2015 IL App (5th) 130250-U

NO. 5-13-0250

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Jasper County.
	)	
v.	)	Nos. 13-CM-95, 13-DT-42, &
	)	13-TR-1025
	)	
RICHARD A. COUSERT,	)	Honorable
	)	Daniel E. Hartigan,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Cates and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Where the arresting officer's knowledge and observations failed to support a reasonable and articulable suspicion that the defendant had committed or was about to commit a crime, the defendant's stop was unlawful and we affirm the order granting the defendant's motion to suppress.

¶ 2 The State asks us to overturn the trial court's order granting the defendant's motion to suppress. A conservation officer suspected that the defendant was illegally hunting and stopped the defendant's vehicle. The officer charged the defendant with driving while under the influence of drugs, unlawful possession of cannabis, and unlawful possession of drug paraphernalia. After a hearing on the defendant's motion to suppress,

the trial court concluded that the officer did not have a reasonable and articulable suspicion that a crime had been or was about to be committed. Consequently, the court ruled that the traffic stop was unlawful and suppressed the evidence resulting from that stop. We affirm.

¶ 3 FACTS

¶ 4 Illinois Conservation Police Officer Brandon Fehrenbacher testified at the hearing on the defendant's motion to suppress. Officer Fehrenbacher testified that during deer firearm season he volunteers to work in various Illinois counties to stop people from poaching deer. He has been a conservation officer for 10 years. In his experience, he testified that most illegal poaching activity occurs in the second and third nights of deer season. He testified that "shining" deer is when a person is using some sort of light to illuminate a deer's eyes. Shining for wildlife is illegal. 520 ILCS 5/2.33(i) (West 2012).

¶ 5 Officer Fehrenbacher testified that on November 30, 2012, he was assigned to patrol the west boat ramp area at Newton Lake. He testified that the west boat ramp at Newton Lake and the surrounding woods are a well-known area for poaching. Officer Fehrenbacher testified that he was parked alongside the road south of the boat ramp. The headlights of his vehicle were turned off. Officer Fehrenbacher testified that at 8:15 p.m., he saw the defendant driving his truck toward the ramp area. He stated that the defendant's headlights were turned on. Officer Fehrenbacher confirmed that it was dark at that time of night. The defendant was driving very slowly. Officer Fehrenbacher estimated the defendant's speed to be less than 10 miles per hour. Although the defendant was at the boat ramp, Officer Fehrenbacher testified that he was not boating or

fishing. Officer Fehrenbacher drove towards the defendant, but kept his own headlights turned off. He testified that his suspicions that the defendant was engaged in or about to engage in illegal activity were heightened because the defendant was driving slowly, which is typical of someone who is shining for wildlife. Additionally, he explained that it was the second night of deer season, and that the area is full of wildlife.

¶ 6 Officer Fehrenbacher testified that he was driving in the opposite direction of the defendant. After he passed the defendant's vehicle, he turned on his own headlights, and then activated his take-down lights. Officer Fehrenbacher testified that he intended to conduct a brief traffic stop to ascertain if the defendant had any weapons or deer parts in his vehicle. He explained that a typical stop of this nature would only last about 30 seconds, and that after an officer confirmed that there were no weapons or animal parts with that driver, the driver would be free to leave. In this case, Officer Fehrenbacher testified that the defendant stopped about 30-40 yards after he activated his take-down lights. He testified that this was unusual as most people immediately stop. Officer Fehrenbacher testified that he drove in reverse until his vehicle was parallel with the defendant's vehicle. Both the defendant and Officer Fehrenbacher rolled down their driver's side windows. Officer Fehrenbacher testified that he immediately detected the aroma of burnt cannabis.

¶ 7 Officer Fehrenbacher testified that the nature of the traffic stop changed after he smelled cannabis. The focus of the stop turned to the defendant's drug usage while driving, rather than on shining wildlife. He charged the defendant with two citations for driving while under the influence of drugs and driving while his driver's license was

suspended. Officer Fehrenbacher testified that he seized a drug pipe and cannabis at the time of the stop. The State later charged the defendant by information with one count of unlawful possession of drug paraphernalia and one count of possession of cannabis.

¶ 8 Officer Fehrenbacher testified that he did not hear any gunshots. He did not see the defendant using a spotlight. He also admitted that he saw no wildlife, but claimed that he would not have been able to do so because his own headlights were off. Officer Fehrenbacher explained that the defendant could have been utilizing his truck's headlights to shine wildlife. He testified that the boat ramp area was still open at that time of night, but that there was nothing happening at the boat ramp to have drawn the defendant to that location.

