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2018 IL App (3d) 150446-U

Order filed January 29, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, McDonough County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0446 Circuit No. 14-CF-159
HARVEY BLAND JR.,	)	The Honorable William E. Poncin, Judge, presiding.
Defendant-Appellant.	)	

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's ruling was not against the manifest weight of the evidence. The public defender fee is vacated.

¶ 2 Defendant Harvey Bland was convicted of retail theft over $300 for stealing a television. At pretrial, defendant filed a motion to suppress evidence and confession, claiming the police conducted an illegal prolonged traffic stop. The trial court denied the motion and, subsequently, sentenced defendant to 180 days in jail and 24 months' probation and imposed, *inter alia*, a $500

public defender fee. Defendant appealed, arguing (1) the trial court's ruling on the motion to suppress was against the manifest weight of the evidence, and (2) the $500 public defender fee must be vacated. We affirm in part and vacate in part.

¶ 3 FACTS

¶ 4 Defendant Harvey Bland, Jr., was charged with retail theft over $300 (720 ILCS 5/16-25(a)(1) (West 2014)) for allegedly stealing a television (TV) from Wal-Mart. On September 1, 2014, Officer Ethan Taylor was on patrol and Officer William Lipcamon, his field training officer, was riding with him when Taylor observed a red Dodge sedan without its headlights on. Taylor followed the vehicle for several blocks and saw it weaving between the lanes. Taylor activated his emergency lights and the vehicle pulled over. When Taylor approached the driver's side of the vehicle, he saw a large, unboxed TV wedged in the backseat of the vehicle that still had the packaging labels on the screen. At the same time, Lipcamon approached the passenger rear of the vehicle.

¶ 5 Taylor informed the driver that he stopped the vehicle because the headlights were off and asked the driver for his license, which confirmed the driver was defendant. Defendant told Taylor that his roommate owned the vehicle. Defendant had not made eye contact and appeared very sweaty, which Taylor found peculiar as the temperature at the time was 70 degrees, defendant's window was down, and the air conditioning appeared to be on inside of the vehicle. He believed defendant was acting very nervous. He asked defendant if there was anything illegal in the car and defendant responded no.

¶ 6 When Taylor and Lipcamon returned to the squad car, Taylor told Lipcamon that defendant had appeared nervous and was sweating. Lipcamon advised Taylor that if he had felt "something was off" he should run a criminal history. Taylor ran defendant's information

through dispatch and learned that defendant had a previous burglary charge in Iowa. When he received defendant's criminal history, he was suspicious that the TV was stolen because the TV had no packaging or box, it was wedged in the vehicle, defendant had not made eye contact, and defendant was sweating. He also believed defendant's previous burglary arrest was an indicator that "something else could be going on." Lipcamon stated that he became suspicious based on the information Taylor told him and the criminal history. Taylor began to write a traffic citation, but Lipcamon informed him that there were "other things pressing," and he stopped to continue the investigation.

¶ 7 Taylor called an additional unit to the scene, returned to the vehicle, and asked defendant to step out. He told defendant that he had not written a traffic citation yet and asked defendant if there was anything illegal inside of the vehicle, and defendant responded no. He later asked defendant for permission to search the vehicle and defendant consented. Defendant was told to get out of the car and stand on the sidewalk with Officer Matthew Marass, who arrived on the scene shortly thereafter.

¶ 8 During the search, Taylor asked defendant about the TV and defendant stated that he had purchased the TV at Wal-Mart. Defendant had trouble fitting the TV in the vehicle so he left it in the front entrance of Wal-Mart and went back to his dorm room to find someone with a larger vehicle. He was unable to find another vehicle so he returned to Wal-Mart and squeezed the TV into the rear of the vehicle. Defendant did not have a receipt because he paid cash and did not keep receipts.

¶ 9 Lipcamon asked defendant where he got the TV, and defendant stated he got it from Wal-Mart and that he paid $365. Lipcamon thought the price was strange because he paid $865 for a

similar TV two years prior. While Marass was standing with defendant during the search, defendant told him that defendant purchased the TV for $863 and that the TV was a Vizio.

¶ 10 Afterward, Lipcamon called Wal-Mart and the Wal-Mart employee did not know whether a TV had been stolen but stated that they did not sell a TV that size. Lipcamon returned to the vehicle to obtain the serial number of the TV to give to Wal-Mart when he saw a plastic bag hanging on the TV that contained a manual and remote with a price tag for a 32-inch TV for $348. Lipcamon approached defendant and asked if he had stolen the TV and defendant responded yes. Taylor arrested defendant.

¶ 11 At pretrial, defendant filed a motion to suppress evidence and confession, alleging that the police conducted an illegal prolonged traffic stop. The trial court denied the motion, finding that the prolonged stop was justified because the officers had additional reasonable suspicion that criminal activity might have occurred after they observed the TV and, therefore, defendant's fourth amendment rights were not violated.

