SIXTH DIVISION
June 30, 2015

No. 1-13-1978

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 CR 661382
	)	
KELVIN POLK,	)	Honorable
	)	Brian Flaherty
Defendant-Appellee,	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for possession of a controlled substance is affirmed, where arrest and warrantless search of defendant was supported by probable cause developed during consensual encounter.

¶ 2 After a bench trial, defendant-appellant, Kelvin Polk, was convicted of being in possession of a controlled substance and was sentenced to a term of four years' imprisonment. On appeal, defendant contends that the trial court improperly denied his motion to quash arrest and suppress evidence, and asks that we remand for a new trial. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by information with two counts of possession of a controlled substance and two counts of possession of a controlled substance with intent to deliver. Each count generally alleged that, on or about October 10, 2010, defendant was in possession of less than 15 grams of heroin.

¶ 5 Defendant filed a motion to quash arrest and suppress evidence, contending that the seizure and search that led to the discovery that he was in possession of heroin were unconstitutional. A hearing on that motion was held on July 17, 2012.

¶ 6 At that hearing, the sole witness was Detective Anthony Bruno, a 20-year veteran of the Chicago Heights police department. At approximately 10:15 p.m. on October 10, 2010, Detective Bruno was on routine patrol in the area of 214 Broadway Avenue in Chicago Heights. He was in full uniform and riding in a marked squad car driven by his partner, Officer Stacey. Two or three more officers were in another marked squad car, and the other officers were also in full uniform. Detective Bruno and the other officers were patrolling the area after receiving many prior complaints of narcotics activity. Detective Bruno had made previous arrests in that area.

¶ 7 Upon arriving near 214 Broadway Avenue, Detective Bruno observed a Chevrolet Impala parked nearby. Defendant was in the driver seat, a woman was in the passenger seat, and a man was standing outside the vehicle near the passenger side window having a conversation with the woman. Neither of the squad cars had their sirens or lights turned on, but the man standing next to the Impala fled immediately upon noticing the two police vehicles approximately 50 feet away. The man fled and entered a building located at 214 Broadway Avenue, approximately 25 to 35 feet away.

¶ 8 Officer Stacey parked Detective Bruno's squad car near the building, in a position that did not impede defendant's ability to drive away. Detective Bruno did not recall exactly where the other squad car parked. After unsuccessfully attempting to chase the fleeing man, Detective Bruno returned to the passenger side of the Impala. Detective Bruno did not recall where any of the other officers were positioned at that time. He then asked the female passenger if she knew the man that had fled, and the woman indicated that she did not. However, during this conversation, Detective Bruno pointed his flashlight inside the Impala and observed what he thought to be cocaine near the passenger's leg, within two feet of defendant. After the passenger attempted to cover up the suspected cocaine, both occupants were ordered out of the vehicle.

¶ 9 Both defendant and the female passenger denied that the suspected cocaine belonged to them, and Detective Bruno performed a field drug test on that material. The material tested positive for cocaine, and both defendant and the woman were subjected to a pat down. Officer Stacey conducted the pat down of defendant, and defendant remained "rigid and wouldn't allow *** Stacey to fully pat him down." Defendant and the woman were then arrested and transported to a police station. A strip search of defendant was conducted at the station, pursuant to which certain items were recovered from his person.

¶ 10 The trial court denied defendant's motion, concluding that there was "nothing to indicate" that the police precluded defendant from leaving before observing the suspect cocaine and that the police had probable cause to arrest defendant "before they told him to exit the car based upon the location of the suspect cocaine and based upon the officer's twenty years of experience[.]" The matter then proceeded to a bench trial.

¶ 11 At trial Detective Bruno provided testimony that was largely consistent with his testimony at the prior hearing. In addition, the State presented the testimony of Officer Stacey,

whose rendition of events was also consistent with Detective Bruno's. In addition, Officer Stacey testified that defendant remained rigid during two separate pat downs, one at the location of his arrest and a second at the police station. During a subsequent strip search of defendant, 16 foil packets of suspected heroin were recovered from a plastic bag protruding from defendant's buttocks. In addition, $185 was recovered from defendant's pants pocket.

¶ 12 Finally, the State introduced stipulations establishing that a proper chain of custody was maintained with respect to the 16 foil packets recovered from defendant, and that these packets contained 2.6 grams of material. The contents of 8 of those packets, weighing 1.1 grams, tested positive for heroin.

¶ 13 At the conclusion of the State's evidence, defendant made a motion for directed finding. That motion was granted with respect to the two counts alleging possession of a controlled substance with intent to deliver, but was denied with respect to the two other counts. The defendant rested, and the trial court found defendant guilty of the remaining two counts of possession of a controlled substance. Defendant's motion for a new trial, which asserted, *inter alia*, that defendant's motion to quash arrest and suppress evidence should have been granted, was denied.

¶ 14 The two convictions were merged into a single conviction for possession of a controlled substance, and defendant was then sentenced to a term of four years' imprisonment. Defendant's motion to reconsider that sentence was denied, and he timely appealed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant contends that the circuit court erred in denying his motion to quash arrest and suppress evidence.

¶ 17 The ruling of a circuit court on a motion to suppress evidence frequently presents mixed questions of law and fact. While we review *de novo* the ultimate legal ruling as to whether suppression of evidence is warranted, we accord great deference to the circuit court's factual findings and will reverse such findings only if they are against the manifest weight of the evidence. *People v. Hackett*, 2012 IL 111781, ¶ 18. "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *People v. Deleon*, 227 Ill. 2d 322, 332 (2008). In conducting our review, we may consider evidence adduced at trial as well as at the suppression hearing. *People v. Richardson*, 234 Ill. 2d 233, 252 (2009).

