2015 IL App (2d) 140993-U
No. 2-14-0993
Order filed May 6, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-399
DENISE TRYGGESTAD-LOPEZ,	)	Honorable Robert C. Tobin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The officer had a reasonable suspicion that defendant had been driving under the influence of alcohol based on the smell of alcohol coming from the vehicle, defendant's admission that she had drunk one beer, and the officer's observation that defendant had red and watery eyes. Therefore, we affirmed the trial court's ruling denying defendant's motions to quash arrest and suppress evidence.

¶ 2 Following a jury trial, defendant, Denise Tryggestad-Lopez, was found guilty of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2010)). On appeal, she argues that trial court erred in denying her motions to quash arrest and suppress evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted for aggravated DUI on September 23, 2010. The indictment alleged that defendant was driving under the influence on September 3, 2010, and had two prior DUIs.

¶ 5 On October 26, 2011, defendant filed a motion to suppress statements; a motion to suppress evidence; and a motion to quash arrest. The last motion alleged that the arresting officer did not have reasonable suspicion to perform an investigatory stop, detain her, or place her in custody.

¶ 6 A hearing on the motions took place on September 12, 2012. We summarize the testimony of Sergeant Edward Krieger, the only witness. On September 3, 2010, shortly after midnight, he was checking the speed of cars with radar. Krieger was seated in his vehicle with the headlights off. The posted speed limit was 45 miles per hour. His radar indicated that a vehicle was going 54 to 55 miles per hour; he "locked it in at 54" when the vehicle drove past him. There was nothing else unusual about the car. When Krieger turned on his headlights, the vehicle made a quick motion to the right and hit the fog line, but then it came right back. Krieger activated his emergency lights, and the vehicle pulled over in an appropriate area.

¶ 7 Krieger tapped on the vehicle's window, and the driver, defendant, rolled it down. There was a male passenger in the car. Krieger informed defendant of the reason for the stop, and defendant said that she thought the speed limit was 55 miles per hour. Krieger asked defendant where she was coming from. She said Woodman's, which was a grocery store, but Krieger did not see any grocery bags in the car. Defendant said that she was going home. Defendant's license had a Rockford address. Krieger asked if she still lived there, and she responded that she lived in Belvidere. She was going in the appropriate direction of travel for Belvidere.

¶ 8 Krieger noticed that defendant had red and watery eyes, and he could smell an odor of alcohol coming from the car. He thought that the odor was coming from both defendant and the passenger. Defendant had no difficulties giving Krieger her driver's license and proof of insurance. Krieger asked defendant if she had been drinking, and she said that she had consumed one beer. At that point, Krieger did not have any reason to disbelieve her. He returned to the squad car and checked the status of defendant's driver's license. The license was valid, and defendant did not have any warrants.

¶ 9 Krieger agreed that in training, factors indicating possible intoxication included the manner in which the vehicle was being driven; how and where the vehicle stopped; breath odor; demeanor; flushing of the face; disheveled or inappropriate clothing; dexterity and speech issues; and the condition of the driver's eyes. Defendant was normal in these categories except that she had red and watery eyes. Additionally, she admitted drinking one beer and was driving late at night.

¶ 10 Krieger asked defendant to exit the car, which he did not need to do for the speeding investigation. Defendant did not have any problems getting out of the car, walking, or communicating. She was smoking a cigarette, and Krieger asked her to put that out; sometimes people smoked because they were nervous or trying to hide odors. Defendant had sandals in the car but chose to be barefoot when doing the field sobriety testing. She was wearing shorts and a tank top. The roadway was somewhat graded so water could run off it, but it was clear and dry. When telling defendant about the Horizontal Gaze Nystagmus (HGN) test, Krieger noticed an alcohol smell coming from defendant. Defendant initially said that she could not see the pen's tip, so Krieger pointed it out to her. Defendant exhibited all six "clues" during the test, in that, in both eyes, she had lack of "smooth pursuit"; "distinct and sustained nystagmus"; and "nystagmus

prior to 45 degrees." Even having four clues would result in failing the test. Krieger agreed that the HGN test indicated alcohol consumption rather than intoxication, and that defendant did not dispute that she had consumed a beer.

