2015 IL App (1st) 133577-U

FOURTH DIVISION
September 10, 2015

No. 1-13-3577

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 20363
	)	
JOSE CARDONA,	)	Honorable
	)	William O'Brien,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justice Cobbs concurred in the judgment.
Justice Ellis specially concurred.

O R D E R

¶ 1 ***Held:*** Trial court did not err in denying defendant's motion to quash arrest and suppress evidence.

¶ 2 Following a bench trial, defendant Jose Cardona was convicted of possession of a stolen motor vehicle and possession of a controlled substance and was sentenced as a Class X offender to nine years in prison. On appeal, defendant contends that the trial court erred in denying his pretrial motion to quash his arrest and suppress evidence because the police officers who arrested him possessed no reasonable suspicion of criminal activity on his part at the time they seized him.

¶ 3 Defendant's conviction arose from events that transpired around 10 a.m. on October 7, 2012. At that time, police officers encountered defendant in the parking lot of a gas station located at 3954 West Division Street. Defendant was sitting in the driver's seat of a car with its engine running, and officers subsequently discovered that defendant's license was revoked and that the car did not belong to him. A custodial search of defendant revealed a baggie of suspect crack cocaine in his right sock. Defendant was charged with possession of a stolen motor vehicle and possession of a controlled substance.

¶ 4 Prior to trial, defendant filed a motion to quash his arrest and suppress evidence, asserting that his warrantless stop and search was improper because it was not supported by probable cause. At the hearing on the motion, defendant testified that around 10 a.m. on October 7, 2012, he arrived at the gas station located on the corner of Pulaski and Division. He was alone in a Honda Accord (the car), which he parked by the air compressor, approximately 12 feet away from the gas station building. He exited the car, but left it running, and sat on a nearby railing to wait for his girlfriend. Approximately three minutes later, police officers approached him and

searched him, but did not show him a warrant to search his person or the car. Defendant acknowledged a 2004 conviction for possession of a stolen motor vehicle.

¶ 5 On cross-examination, defendant testified that his neighbor Ecerdo, whose last name he did not know, had loaned him the car, and that the car did not have a cracked windshield. Defendant acknowledged that his driver's license was revoked at the time of the incident, and the defense then rested.

¶ 6 Officer McCain, a Chicago police officer of 18 years, testified that around 10 a.m. on the morning of the incident he and his partner, Officer Garza, were on patrol in an unmarked patrol vehicle in a known narcotics area. At that time, Officer McCain saw a car parked alongside a fence at the gas station located at 3954 West Division Street. The car was not parked near the gas station building or a gas pump, was still running, and had a crack on its front windshield. A man, who Officer McCain identified in court as defendant, was alone in the car, sitting in the driver's seat. Officer McCain drove through the gas station lot and pulled up alongside the passenger side of the car. Through his open window, Officer McCain asked defendant if he had a driver's license or proof of identification, and defendant stated that he did not. At that time, officers McCain and Garza exited their vehicle and approached the car, which was still running with the key in the ignition. Officer Garza walked to the driver's side of the car and asked defendant to step out of it, and Officer McCain asked defendant his name. After defendant responded, Officer McCain returned to his patrol vehicle and entered that name into a computer system and learned that defendant's license had been revoked. Officer McCain relayed that information to Officer Garza, who then placed defendant into custody and conducted a custodial search. During that

search, Officer Garza found a blue tinted Zip-loc baggie containing a white, rock-like substance of suspect crack cocaine in defendant's right sock.

¶ 7 On cross-examination, Officer McCain acknowledged that he did not see how defendant came to be sitting in the driver's seat of the car, never saw defendant operate the car, and did not observe any type of narcotics transaction. He further testified that the driver's side of the car was next to a guard rail that was located next to a wooden fence, and that the crack in the car's windshield was located "enough between the center and the driver's side to obstruct vision, approximately over six inches." Officer McCain acknowledged that he did not measure the crack in the windshield.

¶ 8 The trial court denied the motion to quash arrest and suppress evidence. In doing so, the court stated, *inter alia*, that it believed Officer McCain's testimony regarding where defendant was sitting at the time Officer McCain first saw him.

