the inquiry into voluntariness is whether, in light of the circumstances surrounding the request for consent, "a reasonable person in the defendant's position would have felt free to leave." *Green*, 358 Ill. App. 3d at 463, 832 N.E.2d at 471. "[T]he totality of the circumstances must control \*\*\*." *Drayton*, 536 U.S. at 207 (citing *Schneckloth*, 412 U.S. at 227).

¶ 30 The State contends the circumstances show Trooper Payne was objectively reasonable in his conclusion defendant consented to the search. The State emphasizes defendant was not unlawfully seized, there was no display of a weapon, no physical touching, and no threatening presence by a police officer, and Trooper Payne's tone of voice was friendly, not forceful. The State further highlights the evidence showing defendant did not say no to the officer's requests to search the vehicle and contends Trooper Payne's question, "Okay, can I search the vehicle?," informed defendant he could decline the request. The State further highlights defendant's exiting of the vehicle and offering to open something for Trooper Payne, as well as defendant's reply of "alright," after Trooper Payne said the search would take a few moments.

¶ 31 Defendant maintains the circumstances show no voluntary consent. Defendant maintains Trooper Payne, after learning of defendant's criminal history, planned to search

defendant's vehicle. Defendant emphasizes Trooper Payne's repeated questions with accusatory undertones regarding the transport of weapons or drugs. Defendant stresses he did not leave the vehicle until after being directed by Trooper Payne to do so, creating a Hobson's choice in either refusing to comply and being arrested for obstructing justice or exiting his vehicle to permit the search.

¶ 32 Upon examining the video and the testimony and considering the totality of the circumstances, we conclude defendant's words and conduct did not evince his voluntary consent to the search of his vehicle, and Trooper Payne was not objectively reasonable in believing defendant consented to the search. Defendant did not verbally agree to the search. When Trooper Payne twice asked defendant if he could search defendant's vehicle, defendant responded by avoiding the question—a fact Trooper Payne noticed. Defendant even asked if he could stay in the vehicle, to which Trooper Payne responded, "Well, I'm going to have you step out." Defendant's decision to exit the vehicle, and his conduct thereafter, followed multiple failed attempts to not permit the search and the officer's direction for defendant to leave the vehicle. Additionally, after defendant left his vehicle, defendant started to turn back. Again, Trooper Payne directed defendant away from his own vehicle by stating, "C'mon, man. Back here."

¶ 33 Fourth-amendment cases require voluntary consent by the person searched or seized. *Terry*, 379 Ill. App. 3d at 296, 883 N.E.2d at 723. The fourth amendment does not permit searches or seizures when consent is sought but an answer is not given. Trooper Payne knew defendant had not answered his questions, but he continued to press defendant. At the point when Trooper Payne directed defendant from his vehicle, no objectively reasonable officer would have believed defendant consented to the search. Once defendant was out of his vehicle,

Trooper Payne did not ask defendant again if he could search his vehicle. He continued to direct defendant away from his vehicle. In addition, we do not find defendant's conciliatory "alright" to the officer's, "Okay, well, this will just take a few moments, okay?" to be voluntary consent.

Trooper Payne did not ask defendant if he could search the vehicle. The sentence, instead, is reasonably interpreted not as a question but as a statement, particularly in light of the facts defendant had already been told to exit his vehicle and to sit in the squad car, and was sitting in the squad car with the officer at the time Trooper Payne made it.

¶ 34 This case is factually distinguishable from those relied upon by the State. For example, in *Terry*, in which we found consent was given (see *Terry*, 379 Ill. App. 3d at 297-98, 883 N.E.2d at 724), the defendant exited his truck as the officers approached and before words were exchanged. One officer and the defendant exchanged greetings. The officer asked defendant if he had any drugs, knives, guns, or needles. The defendant responded he did not. The officer asked the defendant if he could search him. The defendant did not verbally give the officer permission but "put his hands on the side of the truck bed and kicked his legs back into the position in which one would be searched." *Terry*, 379 Ill. App. 3d at 291, 883 N.E.2d at 719. The officer asked a second time if he could search the defendant. The defendant told the officer to "go ahead and do what you got to do." *Terry*, 379 Ill. App. 3d at 291, 883 N.E.2d at 719. The officer asked a third time, and the defendant said, "[y]ou have a job to do" and offered to help the officer by removing items from his pocket. *Terry*, 379 Ill. App. 3d at 291, 883 N.E.2d at 719. The defendant then returned his hands to the search position, and the search ensued. *Terry*, 379 Ill. App. 3d at 291, 883 N.E.2d at 719. The *Terry* defendant did not, as defendant did here, attempt to avoid the search by avoiding the requests for one. Moreover, the *Terry* defendant

positioned himself for a search, whereas defendant did not until told to do so.

¶ 35

### III. CONCLUSION

¶ 36 In closing, we note that in *People v. Hansen*, 2012 IL App (4th) 110603, ¶¶ 60-63, 968 N.E.2d 164, this court criticized the practice of denominating motions to suppress as "motions to quash arrest and suppress evidence," explaining that suppressing the evidence is the entirety of the relief to which defendant is entitled.

¶ 37 We affirm the trial court's judgment.

¶ 38 Affirmed.