¶ 11 Krieger next discussed the walk-and-turn test. Defendant asked for her glasses, and another deputy who had showed up got them out of the car for her. Defendant could not maintain her balance when Krieger was giving instructions and demonstrating. When doing the test, she did not step heel to toe, she stepped off the line twice, she did an improper pivot, and she raised her arms for balance. Defendant exhibited five "clues" out of eight, and it took only two "clues" to fail the test. During the one legged stand test, defendant did not hop or use her arms for balance. However, she put her foot down once; she swayed when she put her foot down; and she swayed a few times after she picked up her foot again. Exhibiting two out of four "clues" counted as failing the test, and defendant exhibited two of them, those being swaying and putting her foot down.

¶ 12 At that point, Krieger told defendant that he thought that he had enough indicators to arrest her for DUI, but if she took a portable breath test and blew well under the legal limit, he would not arrest her. Krieger was not required to tell defendant that she could refuse the test. Defendant initially said that she did not want to take the test because she had been told not to, but then she voluntarily took the test. In at least one attempt, defendant just puffed up her cheeks but did not open her mouth. Defendant made five or six attempts before she had a sufficient breath sample, which resulted in a reading of .106.

¶ 13 Krieger took defendant into custody for DUI. The arrest was based on her performance on the field sobriety tests, her admitting to having at least one beer, her red watery eyes, the odor of alcohol coming from her breath, and the portable breath test result. When the car was

searched prior to towing, there were no groceries found inside. Krieger admitted that he never asked defendant what she was doing at Woodman's.

¶ 14 Prior to the date in question, Krieger had conducted field sobriety tests over 400 times and had seen thousands of intoxicated people. Krieger opined that defendant was too intoxicated or impaired to be driving.

¶ 15 The trial court denied defendants' motions on October 16, 2012, in a memorandum decision. It reasoned as follows. A traffic stop was analogous to a stop under *Terry v. Ohio*, 392 U.S. 1 (1968). The question was whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances that initially justified the stop.[1] During a lawful seizure, an officer could ask questions unrelated to the original detention without having a reasonable suspicion of criminal activity. The question was whether the officer's actions unreasonably prolonged the detention's duration. Here, the officer's stop was justified based on defendant speeding. The main issue was whether the officer's actions unreasonably prolonged the detention's length. The officer could detain defendant under *Terry* if he had a reasonable and articulable suspicion that she had committed an offense. Sergeant Krieger

[1] In *People v. Gonzales*, 204 Ill. 2d 220, 228 (2003), the supreme court stated that for a vehicle stop, we consider (1) whether the officer's action was justified at its inception and (2) whether it was reasonably related in scope to the circumstances initially justifying interference. However, in *People v. Harris*, 228 Ill. 2d 222, 244 (2008), the supreme court overruled *Gonzales* to the extent that *Gonzales* held that for the second prong, a traffic stop's reasonableness must be judged by whether the officer's actions fundamentally altered the stop's nature. Under *Harris*, the second prong relates only to whether the stop's duration was reasonable. *Id.*

smelled alcohol coming from the vehicle and noticed that defendant's eyes were red and watery. He asked if she had been drinking, and she admitted consuming one beer. At that point, Krieger had a reasonable and articulable suspicion that defendant had been driving under the influence. The belief was more than a hunch but less than probable cause.

¶ 16 The trial court continued as follows. Krieger had the right to ask further questions to either rule out or confirm his suspicion. He asked defendant to perform field sobriety tests, and though she had no obligation to, she consented. Defendant's failure to pass the tests provided him probable cause to believe that defendant had committed a DUI. Krieger offered defendant the opportunity to take a portable breath test, which she was also not obligated to do. Defendant initially refused but then consented. Krieger told defendant that if she blew significantly below the legal limit, he would not arrest her, but this was merely him conceding that a low blood alcohol reading would result in him no longer having probable cause to believe that she was driving under the influence. Therefore, Krieger's actions were lawful, and he had probable cause to arrest defendant for DUI.