¶ 9 The defendant filed a motion to suppress, arguing that Officer Fehrenbacher did not have probable cause to believe that he had committed, was committing, or was about to commit a crime at the time of the traffic stop. The defendant asked the court to suppress the evidence connecting him to the crime as that evidence was the fruit of his unlawful detention. When the court called the defendant's motion to suppress for hearing, the defendant's attorney acknowledged that he cited the incorrect standard for a traffic stop. The probable cause standard was incorrect. He clarified his argument, contending that Officer Fehrenbacher had no evidence that the defendant had committed a crime. The defendant asked the court to exclude the seized evidence as fruit from the poisonous tree. In response, the State, citing to *Terry v. Ohio*, argued that officers may stop and temporarily detain a person for the purpose of a limited investigation if the officer can point to specific articulable facts, taken together with reasonable inferences

drawn from the officer's experience, which would reasonably warrant the extent of the intrusion. The trial court granted the defendant's motion to suppress on April 30, 2013, stating in part that an officer cannot stop a motorist unless the officer believes that the motorist is illegally hunting. The State filed a certificate of substantial impairment pursuant to Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2006). The State appeals this suppression order.

¶ 10 LAW AND ANALYSIS

¶ 11 The State has filed an interlocutory appeal in this case pursuant to Supreme Court Rule 604(a)(1), alleging that the court's suppression of evidence has substantially impaired its ability to prosecute the case. *People v. Young*, 82 Ill. 2d 234, 247, 412 N.E.2d 501, 507 (1980). On appeal, the State argues that the trial court erred in granting the defendant's motion to suppress. The State claims that the trial court used a hindsight subjective analysis as to whether the defendant was shining for deer, rather than the required objective analysis about what information Officer Fehrenbacher had at the time of the traffic stop. The State argues that the information Officer Fehrenbacher had that night, coupled with his experience as a conservation officer, would warrant a reasonable person to believe that a stop was necessary to investigate the possibility of criminal activity.

¶ 12 On appeal from a ruling on a motion to suppress, we give great deference to the trial court's factual findings. *People v. Braggs*, 209 Ill. 2d 492, 505, 810 N.E.2d 472, 481 (2003). We will not reverse the ruling unless it is contrary to the manifest weight of the

evidence. *Id.* We review the ultimate legal question addressed by the trial court's ruling on a *de novo* basis. *Id.*

¶ 13 Our federal constitution guarantees that all persons have the right to be secure from unreasonable seizure in their persons, homes, papers, and effects. U.S. Const., amend. IV. This constitutional guarantee applies to all seizures, including those which only subject an individual to a brief detention. *People v. Thomas*, 198 Ill. 2d 103, 108, 759 N.E.2d 899, 902 (2001). The reasonableness guaranteed by the fourth amendment generally requires a warrant supported by probable cause in order to carry out a seizure. *Id.*

¶ 14 In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court recognized a limited exception to the probable cause requirement. The Supreme Court held that "a law enforcement officer could, under appropriate circumstances, briefly detain an individual for investigatory purposes if the officer reasonably believed that the person had committed or was about to commit a crime." *People v. Dent*, 343 Ill. App. 3d 567, 576, 797 N.E.2d 200, 208 (2003) (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). *Terry* presents a two-prong approach to determine if the officer's investigatory detention was reasonable. *Dent*, 343 Ill. App. 3d at 576-77, 797 N.E.2d at 208. The first consideration for the court is "whether the officer's action was justified at its inception." *Terry*, 392 U.S. at 19-20. Secondly, a court must review whether the stop was reasonably related in scope to the circumstances resulting in that stop. *Id.* A reasonable suspicion to stop an individual exists when there are articulable facts that would warrant a reasonably prudent officer to investigate further. *People v. Lampitok*, 207 Ill. 2d 231, 255, 798 N.E.2d 91, 106 (2003)

