2015 IL App (2d) 141187-U
No. 2-14-1187
Order filed October 21, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of De Kalb County.
Plaintiff-Appellant,	)	
v.	)	Nos. 14-DT-287 14-TR-8971
JOHN HARVAT,	)	Honorable John F. McAdams,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendant's motion to suppress and petition to rescind: the seizure of defendant was invalid as community-caretaking (given that, per the trial court's finding, before the seizure the officers had dispelled their concern that defendant had been vomiting) or as a *Terry* stop (given that the officers merely confirmed the location of defendant's vehicle as described by an unidentified informant).

¶ 2 On July 18, 2014, defendant, John Harvat, was arrested at an oasis on I-88 in De Kalb County and was charged with driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2014)). The arresting officer served defendant with notice of the statutory

summary suspension of his driving privileges due to his refusal to submit to, or failure to complete, chemical testing to determine the concentration of alcohol in his blood. On July 28, 2014, defendant filed a petition to rescind the statutory summary suspension, challenging, *inter alia*, the lawfulness of the investigatory stop leading to his arrest. Defendant also moved to suppress evidence obtained as a result of the stop and the ensuing arrest. Following an evidentiary hearing, the circuit court of De Kalb County granted both the rescission petition and the motion to suppress, and the State brought this appeal. We affirm.

¶ 3 At the hearing, Illinois State Trooper Juan Juarez testified that on July 18, 2014, while patrolling I-88, he pulled into the De Kalb Oasis to look for a possibly intoxicated motorist. Juarez testified that he had been advised by a dispatcher that a witness had reported observing a black Corvette swerving on the roadway. At the oasis, Juarez noticed a black Corvette in the parking lot. Juarez approached the vehicle. From a distance of about 25 feet, Juarez observed the driver leaning out of the open driver's-side door. It appeared to Juarez that the driver was vomiting. Juarez testified that at that point he "initiated a motorist assist, which is a well being check." As Juarez proceeded toward the vehicle, he saw the driver sitting in the vehicle, appearing to adjust the radio. Juarez identified defendant as the driver of the vehicle.

¶ 4 Juarez testified that he initiated a conversation with defendant. A fellow state trooper was present during the conversation. Juarez asked defendant if he was alright and if he had been vomiting. Defendant indicated that he was alright. Defendant explained that he had dropped his cell phone and was looking for it beneath his seat. Juarez detected the odor of an alcoholic beverage emanating from defendant's vehicle and observed that defendant's eyes were bloodshot and glassy. Juarez asked defendant to step out of the Corvette. Defendant complied and Juarez

then administered a series of field sobriety tests. In Juarez's opinion, defendant failed each of the tests.

¶ 5 Juarez testified that his squad car was equipped with a video camera, which recorded Juarez's encounter with defendant. According to Juarez, the recording equipment "activates about a minute before you switch on the lights."[1] The recording was played at the hearing and was admitted into evidence but has not been included in the record on appeal. It is apparent, however, that the footage was "time-stamped" with hours, minutes, and seconds in 24-hour notation.

¶ 6 On cross-examination, Juarez testified that the other state trooper at the scene, Brett Nicholsons, arrived in a separate squad car. They both approached defendant's car and then ran back to Juarez's squad car. Juarez explained that they did so to activate the video camera because, pursuant to Department of State Police policy, "every stop, every motorist assist is supposed to be recorded."

¶ 7 Under examination by the court, Juarez testified that, when he first "pulled up," the driver's-side door to defendant's vehicle was open and defendant was leaning out. Juarez testified that he then parked "right behind" defendant's vehicle but did not immediately activate his squad car's emergency lights. The lights were not on at the point in the video recording time-stamped 23:53:16. Juarez activated his emergency lights 17 seconds later, at 23:53:33. Juarez testified that, when he activated his emergency lights, his squad car was parked about five feet behind defendant's vehicle.

[1] Presumably, the equipment records a continuous "loop" of footage before being activated.

¶ 8 In announcing its ruling on the rescission petition and the motion to suppress, the trial court indicated that there was "somewhat of a discrepancy or a confusion between [Juarez's] testimony and then the video." The trial court observed that the video recording showed that, 30 seconds before Juarez activated his squad car's emergency lights, he and Nicholsons were standing about 15 feet from defendant's vehicle and were talking. The court stated, "It looked to me like what these officers were going to do, is what I think they should have done, is walk up to the vehicle, not turn on any lights, not seize [defendant], just walk up and have a consensual encounter." The court found, however, that Juarez and Nicholsons "change[d] course":

