2015 IL App (3d) 130833-U

Order filed May 14, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellant,	)	
	)	Appeal No. 3-13-0833
v.	)	Circuit No. 12-CF-1590
	)	
MARCUS BROWN,	)	Honorable
	)	Edward A. Burmila, Jr.,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Presiding Justice McDade dissented.

ORDER

¶ 1 *Held*: The trial court's order suppressing evidence found during a search of defendant's person is reversed.

¶ 2 After a search of his vehicle and person, defendant, Marcus Brown, was charged with unlawful possession of a controlled substance (5-Methoxy-N, N-diisopropyltryptamine) (720 ILCS 570/402(c), 204(d)(54) (West 2012)). He filed a motion to suppress the evidence, which the trial court granted. The State appeals. We reverse the trial court's decision and remand the cause for further proceedings.

¶ 3 FACTS

¶ 4 At a hearing on defendant's motion to suppress, Officer Thomas Hannon testified that just after midnight on April 28, 2012, he observed a vehicle fail to make a complete stop at a stop sign. Hannon activated his emergency lights. The vehicle stopped in a well-lit minimart parking lot. Hannon pulled in behind the vehicle.

¶ 5 Hannon exited his cruiser and approached the vehicle. Defendant was seated in the driver's seat. There were no other passengers in the vehicle. Hannon requested defendant's license and proof of insurance and informed defendant that he had been pulled over for failing to make a complete stop at a stop sign. Hannon noticed a clear plastic cup containing liquid in the center console and smelled a strong odor of an alcoholic beverage. Hannon saw a "clear corner-cut Baggie with a white powdery residue" on the front passenger floorboard. Based on the residue and the way the baggie was cut, Hannon suspected that the baggie had once contained cocaine. Hannon did not question defendant about the baggie or the alcohol smell, but instead, returned to his cruiser to perform a warrant and license check.

¶ 6 While Hannon sat in his cruiser waiting on the background check, he observed defendant—who was still seated in the driver's seat of his vehicle—make a "suspicious" movement, like he was reaching down toward his shoe or sock: "I observed him dip his right-hand shoulder down to either the ground, the driver's side floor, or near the console. In that direct area I could not see directly, but he was making those movements."

¶ 7 After backup arrived, Hannon again approached the vehicle and asked defendant to step out of the vehicle. Hannon patted him down for weapons but found none. Hannon asked defendant whether he had anything illegal in his car. Defendant responded that he had a partially empty bottle of Remy Martin under the front seat, which defendant had drunk from that night.

¶ 8 Hannon testified that he did not have any suspicion that defendant was under the influence of alcohol. Defendant was not slurring his speech or exhibiting problems with his balance. Nor did Hannon at any time suspect that defendant was under the influence of a controlled substance.

¶ 9 Hannon asked defendant why he reached down toward his right shoe while Hannon had been running the background check. Defendant first replied he was picking up a pack of cigarettes that a friend left in his car. Later, defendant told Hannon he was putting his insurance card back into the glove box.

¶ 10 Based on the presence of the corner-cut baggie, Hannon searched defendant's vehicle. Because of the way the baggie was cut and the appearance of the residue, Hannon suspected that "it did at one time contain either a form of rock cocaine or powder cocaine." Hannon recovered the baggie from the car and noticed that the top of the bag looked stretched out as if it had once been tied and then torn open in a hasty manner to quickly access its contents. Hannon inferred that defendant had hidden the former contents of the baggie somewhere in the vehicle or on his person.

¶ 11 After Hannon searched the vehicle without finding any controlled substances, he decided to search defendant's shoe: "the way he was dipping his shoulder to his right, and these—the way the bag was torn, it was my assumption that it could be possibly in his shoe. The shoe is a common place for subjects to hide narcotics if they are trying to conceal them." The prosecutor asked Hannon, "And you had him remove his right shoe to confirm your suspicions that he had taken that contraband from that plastic bag and put it in his shoe?" Hannon replied, "Yes, ma'am." Inside defendant's shoe, Hannon found different colored pills, which he suspected were ecstasy.

¶ 12 Neither the corner-cut baggie nor the bottle of Remy Martin was retained as evidence.

¶ 13 The defense introduced into evidence the video recording of the stop recorded by the "dash-cam" mounted in Hannon's cruiser. On the video Hannon stopped defendant's vehicle and then approached the vehicle and asked for defendant's driver's license and proof of insurance. Hannon returned to his cruiser. After a few minutes, Hannon returned to defendant's vehicle and asked him to exit the car. Defendant complied. Hannon told defendant he saw defendant reaching around in his vehicle while Hannon was running the background check. Defendant told Hannon that he was reaching for a cigarette and was also putting things back in the center console. Defendant said that the only illegal object in the vehicle or on his person was a bottle of Remy Martin located under the passenger seat. Defendant admitted to drinking some of the Remy Martin that night. Hannon stated that he was going to search the vehicle once backup arrived, and if the only contraband in the car was the Remy Martin bottle, Hannon would let defendant go with a warning. Hannon did not mention a baggie prior to searching the vehicle.