¶ 9 At trial, Maria Heras testified that on the day of the incident the 1996 Honda Accord with license plate number K736836, which she owned, was parked near her home. Later that day, she learned that the police wished to speak with her, so she went to the police station, where she told an officer that she had not given anyone permission to be in her car. Heras testified that she did not know defendant and did not give him permission to be in her car on the day of the incident. When her car was returned to her, Heras saw that the lock on the door was damaged and it appeared that the switch on the ignition had been forced.

¶ 10 Officer McCain testified consistently with his testimony from the hearing on the motion to quash arrest and suppress evidence, and further added that he and Officer Garza were dressed

in plain clothes on the day of the incident. Officer McCain testified that after the custodial search, he and Officer Garza placed defendant into their patrol vehicle and asked him who owned the car, but defendant gave conflicting stories in response. Following Officer Garza's unsuccessful search for ownership documents in the car, he removed the key from the ignition. Officer McCain identified People's Exhibit 1 as that key, and testified that it was in the same condition as on the day of the incident. Specifically, the key had unusual markings on it and was "shaved down." A key in such a condition is known as a "jiggler" key, which is used to steal cars. The car in which defendant had been sitting was a 1996 Honda Accord with license plate number K736836. When he ran that number through the computer system, Officer McCain learned that the car was registered to Maria Heras.

¶ 11 Officer McCain further testified that on the day of the incident, he and Officer Garza transported defendant to the police station and placed him in an interview room. At that time, Officer McCain read defendant his *Miranda* rights from a preprinted form, and defendant stated that he understood those rights and agreed to speak with them. Defendant then told officers McCain and Garza that he got the car from a "guy who steals cars" and that he "gave it to him to buy the rock." Officer McCain testified that the baggie of suspect crack cocaine and the jiggler key were inventoried at the police station.

¶ 12 On cross-examination, Officer McCain testified that he never saw defendant place the key into, or take it out of, the car's ignition. He did not see how defendant got into the car and did not know how long defendant had been sitting there. Aside from the cracked windshield, Officer

McCain could not recall any damage to the exterior of the car. At the time of the incident, the car had not been reported stolen.

¶ 13 The parties then stipulated to the chain of custody of the bag of powdery substance recovered from defendant's person. The parties further stipulated that the chemical composition of that substance tested positive for cocaine and weighed less than .1 gram.

¶ 14 Following closing arguments, the trial court found defendant guilty of possession of a stolen motor vehicle and possession of a controlled substance. Defendant subsequently filed a post-trial motion in which he argued, *inter alia*, that the trial court erred in denying his motion to quash arrest and suppress evidence. The trial court denied that motion and sentenced defendant to a Class X sentence of 9 years' imprisonment on his conviction for possession of a stolen motor vehicle. On appeal, defendant solely contends that the trial court erred in denying his motion to quash arrest and suppress evidence and asks this court to vacate his conviction.

¶ 15 In reviewing an order denying defendant's motion to quash arrest and suppress evidence, mixed questions of law and fact are presented. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). Factual findings made by the trial court will be upheld unless they are against the manifest weight of the evidence, whereas the trial court's application of the facts to the issues presented and the ultimate question of whether the evidence should be suppressed is subject to *de novo* review. *Id.* On appeal, we may consider the evidence presented at the hearing on the motion to quash and suppress, as well as the evidence presented at trial to the extent that it supports affirming the trial court's judgment. *People v. Butorac*, 2013 IL App (2d) 110953, ¶ 14, citing *People v. Brooks*, 187 Ill. 2d 91, 127-28 (1999). Here, defendant does not contest that factual

findings made by the trial court in arriving at its decision, but argues that a *de novo* review of his legal claim reflects that he was illegally seized.