¶ 17 Based on this reasoning, the trial court denied the motion to quash arrest and the motion to suppress evidence. It denied the motion to suppress statements on the basis that there was no evidence that defendant made any statements while in custody.

¶ 18 Defendant's jury trial took place on April 23 and 24, 2014. Krieger was again the only witness and provided testimony consistent with that from the hearing on the motions to quash arrest and suppress evidence. The parties elicited certain additional details, and we summarize the relevant portions. Krieger followed defendant for ¼ mile or less before activating his emergency lights. After he tapped on the window, defendant opened up the door, so Krieger assumed the window was not working. In addition to the HGN test, Krieger conducted a vertical

gaze nystagmus (VGN). Nystagmus was the involuntary jerking of the eye that is visible after a person consumes alcohol, and the VGN test checked whether nystagmus was visible in the vertical plane, which could indicate illicit drugs or high doses of alcohol. Defendant had nystagmus on the horizontal plane but not the vertical plane. When defendant was performing the field sobriety tests, the odor of alcohol was strong enough that Krieger could smell it a couple of feet away. After Krieger arrested defendant, she behaved normally during the ride to the police station. At the jail, he gave her the opportunity to take the breath-alcohol test, but she refused.

¶ 19 Krieger agreed that his report did not indicate that he smelled alcohol on defendant's person; he testified that he inadvertently left that fact out. Before defendant got out of the car, he had no reason to disbelieve that she had only had one beer. Based on Krieger's training and experience, red and watery eyes could indicate that someone had consumed alcohol.

¶ 20 Defendant moved for a directed verdict, which the trial court denied. The jury found defendant guilty of aggravated DUI.

¶ 21 On May 23, 2014, defendant filed a motion for a new trial, and she subsequently filed an amended motion for a new trial. The trial court denied the motion on September 4, 2014. It sentenced her to an agreed sentence of 10 days in jail and 24 months' probation. It also ordered the payment of various fines, fees, and costs. Defendant timely appealed.

II. ANALYSIS

¶ 22 On appeal, defendant argues that the trial court erred in denying her motions to quash arrest and suppress evidence. When reviewing rulings on motions to suppress, we defer to the trial court's factual findings and reverse those findings only if they are against the manifest weight of the evidence. *People v. Almond*, 2015 IL 113817, ¶ 55. Such deference is based on

the recognition that the trial court is in a superior position to determine and weigh the witnesses' credibility, observe their demeanor, and resolve conflicts in their testimony. *People v. Richardson*, 234 Ill. 2d 233, 251 (2009). However, we review *de novo* the ultimate legal ruling on the motion to suppress. *Almond*, 2015 IL 113817, ¶ 55. Moreover, in reviewing the trial court's ruling on a motion to suppress, we may consider evidence presented at both the suppression hearing and the trial. *Id.*

¶ 23 Vehicle stops must comply with the fourth amendment's reasonableness requirement, and we analyze them under the principles articulated in *Terry*, 392 U.S. 1. *People v. Close* 238 Ill. 2d 497, 505 (2010). An officer may conduct a brief investigatory stop of a vehicle without probable cause if the officer believes that a crime has been or is about to be committed. *Id.* The officer must be able to cite specific, articulable facts which, when combined with rational inferences derived from them, reasonably warrant the intrusion. *Id.* In judging the officer's conduct, we apply an objective standard rather than a subjective standard. *Id.*

¶ 24 Here, defendant was seized when her car was stopped for speeding. This seizure was lawful, as Krieger had probable cause to believe that she was speeding based on the reading of the radar gun. Still, a lawful seizure can become unlawful if it is prolonged beyond the amount of time reasonably required to complete the traffic stop. *People v. Harris*, 228 Ill. 2d 222, 235 (2008). That is, the stop may last no longer than the time necessary to address the infraction that led to the stop, and "[a]uthority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriguez v. United States*, 575 U.S. __ , __ (2015), 2015 WL 1780927, at *5. An officer may conduct some unrelated checks during a lawful traffic stop, but he may not do so in a manner that prolongs the stop, unless he has the reasonable suspicion of criminal activity necessary to detain someone. *Id.*