> "[O]ne trooper walks back to his vehicle, and the other trooper without any headlights on starts to walk towards [defendant's] car. At that point [defendant] shuts the door. At that point the officer gets within one or two feet to the back bumper of [defendant's] car, and it's clear to me on the video, and it should have been clear to the officer on the scene who is a foot and a half or 2 feet behind [defendant's] car, that there was no vomit on the pavement.
>
> If you're driving up and you think you see somebody vomiting, that might give the police a reason to seize the person for community caretaking functions to see if the person is okay, but that's not what we have here. What we have here is a seizure at the point of 11:53:17. That's when the officer—at 11:53:17 the officer is standing 1 to 2 feet behind the vehicle and clearly can see, because I can see it on the video, that there's no vomit there, and the defendant's door is shut.
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> So now you have a vehicle that's lawfully parked in a parking lot that he's allowed to be in, and any *** thought that the officer had, hey, I may have to protect the public and perform a community caretaking function by helping this motorist *** is

dispelled. There's no longer that need. If he thought the person was vomiting, that might give them a reason to stop him, but once he realizes there's no vomit, there's no basis for a community caretaking function at that point.

So, at 11:53:32, that's when the seizure takes place. That's when the lights go on, that's when the officer pulls up behind 5 feet, that's when the two officers walk up to the vehicle. ***

They had in their mind when they drove up and they were 25 feet away, the car was open and it looked like somebody was vomiting. But then now the car door is shut at the time of the seizure, the officers got out of the vehicle and walked close enough to the vehicle to determine that there was no vomit, so to then say well, we're going to do a motorist assist, we're going to do—we're going to perform this community caretaking function, given all the information that he had at that point, I don't think it's reasonable."

¶ 9 Section 11-501.1 of the Illinois Vehicle Code (625 ILCS 5/11-501.1 (West 2014)), which is commonly known as the "implied consent law," provides that a motorist operating a vehicle on a public highway in Illinois is deemed to have consented that, if arrested for DUI, he or she will submit to chemical testing to determine his or her blood alcohol level. If the motorist refuses to undergo testing, or submits to testing that reveals a blood alcohol level of 0.08 or more, his or her driving privileges will be summarily suspended. However, the motorist is entitled to rescission of the suspension if it resulted from an unconstitutional seizure of the motorist. See *People v. Crocker*, 267 Ill. App. 3d 343, 345 (1994). On review of the trial court's ruling, the trial court's findings of fact will not be disturbed unless they are against the manifest weight of the evidence. *People v. Rush*, 319 Ill. App. 3d 34, 38 (2001). However, the trial court's ultimate conclusion as to the legality of the seizure is reviewed *de novo*. *Id.* at 38-39. The same standard

of review applies to the trial court's ruling on a motion to quash an arrest and suppress evidence. *Id.*

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

> "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.]"

Vehicle stops are seizures and are generally analyzed under the principles governing *Terry* stops. *People v. Close*, 238 Ill. 2d 497, 504-05 (2010).

¶ 11 In addition, a seizure may be justified under the community-caretaking doctrine. "Rather than describing a tier of police-citizen encounters, community caretaking refers to a capacity in which the police act when they are performing some task unrelated to the investigation of crime, such as helping children find their parents, mediating noise disputes, responding to calls about missing persons or sick neighbors, or helping inebriates find their way home." *McDonough*, 239 Ill. 2d at 269. A seizure passes constitutional muster under the community-caretaking doctrine if the law-enforcement officer effecting the seizure is performing some function other than the

investigation of a crime and the seizure "was undertaken to protect the safety of the general public." *Id.* at 272.

¶ 12 The State argues that the seizure in this case was constitutional under both the community-caretaking doctrine and *Terry*. Initially, we note that the encounter here became a seizure when Juarez activated the emergency lights on his squad car. See *People v. Smulik*, 2012 IL App (2d) 110110, ¶ 6. Indeed, during the proceedings below, the State conceded that a seizure occurred at that point. The State contends that Juarez was engaged in community caretaking inasmuch as he observed that defendant appeared to be vomiting and might therefore have needed Juarez's assistance. However, upon viewing the video recording of the encounter, the trial court found that, *before* Juarez activated his emergency lights, he and a fellow state trooper had walked close enough to defendant's vehicle to determine that defendant had not been vomiting. Thus, the precise concern underlying Juarez's decision to initiate a "motorist assist" had been resolved. According to the State, however, "[w]hat [Juarez] perceived as a man vomiting could have been a person leaning out, gasping for breath due to a heart attack, stroke or pneumonia." We disagree. Juarez never specified what led him to believe that defendant had been vomiting. It is therefore difficult to assess the likelihood that whatever Juarez saw could have been a sign of respiratory distress. To allow this *post hoc* rationalization on the basis of the record before us would give police too much latitude to conduct criminal investigations under the guise of rendering assistance. See generally Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 Wash. & Lee L. Rev. 1485, 1562-63 (2009) ("The challenge of [the] community-caretaking doctrine is to permit helpful police to fulfill their function of assisting the public, while ensuring that searches for law-enforcement purposes satisfy the requirements of the Fourth Amendment.").