¶ 14 Backup arrived, and Hannon patted down defendant for weapons. Hannon then searched defendant's vehicle, including the trunk. After the search, Hannon told defendant that he found a corner-cut baggie that "used to have something up in it." Hannon said, "I am going to do a little more thorough search on you." Hannon then told defendant to take off his right shoe. Inside the shoe, Hannon found pills. After finding the pills, officers placed defendant in handcuffs and under arrest.

¶ 15 Defendant testified that he kept his driver's license in the center console. In order to get it out to give it to Hannon, defendant had to "dump some stuff" out of the console, such as napkins, a hair brush, and papers. Defendant testified that there were no plastic baggies on the passenger floorboard. Defendant had a bottle of Remy Martin in the vehicle that he had drunk from that

night. He denied having a cup of alcohol in the vehicle. When Hannon returned to his cruiser to conduct the background check, defendant picked up a cigarette from the passenger floorboard and also picked up the loose belongings he had dumped out of the center console and returned them back to the center console. Defendant testified that rather than leaning down toward his right shoe, he leaned over toward the passenger seat.

¶ 16 The court granted defendant's motion to suppress. The court found that everything through the search of the vehicle was reasonable. However, it found that the officer's search of defendant's shoe was based on a "mere hunch." The court stated that it found no "evidence that linked the bag that the officer saw in the corner of the vehicle with the defendant's shoe." In addition, the court found that defendant was not under arrest at the time of the search; hence, the search of defendant's person could not be justified as a search incident to arrest.

¶ 17 ANALYSIS

¶ 18 The State—under Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2006)—appeals from the trial court's decision granting defendant's motion to suppress evidence. The State argues that the search of defendant's person was supported by probable cause and was therefore reasonable under the fourth amendment (U.S. Const., amend. IV). We agree.

¶ 19 At the outset, we note that defendant has not filed an appellee's brief. In spite of the lack of an appellee's brief, we will decide the present case on its merits because the record is simple and the issues are such that this court can easily decide them without an appellee's brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 20 When reviewing a trial court's decision on a motion to suppress, we apply a two-tiered standard of review: the trial court's factual findings are reviewed under a manifest weight of the

evidence standard, while the ultimate ruling whether suppression is warranted is reviewed *de novo*. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006).

¶ 21 The fourth amendment to the United States Constitution mandates a "significantly heightened protection afforded against searches of one's person." *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999). A warrantless search of a person is reasonable when there exists probable cause, *i.e.*, when the facts available to the officer would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present on the person. *Florida v. Harris*, ___ U.S. ___, ___, 133 S. Ct. 1050, 1055 (2013).

¶ 22 Here, the trial court found that the officers' actions were reasonable up to the point when Hannon searched defendant's shoe. The record supports this finding as the seizure was valid based on defendant failing to make a complete stop at a stop sign. In addition, the search of the vehicle was valid based on the presence of the baggie containing what Hannon, based on his training and experience, reasonably believed was the residue of a controlled substance. The only issue on appeal is whether there was probable cause to support the search of defendant's person, specifically, his shoe.

¶ 23 Our appellate court recently addressed the issue of probable cause to search vehicle occupants in *People v. Williams*, 2013 IL App (4th) 110857. In that case, police stopped a vehicle containing defendant in the front passenger seat, his significant other in the driver's seat, and the couple's two children in the back seat. *Id.* ¶ 5. The investigating officer detected a strong odor of cannabis emanating from inside the vehicle. *Id.* Based on the odor, officers first searched the driver and the interior of the vehicle for cannabis but found none. *Id.* ¶ 6. Officers then searched the defendant's person, finding cannabis in his shoe. *Id.* ¶ 7. The appellate court upheld that search of defendant's person because the odor encompassed all the occupants of the

vehicle, and established probable cause to search them and the vehicle. *Id.* ¶ 34. In addition, officers searched the defendant only after searches of the vehicle and the driver were unsuccessful. *Id.* ¶ 6-7. At that point, the only logical place that could contain the cannabis was defendant's person.

¶ 24 We find the holding of *Williams* applicable to the present case. Here, the baggie containing the residue of a controlled substance warranted Hannon's belief that there were controlled substances located somewhere within the vehicle, as did the odor of cannabis in *Williams*. As in *Williams*, Hannon searched defendant's person only after a search of the vehicle did not uncover any controlled substances. At that point, the only place the controlled substances could be located was on defendant's person. Hannon's search of defendant's person was not merely a hunch based on the fact that the shoe is a common hiding place. It was a logical conclusion based on the specific facts of this case: there was probable cause to believe that controlled substances were present in the vehicle. When no controlled substances were discovered during the vehicle search, it was reasonable to believe that the substances were located on defendant's person.

¶ 25 Although the presence of the controlled substance residue was sufficient in itself to uphold the search of defendant's person, other facts bolstered Hannon's belief that controlled substances were present on defendant's person. For one, the baggie was stretched and torn, indicating to Hannon that it had been opened hastily, as might occur in order to quickly remove and hide the contents. In addition, Hannon observed defendant leaning over in a manner that led Hannon to believe defendant was hiding something in his shoe. Those facts only strengthened Hannon's reasonable belief that controlled substances were located on defendant's person. In

light of the totality of the present circumstances, there was probable cause to search defendant's person.