¶ 18 The United States and Illinois constitutions prohibit the government from subjecting citizens to unreasonable searches and seizures. U.S. Const., Amends. IV, XIV; Ill. Const. 1970, art. I, § 6. For purposes of the fourth amendment, an individual is "seized" when an officer "'by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" *People v. Luedemann*, 222 Ill. 2d 530, 550 (2006) (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). "However, not every encounter between the police and a private citizen results in a seizure." *People v. McDonough*, 239 Ill. 2d 260, 268 (2010). As our supreme court has 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, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (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.]" *McDonough*, 239 Ill. 2d 268.

¶ 19 Thus, it is well recognized that "not every encounter between the police and a private citizen results in a seizure," and consensual encounters involve no coercion or detention and therefore do not implicate any fourth amendment interests. *Id.* Thus, "the law clearly provides that a police officer does not violate the fourth amendment merely by approaching a person in public to ask questions if the person is willing to listen." *Luedemann*, 222 Ill. 2d at 549.

¶ 20 In contrast, an individual is "seized" for purposes of the fourth amendment when an officer " 'by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' " *Id.* Put another way, "[a] person is seized when, in view of all the facts and circumstances, he would not feel free to leave." *People v. Roa*, 398 Ill. App. 3d 158, 164 (2010). However, in situations in which the person's freedom of movement is restrained by some factor independent of police conduct, such as sitting in a parked vehicle, the “free to leave” test is inapplicable and " 'the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.' " *Luedemann*, 222 Ill. 2d at 550 (quoting *Bostick*, 501 U.S. at 436).

¶ 21 In making this determination, a court may consider the following non-exhaustive list of factors: "(1) whether there was a threatening presence by several officers; (2) whether the officer displayed a weapon; (3) whether there was some physical touching by the officer; and (4) whether the language or tone of voice used by the officer indicated that compliance with the officer's request was compelled." *Id.* The absence any of these factors, while "not necessarily

conclusive, is highly instructive" as to whether a seizure has occurred. *Luedemann*, 222 Ill. 2d at 554. Indeed, our supreme court has repeatedly indicated that in the absence of any of these factors, otherwise inoffensive contact between a member of the public and the police will not amount to a seizure. *Id*. at 553-54; *People v. Cosby*, 231 Ill. 2d 262, 282 (2008). In addition, however, other "factors that courts have found indicative of a seizure of a parked vehicle are 'boxing the car in, approaching it on all sides by many officers, pointing a gun at the suspect and ordering him to place his hands on the steering wheel, or use of flashing lights as a show of authority.' ". *Luedemann*, 222 Ill. 2d at 557 (quoting 4 W. LaFave, *Search & Seizure* § 9.4(a), at 434-35 (4th ed. 2004)).[1]

¶ 22 On appeal, defendant contends that he was illegally seized prior to the Detective Bruno's observation of the suspected cocaine inside the vehicle, and that his motion to suppress and quash arrest should therefore have been granted. We disagree.

¶ 23 To begin with, none of the factors described above are implicated here. While the evidence established the police officers present at the time were in uniform and were armed, there was no evidence at the hearing or at trial that any weapons were ever displayed. Nor was there any evidence that either defendant or the female passenger were ever physically touched or directly or impliedly ordered to do anything prior to the observation of the suspected cocaine. The female passenger was simply asked a question. Moreover, there was no evidence that the Impala was "boxed in," that defendant was ordered to place his hands on the steering wheel, or that the police used any flashing lights.

[1] Although not specifically relied upon by defendant, we do note that Detective Bruno's use of a flashlight is not material to our analysis. *Luedemann*, 222 Ill. 2d at 561 (noting that "[i]t is well settled that the use of a flashlight to illuminate a vehicle located on a public way is not a fourth amendment search.").

¶ 24 The only factors even potentially implicated here are whether there was a threatening presence by several officers and/or an approach to the parked vehicle on all sides by many officers. Defendant contends that these factors are implicated, because there were four to five uniformed officers and two squad cars present at the scene. However, there is no evidence that the police officers in the second squad car played *any* role in defendant's arrest. While defendant speculates to the contrary, the evidence introduced at the hearing on defendant's motion and at trial all indicated it was only Detective Bruno and Officer Stacey that approached the Impala and eventually effectuated defendant's arrest.

¶ 25 It is generally recognized that "the police may approach a person seated in a parked vehicle and ask questions of that person without that encounter being labeled a seizure." *Luedemann*, 222 Ill. 2d at 552. More specifically, "the presence of only two officers, without more, is not a factor that would indicate a seizure occurred. *Cosby*, 231 Ill. 2d at 278. Thus, "the fact that two officers approached defendant from opposite sides of [a] vehicle, absent other evidence, does not transform a consensual encounter into a seizure." *People v. Lopez*, 2013 IL App (1st) 111819, ¶ 32 (citing *Cosby*, 231 Ill. 2d at 278).

¶ 26 A similar situation presents itself here, and we therefore conclude that the interaction between defendant, the female passenger, and the police was a consensual encounter at the time Detective Bruno observed suspected cocaine. That cocaine was less than two feet away from defendant, inside a vehicle defendant was driving. Once Detective Bruno made this observation, he had probable cause to arrest defendant. *People v. Grant*, 2013 IL 112734, ¶ 11 ("Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime."). Moreover, having probable cause to arrest defendant, the police were also fully justified in

conducting a search of defendant's person incident to that arrest. *People v. Cregan*, 2014 IL 113600, ¶ 28 (recognizing that a search incident to arrest requires no additional justification). We therefore conclude that the trial court properly denied defendant's motion to quash arrest and suppress evidence, and we affirm his conviction.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 29 Affirmed.