(citing *Maryland v. Buie*, 494 U.S. 325, 334 (1990)). The court must objectively review the reasonable suspicion leading to a suspect's detention by considering the facts available to the officer at the time of the stop. *Dent*, 343 Ill. App. 3d at 577, 797 N.E.2d at 208; *People v. Taylor*, 253 Ill. App. 3d 768, 772, 625 N.E.2d 785, 789 (1993) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). The factual knowledge of a law enforcement officer, based upon that officer's experience, is a relevant consideration in the determination of reasonable suspicion. *People v. Tisler*, 103 Ill. 2d 226, 237, 469 N.E.2d 147, 153 (1984). However, the "officer must be able to point to specific and articulable facts that, taken together with rational inferences, reasonably warranted the intrusion." *Dent*, 343 Ill. App. 3d at 577, 797 N.E.2d at 208 (citing *People v. Cox*, 202 Ill. 2d 462, 467, 782 N.E.2d 275, 278 (2002)). The necessary facts do not have to establish probable cause, but must be more than the officer's hunch. *Id.*

¶ 15 Conservation officers have the same detention, search, and arrest powers as other law enforcement officers. *Fulk v. Roberts*, 164 Ill. App. 3d 194, 198, 517 N.E.2d 1098, 1100 (1987). Therefore, conservation officers have the power to temporarily detain a person to conduct a limited investigation. *Id.* at 198, 517 N.E.2d at 1101.

¶ 16 In this case, the State argues that the facts of this case, coupled with Officer Fehrenbacher's knowledge that poaching occurs in that area, warranted the stop. Officer Fehrenbacher testified that poaching is especially common on the second day of hunting season and around Newton Lake because of the abundance of wildlife. We turn then to what specific actions or inactions the defendant made that led to the stop. The defendant was driving slowly near the boat ramp. The defendant had his headlights turned on. The

trial court concluded that these two facts, even taking into account Officer Fehrenbacher's experience and knowledge of this area, were not sufficient to establish the reasonable and articulable basis to stop the defendant's vehicle. We turn to other hunting and conservation cases for guidance.

¶ 17 Although *Fulk v. Roberts* was a civil rights case stemming from a conservation officer's limited detention of Fulk, the case is helpful for an understanding of what actions or inactions by a motorist can lead a conservation officer to have a reasonable and articulable suspicion of criminal activity. Fulk was an employee of Freeman United Coal Company and was heading to work at night in late November. *Fulk*, 164 Ill. App. 3d at 196, 517 N.E.2d at 1099. Fulk turned on a spotlight that was attached to his truck in order to notify the foreman that he was driving in, and also to locate a drill machine and high wall area that frequently changed locations as the mining work progressed. *Id.* He parked his car, and the two conservation officers approached him. *Id.* The officers asked Fulk why he was shining a spotlight, asked for his identification, and checked to see if he had a firearm in the truck. *Id.* After the investigation was complete, the officers left. *Id.* Fulk sued the conservation officers seeking damages for the alleged violation of his civil rights. *Id.* at 195, 517 N.E.2d at 1098-99. The trial court ruled in favor of Fulk and awarded damages, stating that there were no reasonable grounds to detain him. *Id.* at 198, 517 N.E.2d at 1100.

¶ 18 The officers appealed, arguing that they had sufficient cause to conduct a brief investigatory stop to address their suspicions that Fulk's use of a spotlight was for "shining" purposes. *Id.* The appellate court agreed with the officers. *Id.* The court noted

that it was hunting season and the officers' observations were in an area where wildlife was seen and poaching had occurred. *Id.* at 198-99, 517 N.E.2d at 1101. Furthermore, Fulk was using a spotlight in a sweeping back-and-forth motion commonly associated with "shining." *Id.* at 199, 517 N.E.2d at 1101. The court found that the officers drew a conclusion that any reasonable person might have made under similar circumstances: that Fulk was using the spotlight to look for wildlife. *Id.* Citing section 2.33(i) of the Wildlife Code, the court explained that it is illegal " 'to take, pursue or intentionally harass or disturb in any manner any wild birds or mammals by *** use of lights thereof *** while in the possession of a gun or bow and arrow ***.' " *Id.* (quoting Ill. Rev. Stat. 1983, ch. 61, ¶ 2.33(i)). Fulk was driving in an area of wildlife and was sweeping a spotlight back and forth across the terrain. *Id.* Therefore, the court held that the officers reasonably had the belief that Fulk was violating this section of the Wildlife Code, and the brief investigatory stop was proper. *Id.*