¶ 26 Furthermore, the characterization of the basis for looking in defendant's shoe as a "hunch" misapprehends the nature of a search. Implicit in the word "search" is the notion that you do not know exactly where the item sought is located in the area to be searched. Otherwise, there is no reason to "search"; just go to the item. If you have probable cause to believe certain contraband is capable of being hidden on the person of the driver in a vehicle, you certainly have probable cause to search the driver, the same as you have probable cause to search the console or under the floor mat. Looking first in the shoe as opposed to a pocket might reasonably be characterized as a "hunch"; but "hunches" as to where the best place to look during a probable cause search do not negate the probable cause to search the area.

¶ 27 The present case is distinguishable from *United States v. Di Re*, 332 U.S. 581 (1948), where a passenger was unreasonably searched based upon probable cause to believe there was contraband in a vehicle. In *Di Re* there was evidence singling out one of the passengers as in possession of contraband. Therefore the search of a different passenger was unsupported by probable cause. *Id.* To the contrary, in the present case, defendant was the only passenger in the vehicle. Therefore the probable cause established by the baggie was particularized to him, and the search of his person was supported by probable cause.

¶ 28 In light of these facts, we find the trial court erred in holding that Hannon lacked probable cause to search defendant's shoe. The record establishes probable cause. Therefore, we reverse the trial court's order to suppress the evidence and remand the cause for further proceedings.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court of Will County is reversed, and the cause is remanded for further proceedings.

¶ 31 Reversed and remanded.

¶ 32 PRESIDING JUSTICE McDADE, dissenting.

¶ 33 The majority has reversed the decision of the circuit court of Will County suppressing evidence (contraband in the form of a controlled substance) found during a search of defendant's person. For the reasons that follow, I respectfully dissent from that decision.

¶ 34 I would suggest that by characterizing the search of defendant's shoe as based on "a hunch" the trial court was implicitly finding the officer's account of the stop and the basis for his search not to be credible. I would further suggest that there is strong support for such a finding in the record. Indeed much of that support is actually set out in the majority decision.

¶ 35 Officer Hannon stopped defendant for failure to make a "complete" stop at a stop sign. That implies he did not blow through the intersection but came to a rolling stop where the nose of the car does not come up to indicate a full stop. According to the officer, there was nothing about defendant's operation of the car that caused Hannon to suspect defendant was under the influence of either alcohol or drugs.

¶ 36 Hannon testified that when he initially approached the driver's door, he saw a clear plastic cup containing liquid and smelled a strong odor of alcohol. He also saw a "clear corner-cut baggie with a white powdery *residue*" that he suspected "had once contained cocaine." In other words, it was an open, empty bag.

¶ 37 Without asking defendant about either of these items, the officer returned to his cruiser to do a background check. While waiting for the information to come in, he testified he saw defendant make a "suspicious" movement like he was reaching down to his shoe or sock.

Although he could not see directly, he asserted defendant's right shoulder dipped "to either the ground, the driver's side floor, or near the console."

¶ 38 Hannon testified that he searched the vehicle based on the presence of the corner-cut baggie. He searched the defendant's shoe based on the combination of the presence of the baggie and the suspicious shoulder movements he observed from his car. He said, "the way he was dipping his shoulder to his right and these – the way the bag was torn, it was my assumption that it could be possibly in his shoe. The shoe is a common place for subjects to hide narcotics if they are trying to conceal them." To make the point crystal clear, the prosecutor asked: "And you had him remove his right shoe to confirm your suspicion that he had taken that contraband from that plastic bag and put it in his shoe?" The officer confirmed, "Yes, ma'am."

¶ 39 Perhaps the trial judge was as confounded by his testimony as I am because, according to Officer Hannon, the bag was already *open and empty* when he initially approached the car.

¶ 40 Perhaps the trial court was as amazed as I am that this corner-cut empty baggie which constituted the justification for the challenged search was not preserved and retained as evidence. Or that the officer's "dash-cam" video showed no baggie and showed no reference by the officer to either the baggie or the cup of alcoholic beverage. The video also provides no confirmation of the "suspicious" movement that led the officer to conclude the defendant was removing something from an empty bag and hiding it in his shoe.

¶ 41 This absence of any objective corroboration of the officer's account of the traffic stop coupled with the defendant's testimony that there was never a baggie or a cup in the car (although he admitted there was a partially empty whiskey bottle hidden under his seat) could support a very reasonable determination that the officer was acting solely on the basis of a hunch rather than a reasonable suspicion or probable cause.

¶ 42 The trial judge was in a better position to observe the witnesses, assess the evidence (or lack thereof), view the videotape, and evaluate credibility than are we. One could wish he had provided more explanation for his judgment, but there is, in my opinion, nothing in the record to justify reversing his decision to suppress the pills found in defendant's shoe.

¶ 43 That decision should be affirmed.