¶ 25 The State argues that police officers may order the driver out of the vehicle during a lawful traffic stop. See *People v. Sorenson,* 196 Ill. 2d 425, 433 (2001) (following a lawful traffic stop, the police may order the driver and any passengers out of the vehicle pending completion of the stop). However, after Krieger checked defendant's license and insurance and returned them to her, he admittedly had no reason to ask her to get out of the car other than to perform field sobriety tests. Absent a reasonable, articulable suspicion that she was driving under the influence of alcohol, having her exit the car *and* perform the tests would qualify as unreasonably prolonging the length of the traffic stop. *Cf. id.* at __ (dog sniff extending traffic stop by seven or eight minutes unreasonably prolonged the stop if the officer did not have reasonable suspicion of criminal activity relating to the sniff); *People v. Hall,* 351 Ill. App. 3d 501, 504 (2004) (when officer gave the defendant a warning and said that he was free to go, the stop's purpose was complete, and subsequent questions regarding contraband and requests to search the car impermissibly prolonged the defendant's detention). Therefore, the question is whether Krieger had a reasonable, articulable suspicion that defendant was driving under the influence of alcohol.

¶ 26 Defendant notes that during the hearing on the motions to quash arrest and suppress evidence, Krieger said that he asked her to get out of the car "[b]ecause she had red, watery eyes, because she admitted to having at least one beer, and [he] stopped her late at night." When asked if there was anything else, Krieger responded, "At that point, no." Defendant argues that based on this testimony, Krieger did not consider the alcohol odor coming from the car to be a factor in asking her to get out of the car, which was logical because he thought it could have been coming from the passenger.

¶ 27 We note that when asked if the alcohol odor was coming from defendant or the

passenger, Krieger responded that he thought it was coming from both of them. Moreover, regardless of what Krieger stated that he relied on in asking defendant to exit the vehicle, we examine a *Terry* stop under an objective standard rather than a subjective standard (*Close*, 238 Ill. 2d at 505), and here Krieger clearly testified about the alcohol odor coming from the car.

¶ 28 Defendant argues that even if the odor of alcohol could be considered, it did not create a reasonable suspicion that she was committing a crime, as Krieger admitted that it was possible to smell alcohol after only one beer, and having one beer was not a crime. Defendant argues that it did not even create a reasonable suspicion of a crime, and that simply being out late at night was also not a crime. She further argues that Krieger did not testify that red, watery eyes indicated intoxication, and she contends that the condition could have been due to allergies or a medical condition.

¶ 29 Defendant additionally notes that in determining the reasonableness of an officer's action, we must consider all of the circumstances that existed at the time. See *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 23 ("In determining the reasonableness of a *Terry* stop, we look to the totality of the circumstances."). Defendant argues that the vast majority of circumstances indicated that she was not intoxicated. She points out that her driving up until the time of the stop was normal, other than that she was speeding. Moreover, at the time of the stop, her demeanor was normal and she answered questions appropriately; her clothing was not dirty or disheveled; her speech was not slurred or slow; there were not any problems with her manual dexterity; she did not have flushing or redness in her face; her direction of travel was accurate to her home; and she did not demonstrate any confusion. Defendant argues that while Krieger testified that the presence of these characteristics indicate intoxication, the absence of them do not indicate the lack of intoxication, he also admitted at trial that the characteristics' absence

could be inconsistent with intoxication. Moreover, she argues that the characteristics are part of the totality of the circumstances that must be considered in assessing the reasonableness of Krieger's actions.