¶ 16 The fourth amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures. U.S. Const., amend. IV; *People v. Gherna*, 203 Ill. 2d 165, 176 (2003). However, not every interaction between police and private citizens results in a seizure. *People v. McDonough*, 239 Ill. 2d 260, 268 (2010). Rather, there are three tiers of police-citizen encounters that have been recognized by courts: (1) an arrest which must be supported by probable cause, (2) temporary investigative *Terry* stops for which an officer must have reasonable, articulable suspicion of criminal activity, and (3) consensual encounters, which involve no coercion or detention, and thus do not implicate any fourth amendment concerns. *Id.*

¶ 17 According to defendant, he was seized for purposes of the fourth amendment at the time the officers drove their patrol vehicle directly at his parked car, stopped alongside him and "interrogated" him. Specifically, he argues that the manner in which the officers stopped their vehicle "boxed in" his car, which is indicative of a seizure. He contends that at this time, the officers had no reasonable suspicion of criminal activity on his part to justify a *Terry* stop, and that he was thus unlawfully seized. The State, however, maintains that at that time, the officers merely engaged in a consensual encounter, and that defendant was not seized until the officers determined that defendant's license had been revoked, at which point they had probable cause to arrest him.

¶ 18 It is well-settled that a seizure does not occur simply because an officer approaches an individual and asks them questions if that person is willing to listen, and this premise extends to situations where the person being questioned is seated in a parked car. *People v. Luedemann*, 222 Ill. 2d 530, 551-52 (2006). Permissible questions include a request to examine an individual's identification, as long as the police do not convey a message that compliance with their request is required. *Id.* at 551. Such an encounter becomes a seizure only if the officer, through physical force or a show of authority, restrains the liberty of the vehicle's occupant. *Id.* at 552-53.

¶ 19 The United States Supreme Court has enumerated, and our supreme court has adopted, the following factors that may be indicative of a seizure: (1) the threatening presence of several officers, (2) the display of a weapon by an officer, (3) some physical touching of the person of the citizen, and (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Id.* at 553, citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). These factors, however, are not exhaustive, and Illinois courts have considered the following additional factors in determining whether a seizure of a parked car has occurred: (1) "boxing" the car in, (2) approaching the car on all sides by many officers, (3) pointing a gun at the vehicle's occupant and ordering him to place his hands on the steering wheel, and (4) the use of flashing lights as a show of authority. *Id.* at 557.

¶ 20 As previously stated, defendant argues that a seizure occurred at the time Officer McCain stopped his patrol vehicle alongside the car, and spoke to him. However, we find that the evidence presented shows that none of the factors outlined in *Mendenhall*, or the additional factors specific to the seizure of parked cars, were present at that time. Officers McCain and

Garza were wearing plain clothes and in an unmarked car at the time they first encountered defendant, and neither officer displayed or pointed a weapon, or flashed the lights of their vehicle. Both officers remained in their patrol vehicle, and neither officer touched defendant or ordered him to place his hands on the steering wheel. Although in his brief, defendant argues that Officer McCain "interrogated him," Officer McCain testified that he merely asked defendant whether he had a driver's license or proof of identification. Nothing in the record suggests that Officer McCain's tone of voice compelled compliance on defendant's part. We note that the supreme court found that where only one or two officers approach the defendant, display no weapons, do not touch the defendant, and do not use language or tone of voice indicating that compliance with their requests is compelled, a seizure is much less likely to be found. *Id.* Such were the circumstances involved in the case at bar, and we thus find that no seizure occurred at this time.

¶ 21 Defendant, however, maintains that the manner in which Officer McCain positioned his patrol vehicle next to the car "boxed [it] in." In so arguing, he relies upon the following statement in *Luedemann*: "if [the officer] would have pulled alongside defendant's vehicle, he would have been blocking defendant in his parking space, and this is a factor often used by courts to determine that a seizure of a person in a parked vehicle has occurred." 222 Ill. 2d at 559. We do not believe that this statement stands for the proposition that a car is "boxed in," and a seizure occurs, anytime an officer stops his vehicle alongside a defendant's vehicle. Notably, in the sentence immediately following the one upon which defendant relies, the court cites one of its prior cases and states, in pertinent part: "the positioning of the officers and their bicycles

prevented defendant from either exiting the vehicle or driving the vehicle away from the scene." *Id.*, citing *People v. Gherna*, 203 Ill. 2d at 180. Thus, the fundamental inquiry is whether the positioning of the officer's car completely blocks the defendant's car, preventing him from being able to leave the scene.