¶ 19 In a more recent case, *People v. Levens*, the conservation officer observed Levens and his passenger driving slowly. *People v. Levens*, 306 Ill. App. 3d 230, 231, 713 N.E.2d 1275, 1276 (1999). Both men were dressed in bright orange hunting clothing and the officer observed the men looking out into a field. *Id.* These observations were made at a time when it was hunting season and wildlife was known to inhabit that area. *Id.* The officer admitted that he did not see Levens violate any motor vehicle laws. *Id.* He stopped Levens because he suspected that Levens was violating the Wildlife Code by using public roadways and his vehicle to hunt. *Id.* Upon approaching the vehicle, the officer noticed a cased shotgun on the vehicle seat. *Id.* The officer asked Levens for his

driver's license and firearm owner's identification card. *Id.* Levens did not have either card and the officer arrested him. *Id.* The trial court granted Levens' motion to suppress the evidence and quash the arrest. *Id.* at 231-32, 713 N.E.2d at 1276. The trial court based its ruling on the fact that the arresting officer did not witness Levens violate any traffic or hunting laws, and thus the stop was invalid. *Id.* at 232, 713 N.E.2d at 1277.

¶ 20 The appellate court agreed with the trial court's statement of the law–that a conservation officer should not stop a motorist unless they reasonably believe that the motorist's hunting is illegal. *Id.* at 233, 713 N.E.2d at 1277. However, the appellate court disagreed with the trial court's interpretation of these facts and application of the law. *Id.* The appellate court noted that the officer saw Levens and his passenger wearing hunting clothes, driving slowly, and looking into a field. *Id.* at 232-33, 713 N.E.2d at 1277. The court explained that Levens and his passenger fit the "hunter's profile." *Id.* The court also noted that the field was in an area known for wildlife and the stop occurred during hunting season. *Id.* The appellate court concluded that the officer's stop was proper because he reasonably believed that Levens was engaged in illegal hunting. *Id.* at 233, 713 N.E.2d at 1277.

¶ 21 Turning to the facts in this case, Officer Fehrenbacher saw the defendant driving slowly in an area near a boat ramp at Newton Lake. The area was open and accessible. Officer Fehrenbacher testified that since there was no activity at the boat ramp, the defendant had no reason to be driving there. We do not agree with Officer Fehrenbacher's conclusion that poaching is the only reason to drive near the west Newton Lake boat ramp. The park was open to the public, and therefore, the defendant had the

right to drive near the lake. We do not agree with the proposition that driving near a boat ramp at night reasonably implies that the defendant was engaged in or was about to engage in illegal hunting.

¶ 22 Officer Fehrenbacher also observed that the defendant was driving slowly. We do not know whether the defendant was familiar with the area. We note that it was dark, and the defendant was driving in close proximity to the lake. Driving slowly, without more, simply does not rise to reasonable suspicion of wrongdoing. This case is factually different from *People v. Levens.* Although Levens and the defendant were both driving slowly, the defendant was not wearing hunting clothing.

¶ 23 Additionally, the defendant was driving with his headlights turned on. Driving at night with headlights illuminated is mandatory. While in theory the defendant could have been using his headlights to shine for deer, the defendant was undoubtedly also using his headlights to see where he was driving. Section 2.33(i) of the Wildlife Code contemplates this possibility. Although it is unlawful to shine for wildlife, "nothing in this Section shall prohibit the normal use of headlamps for the purpose of driving upon a roadway." 520 ILCS 5/2.33(i) (West 2012). Although in *Fulk v. Roberts*, Fulk was using a light for illumination, the facts of this case are distinguishable. Fulk used a separate spotlight and the officers witnessed him moving the light back and forth, as a motorist who is shining wildlife commonly does.

¶ 24 We believe that the defendant's slow rate of driving speed and lawful use of headlights, alone, do not support a reasonable articulable suspicion of illegal hunting. Officer Fehrenbacher testified that he did not see the defendant violate any laws. He did

not hear any gunshot or see any evidence that the defendant had a weapon. He also did not see any animal parts, which would establish that the defendant had been hunting. The defendant was not dressed in hunting gear. The defendant did not use a hand-held or mounted spotlight, as typically done to shine for wildlife.

¶ 25 We conclude that driving slowly at night with the vehicle's headlights turned on in an area known to be replete with wildlife, without more *indicia* of illegal hunting, is insufficient to justify a *Terry* stop. Despite Officer Fehrenbacher's experience with hunting violations, we conclude that he did not objectively have a reasonable and articulable suspicion to stop the defendant. The trial court's order granting the defendant's motion to suppress was proper and not contrary to the manifest weight of the evidence.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, we affirm the judgment of the Jasper County circuit court.

¶ 28 Affirmed.