¶ 30 The State argues that Krieger had a reasonable suspicion of DUI, citing *Village of Lincolnshire v. Kelly*, 389 Ill. App. 3d 881 (2009), and *People v. Bruni*, 406 Ill. App. 3d 165 (2010). In *Kelly*, the defendant was pulled over for speeding. *Kelly*, 389 Ill. App. 3d 882. The officer noticed a strong odor of alcohol when he first spoke to the defendant. *Id.* She said that she was coming from the Lincolnshire area, but when asked where in that area, she said that she was coming from the Vernon Hills area and that " 'we got really lost.' " *Id.* The defendant had been at T.G.I. Friday's in Mundelein and admitted drinking one glass of wine. *Id.* Based on these factors, the officer administered field sobriety tests. *Id.* at 884. There were no problems with the defendant's eyes, her clothes were orderly, she was polite, she gave him her license without difficulty, and walked from the car normally. *Id.* at 882-83. This court stated that, in light of the standard for reasonable suspicion and given the officer's experience, he had more than a mere hunch of a DUI violation because "[h]e smelled a strong odor of alcohol and defendant admitted to drinking." *Id.* at 887. We stated that we understood the trial court's apprehension about allowing an officer to detain a driver for a minor traffic violation and then administering field sobriety tests, but that " 'an officer faced with these facts would be derelict in his duties if he chose not to conduct a further investigation.' " *Id.* (quoting *Village of Plainfield v. Anderson*, 304 Ill. App. 3d 338, 342 (1999)).

¶ 31 In *Bruni*, the defendant was stopped at a sobriety checkpoint. *Bruni*, 406 Ill. App. 3d at 166. In response to questioning, the defendant said that he had been at a karaoke party, and he added that he had won a karaoke contest. *Id.* The officer noticed a faint odor of alcohol from the

vehicle and that the defendant's eyes were glossy. *Id.* The officer asked the defendant if he had been drinking, and the defendant said that he had drunk one beer. The officer then asked the defendant if he would step out of the car and perform field sobriety tests, and the defendant agreed. *Id.* The officer subsequently concluded that the defendant was under the influence of alcohol based on his performance on the tests. *Id.*

¶ 32 On appeal, the defendant argued that, among other things, the officer did not have a reasonable, articulable suspicion that he was under the influence of alcohol. This court held that the "defendant's admission that he had consumed a beer, coupled with the officer's testimony that he detected the odor of alcohol emanating from the passenger compartment of [the] defendant's vehicle and the officer's observation that [the] defendant's eyes were 'glossy,' was sufficient to justify the relatively minor intrusion of requesting that a properly stopped motorist step out of a vehicle to perform field sobriety tests." *Id.* at 172. We again quoted *Anderson* for the proposition that, under the circumstances, an officer would be derelict in his duties if he did not choose to conduct a further investigation. *Id.*

¶ 33 Thus, in both *Kelly* and *Bruni*, this court held that a driver's admission to drinking an alcoholic beverage and the smell of alcohol coming from the car, along with glossy eyes in *Bruni*, provided a reasonable and articulable suspicion of DUI. We agree with the State that based on these cases, Officer Krieger likewise had a reasonable and articulable suspicion that defendant was under the influence of alcohol based on the smell of alcohol coming from the car, her admission to drinking a beer, and her red and watery eyes. While defendant argues that Krieger did not testify that red, watery eyes indicated intoxication, Krieger testified at the hearing that factors indicating possible intoxication included the condition of the driver's eyes, and that defendant's eyes were red and watery. Similarly, at trial he testified that based on his

training and experience, red and watery eyes could indicate that someone had consumed alcohol. See *Almond*, 2015 IL 113817, ¶ 55 (we can consider evidence at both the suppression hearing and trial in reviewing a ruling on a motion to suppress). *Id.* Defendant may not have shown indications of intoxication in many other ways, such as her appearance, speech, and manner, but these factors do not negate the indications that Krieger did observe.

¶ 34 Defendant attempts to distinguish *Kelly* and *Bruni*. She argues that in *Kelly*, the odor of alcohol was strong and must have been coming from the driver because there was no indication of a passenger. She further argues that the defendant's answers to questions about where she was coming from were inconsistent and confused, which could also indicate impairment. Defendant argues that in *Bruni*: there was a more reasonable belief that the driver had been consuming alcohol because he was coming from a karaoke party, as opposed to a grocery store; the consumption of alcohol occurred closer in time to the stop; the defendant stated that he had won a karaoke contest, which would lead to the belief that he celebrated more with alcohol, and it was also an example of an excited, inappropriate demeanor; the odor must have been coming from the driver because there was no mention of a passenger; and the defendant had glossy/glassy eyes, which was an indicator of intoxication.