¶ 22 Here, no evidence was presented showing that Officer McCain's patrol vehicle in any way prevented defendant from either exiting the car, or driving it away from the scene. Officer McCain testified that the car was parked alongside a fence at the gas station, and that he stopped his patrol vehicle alongside the passenger side of the car. The evidence thus shows that the two cars were parallel to one another, but does not establish that defendant's car was "boxed in." For example, the record does not show that defendant's car was parked so close to the railing that he would have been unable to open the driver's side door and exit the car if he so wished. Nor does the record show that the car had no space in front of it such that defendant would have been unable to drive the car forward and away from the officers. We thus find that contrary to defendant's contention, the evidence does not support his argument that the car was "boxed in."

¶ 23 Based on the foregoing, we find that at the time Officer McCain stopped his unmarked patrol vehicle alongside defendant's car and asked him if he had identification or a driver's license, he was merely engaging in a consensual encounter. When defendant stated that he did not have a driver's license, however, Officer McCain then had a reasonable suspicion of criminal activity in that defendant was seated in the driver's seat of a car that was running, but was not in possession of a driver's license, in violation of the Illinois Vehicle Code's (Code) requirement that a person operating a motor vehicle must carry a driver's license at all times and exhibit it on

demand. 625 ILCS 5/6-112 (West 2012). Upon investigating further, Officer McCain then became aware that defendant's license was revoked. Given that defendant was seated in the driver's seat of a car that was running, and he was alone, it was reasonable for officers McCain and Garza to infer that defendant drove the car to the gas station, and did so while his license was revoked. We thus find that at the time the officers took defendant into custody, they had probable cause to arrest him for driving with a revoked license. 625 ILCS 5/6-303 (West 2012).

¶ 24 We conclude that the trial court did not err in denying defendant's motion to quash arrest and suppress evidence, and, accordingly, affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.

¶ 26 JUSTICE ELLIS, specially concurring.

¶ 27 I join in the majority's conclusion that the police officer did not seize defendant when he asked him for his driver's license, because I am compelled to do so by binding case law on this issue. See *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991); *People v. Luedemann*, 222 Ill. 2d 530, 550-51 (2006). I write separately, however, because I do not believe the case law reflects the reality of the encounter that took place here between the police officer and defendant. Relying on that case law, the majority holds that the initial interaction between the officer and defendant was a "consensual encounter," the least intrusive and least coercive category of interactions and one that does not invoke the fourth amendment at all. In my view, however, there was nothing "consensual" about the officer's demand for defendant's driver's license in this case.

¶ 28 In determining whether a seizure occurred when an officer approaches an individual in a parked car, the law is clear that we must ask "whether a reasonable person in defendant's position would have believed he was free to decline [the police's] requests or otherwise terminate the encounter." *Luedemann*, 222 Ill. 2d at 551. I cannot fathom that any clear-thinking, objectively reasonable (and innocent) person, sitting in the driver's seat of a running car, would believe that he or she was free to decline a police officer's demand or request for a driver's license.

¶ 29 I would emphasize the particular context of this case. This is not a case where a car was pulled over for a traffic violation, whereupon the officer asked the driver for his or her license. In the instance of a traffic stop, we would not need to reach the question of whether the request for a driver's license constituted a seizure, because a seizure already occurred when the officer

pulled over the car, and thus the police already would be required to have a reasonable, articulable suspicion of a crime. *People v. Hackett*, 2012 IL 111781, ¶ 20 (traffic stop is seizure requiring reasonable, articulable suspicion that traffic offense has been committed).

¶ 30 Nor is this a situation where someone was sitting in the back seat or passenger seat of an idling car. Neither is this a case where the car was parked but with the engine turned off.

¶ 31 Here, we are presented with an individual in the driver's seat of a car that was parked but with the engine running. The car was absolutely in operation. And defendant was there of his own volition; he certainly was not pulled over by police officers. But then an officer pulled up next to him and asked him for a driver's license.