¶ 13 The trial court's salient factual finding—that, by the time the seizure occurred, there was nothing that would lead Juarez to believe that defendant was in need of assistance—is not against the manifest weight of the evidence. Based on that finding, we agree with the trial court's ultimate conclusion that the stop was not permissible under the community-caretaking doctrine.

¶ 14 Furthermore, in order for community caretaking to justify a seizure, the police must be performing some function other than investigating the violation of a criminal statute. *People v. Luedemann*, 222 Ill. 2d 530, 546 (2006). Here, Trooper Juarez testified that he entered the DeKalb Oasis for the specific purpose of looking for a vehicle matching the description of that given by his dispatch as a "possible intoxicated driver." When he saw defendant's vehicle, which matched the description given, he pulled up behind it, put on his emergency lights, and approached. Juarez was in the process of investigating a crime and the trial court's determination that this was not community caretaking based on *Luedemann* was supported by the record.

¶ 15 We turn now to the State's alternative argument (which, we note, was not raised in the trial court until the State moved to reconsider the ruling on defendant's suppression motion and his rescission petition) that the seizure that occurred here was a permissible *Terry* stop. The State argued that the report of a possibly intoxicated motorist in a black Corvette created a reasonable suspicion that defendant had committed a crime. When the seizure occurred, Juarez had no personal knowledge of any facts suggesting that defendant was intoxicated. Instead, Juarez relied on information provided by a dispatcher. This court has noted:

> "If *** the officer initiating the stop relies on a dispatch, the officer who directed the dispatch must have possessed sufficient facts to establish reasonable suspicion for the stop. [Citation.]

An investigatory stop need not be based on personal observations by the officer conducting the stop (or by those officers whose knowledge is imputed to the officer conducting the stop). [Citation.] A stop may also be based on information received from members of the public. [Citation.] However, the informant's tip must bear ' "some indicia of reliability' " in order to justify the stop. [Citation.] '[A] reviewing court should consider the informant's veracity, reliability, and basis of knowledge.' [Citation.] Whether a tip is sufficient to support a stop is not determined according to any rigid test but rather depends on the totality of the circumstances. [Citation.]

The nature of the informant is relevant. All other things being equal, information from a concerned citizen is ordinarily considered more credible than a tip from an informant who provides information for payment or other personal gain. [Citation.] Another significant factor in determining the reliability of a tip received from a member of the public is whether, prior to conducting a *Terry* stop, the officer is aware of facts tending to corroborate the tip. [Citation.] This court has observed that '[c]orroboration is especially important when the informant is anonymous [citation] and is even more important when the anonymous tip is given by telephone rather than in person.' [Citation.] There is authority, however, that a tip conveyed via an emergency telephone number—a 911 call for instance—should not be considered 'truly anonymous,' even if the caller does not specifically identify himself or herself. [Citation.] The rationale is that such a caller is likely aware that, because the authorities often record emergency calls and have the means to instantly determine the telephone number from which a call was placed, they may therefore be able to determine the caller's identity. That an

> informant has placed his or her anonymity at risk may be considered in assessing the reliability of the tip. [Citations.]
>
> Even when information comes from an identified informant, 'it remains the case that a minimum of corroboration or other verification of the reliability of the information is required.' [Citation.]" (Emphasis in original.) *People v. Linley*, 388 Ill. App. 3d 747, 749-51 (2009).

¶ 16 Here the record is largely devoid of evidence establishing the reliability of whoever reported to Juarez's dispatcher that there was a "possibly intoxicated" motorist on I-88 driving a black Corvette. Moreover, Juarez was able to corroborate nothing more than the presence of a black Corvette on I-88. The record lacks any evidence concerning the identity of the witness who saw the Corvette swerving, how the information was conveyed to the dispatcher, when the dispatcher received the information, when Trooper Juarez received the dispatch, the Corvette's supposed direction of travel, where on I-88 in relation to the oasis the Corvette was seen swerving, any description of the erratic driving other than "swerving," and any description or identification of the vehicle other than a "black Corvette." Under these circumstances the record does not support a determination that Juarez had a reasonable suspicion of criminal activity, so *Terry* does not justify the seizure in this case. *Cf. Village of Mundelein v. Thompson*,341 Ill. App. 3d 842, 851 (2003) (stop valid when police found van where *indentified* informant said it would be).

¶ 17 For the foregoing reasons, the judgment of the circuit court of De Kalb County is affirmed.

¶ 18 Affirmed.