¶ 35 Defendant's argument is not persuasive. Although defendant argues that the defendant in *Kelly* did not have a passenger, the defendant said that " 'we got really lost,' " (*Kelly*, 389 Ill. App. 3d at 882) which would imply that someone else was in the car with her. Even otherwise, defendant admitted drinking one beer, so it was not unreasonable to presume that at least some of the alcohol smell could be coming from her. More significantly, while defendant attempts to tie the driver's confused statements in *Kelly* to our conclusion in that case, we specifically held that the officer had a reasonable and articulable suspicion of a DUI violation because "[h]e smelled a

strong odor of alcohol and defendant admitted to drinking." *Id.* at 887. We cited these same two factors in describing the *Kelly* case in *Bruni*. See *Bruni*, 406 Ill. App. 3d at 170. Similarly, in *Bruni*, we specifically pointed to the defendant's admission that he had consumed a beer, the officer's testimony of the odor of alcohol coming from the vehicle, and the officer's observation that the defendant had glossy eyes in concluding that the officer had a reasonable and articulable suspicion that the defendant was under the influence of alcohol. As such, here defendant's admission to drinking a beer, the odor of alcohol coming from the car, and Krieger's observation that defendant's eyes were red and watery constituted a reasonable and articulable suspicion that defendant was under the influence of alcohol, justifying the request that she perform field sobriety tests.

¶ 36 Defendant argues that even if Krieger had a reasonable suspicion when he asked her to get out of the car, the suspicion was no longer reasonable when she exited the car without stumbling, did not have any problems speaking or walking to the test site, and did not appear nervous. Defendant focuses on the time between when she got out of the car and when Krieger began giving her instructions and smelled alcohol on her breath.

¶ 37 Defendant cites *People v. Cummings*, 2014 IL 115769, in support. There, an officer checked a vehicle's registration and saw that its owner, a woman, had an outstanding warrant for her arrest. *Id.* ¶ 5. When he pulled the van over, he saw that the driver was a man. *Id.* ¶ 6. He still asked for license and insurance as " 'standard operating procedure' " after pulling over a car (*id.*), which led to a citation of the driver for driving while license suspended (*id.* ¶ 3). Our supreme court stated that while the officer initially had a reasonable suspicion that the driver was subject to seizure, that suspicion disappeared when he saw that the driver was a man. *Id.* ¶ 20. The court stated that requesting the defendant's license impermissibly prolonged the stop

because it was not related to the reason for the stop, and it violated the fourth amendment. *Id.* ¶¶ 20, 28. Defendant argues that in the instant case, even if Krieger had a reasonable suspicion that justified asking her to exit the car, the suspicion dissipated in the face of additional observations that her mental and physical abilities were not impaired.

¶ 38 Defendant's argument is not persuasive. First, *Cummings* was very recently vacated by the United States Supreme Court, which ordered our supreme court to consider it in light of *Rodriguez*. *Illinois v. Cummings*, No. 14-209 (April 27, 2015). Second, in *Cummings*, any reasonable suspicion of the driver being the woman wanted on an arrest warrant was eliminated when the officer saw that the driver was a man. Here, in contrast, defendant's behavior in the brief time between when she exited the car and Krieger started giving her sobriety test instructions did not negate the facts that Krieger had smelled alcohol from the car, that defendant had admitted drinking an alcoholic beverage, and that Krieger had observed her eyes to be red and watery.

¶ 39 Last, defendant argues if we agree with her first argument and find that Krieger's original request for defendant to exit the car was unreasonable, or if we agree with her second argument and find that Krieger's further request to perform field sobriety tests was unreasonable, her consent to perform the tests should be deemed tainted with the original illegality, and we should suppress the test results. As we have determined that Krieger's request that defendant perform field sobriety tests was at all relevant times supported by a reasonable suspicion that she had been driving under the influence of alcohol, there is no basis on which to suppress the test results.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the judgment of the circuit court of Boone County.

¶ 42 Affirmed.