¶ 32 Under the case law, as the majority notes, "a seizure does not occur simply because a law enforcement officer approaches an individual and puts questions to that person if he or she is willing to listen." *Luedemann*, 222 Ill. 2d at 551. Even more specific to this case, "the police may approach and question a person seated in a parked vehicle without that encounter being labeled a seizure." *Id.* at 552.

¶ 33 But this was not just any old question defendant was asked. He was not asked, for example, what he was doing parked in the corner of that gas station with the car idling. He was asked if he had a driver's license for the vehicle he was currently operating. If he did not, he was violating the law. See, *e.g.*, *People v. Mattison*, 149 Ill. App. 3d 816, 819 (1986) (evidence was sufficient to convict defendant of driving while license revoked where defendant was in driver's seat, with keys in ignition, attempting to start car).

¶ 34 And everybody knows that—everybody knows you have to carry a driver's license to operate a vehicle. Any reasonable, innocent person would undoubtedly feel obligated to produce his or her license in order to dispel the notion that he or she was committing a crime by operating a car without a license. Said differently, no reasonable, innocent person would think that it would be permissible to ignore or decline an officer's request for a driver's license; rather, any such person would expect that a good police officer, whose duty is to enforce the law and ensure the safety of our streets, would not take a refusal for an answer and would take additional steps to either detain the car or somehow get an answer to his or her question.

¶ 35 It may be true that a mere refusal to cooperate with a police request, without more, does not give rise to the level of suspicion necessary to justify a seizure. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). Thus, in *theory*, a reasonable, innocent person in defendant's position could decline to answer the officer's question and drive away, or roll up the window and turn away, or the like, and if the officer detained him or her as a result of that refusal, that detention would be unconstitutional. But in *practice*, does any reasonable, innocent person (not a law professor or judge or even an attorney, but an ordinary, objectively reasonable person) know that? I cannot believe the answer to that question is yes. See *Bostick*, 501 U.S. at 447 (Marshall, J., dissenting) (fact that individual may refuse to answer police questions without creating reasonable suspicion justifying seizure "is utterly beside the point, because a passenger unadvised of his rights and otherwise unversed in constitutional law *has no reason to know* that the police cannot hold his refusal to cooperate against him" (emphasis in original)).

¶ 36 I think that a reasonable, innocent person would believe that a refusal to respond to that request—a request to verify that the person is not currently breaking the law by operating a car without a license—would lead to a heightened response of some kind by the officer, as opposed to a passive retreat by that officer. When Officer McCain asked defendant for his driver's license, a reasonable, innocent person in defendant's position "reasonably could have believed that [refusing to respond] would only arouse the officers' suspicions and intensify their interrogations." *Id.* (Marshall, J., dissenting). Any holding to the contrary, in my mind, ignores the reality of the world in which we live. See *Wyoming v. Houghton*, 526 U.S. 295, 306 (1999) ("the Fourth Amendment must take account of *** practical realities.").

¶ 37 By no means am I suggesting that it was improper to ask defendant in this case for his driver's license. Nor am I criticizing the officer's actions here in any way. I am simply saying that we should call this interaction what it was—a seizure. Indeed, even though I believe the officer's question should be considered a seizure, I would still affirm the denial of the motion to suppress because the evidence adopted by the trial court showed that the officer did, in fact, have a reasonable and articulable suspicion that a traffic offense had been committed. Defendant's cracked windshield, which was large enough "to obstruct vision" according to McCain, would have justified a traffic stop of the car. See 625 ILCS 5/12-503(e) (West 2012) ("No person shall drive a motor vehicle when the windshield, side or rear windows are in such defective condition or repair as to materially impair the driver's view to the front, side or rear.").

¶ 38 In fact, the trial court expressly noted that McCain "could have given [defendant] a ticket for the cracked windshield" and analogized what happened here to a "traffic stop." And during

the time it took Officer McCain to issue defendant a citation, he could permissibly ask for defendant's identification. See *Rodriguez v. United States*, 575 U.S. ___, ___, 135 S. Ct. 1609, 1615 (2015) (during traffic stop, officer may conduct "ordinary inquiries" incident to stop, including "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance" (internal quotation marks omitted)). Consequently, even if McCain's questioning could be considered a seizure, the trial court did not err in denying defendant's motion to suppress.