¶ 12 The parties agreed to a stipulated bench trial. The State presented (1) Taylor's testimony at the motion to suppress hearing, (2) Lipcamon's testimony at the motion to suppress hearing, (3) Wal-Mart employee testimony that security footage showed defendant walking out of Wal-Mart with a TV, and (4) Wal-Mart employee testimony that Lipcamon returned a 55-inch TV that did not have a record of purchase to Wal-Mart. The trial court found defendant guilty of retail theft over $300. The parties presented a joint sentencing recommendation to the court. The following colloquy occurred:

> MS. BLOOM: Your Honor, the State is ready at this time to provide those terms and conditions to you.
>
> MR. MILLER: The defense is also ready, Your Honor.

THE COURT: All right.

MS. BLOOM: The defendant would be placed on 24 months of probation with the following terms and conditions to apply.

* * *

Number 19. The defendant shall pay a $500 Public Defender reimbursement fee.

* * *

That would be the State's and defense counsel's agreement, Your Honor.

THE COURT: Is that a correct statement of the agreed-upon sentence, Mr. Miller?

MR. MILLER: Yes, Your Honor, and I neglected to advise the Court, we do have a cost sheet that was actually signed by defendant at his last court date, although it is not dated. May I write in today's date next to the signature line and then tender it to the Court?

THE COURT: Yes, you may. And that sheet is a summary of the fines, costs, penalties and assessments?

MR. MILLER: That is correct, and it appears that the defendant, after his [$1000] bond is applied, will owe $1,960.

THE COURT: All right. Mr. Bland, is that your understanding of the agreed-upon sentence?

THE DEFENDANT: Yes, Your Honor.

* * *

THE COURT: Anything you would like to say about the sentence before I indicate whether I will approve it or not?

THE DEFENDANT: No, sir.

THE COURT: All right. May I see the sentencing order?

MR. MILLER: Yes, and I will also tender to the Court the cost sheet that was signed by the defendant on the earlier date.

THE COURT: All right. I will approve the sentence, finding it to be fair and reasonable under the circumstances."

¶ 13 The court sentenced defendant to 180 days in jail and 24 months' probation and imposed $2,960 in fines and cost, including a $500 public defender fee. Defendant appealed the trial court's denial of his motion to suppress.

¶ 14 ANALYSIS

¶ 15 I. Motion to Suppress

¶ 16 Defendant concedes that the initial reason for the stop was warranted. However, defendant alleges that the trial court's ruling was against the manifest weight of the evidence because the officers did not have a reasonable suspicion to prolong the traffic stop to investigate whether the TV in the backseat of defendant's vehicle was stolen. Therefore, defendant argues that the stop was an invalid seizure in violation of his fourth amendment rights. The State asserts that the large, unboxed TV; defendant's nervous appearance; and defendant's profuse sweating constituted a reasonable suspicion to prolong the stop to investigate whether the TV was stolen.

¶ 17 "Review of a motion to suppress evidence presents questions of both law and fact." *People v. Moss*, 217 Ill. 2d 511, 517 (2005). The trial court's findings of fact will be upheld unless they are against the manifest weight of the evidence. *Id.* at 517-18. Matters of credibility are for the trial court to decide because the trial court is in a better position to observe the witnesses, assess their demeanor, and make credibility judgments. *People v. Roa*, 398 Ill. App. 3d 158, 166 (2010). The ultimate question of whether the evidence should be suppressed, however, is reviewed *de novo*. *Moss*, 217 Ill. 2d at 518. A reviewing court may consider evidence presented at the suppression hearing as well as evidence presented at trial when making its decision. *People v. Rivas*, 302 Ill. App. 3d 421, 437 (1998).

¶ 18 The fourth amendment of the United States Constitution protects the rights of individuals against unreasonable searches and seizures. U.S. Const. amend. IV. "Reasonableness is the touchstone of fourth amendment analysis and presents an objective standard, determined by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). Generally, a warrant supported by probable cause is necessary to meet the reasonableness requirements under the fourth amendment. *Moss*, 217 Ill. 2d at 518. During the temporary detention of a traffic stop, however, the *Terry* principles guide whether the seizure of the occupant was permissible under the fourth amendment. *People v. Bunch*, 207 Ill. 2d 7, 13-14 (2003) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). "Under *Terry*, limited investigative stops are permitted where probable cause is lacking but a reasonable suspicion exists, based on articulable facts, that the person has or is about to commit a criminal offense." *People v. Jones*, 215 Ill. 2d 261, 270 (2005) (citing *Terry*, 392 U.S. at 21-22). "However, the investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Id.* at 270-71. "Mere hunches and unparticularized suspicions are not enough to justify a broadening of the

stop into an investigatory detention." *People v. Ruffin*, 315 Ill. App. 3d 744, 748 (2000). "[W]here an officer's confinement of a person goes beyond the limited restraints of a *Terry* investigative stop, a subsequent consent to search may be found to be tainted by the illegality." *People v. Brownlee*, 186 Ill. 2d 501, 519 (1999).

¶ 19 Defendant cites *People v. Davenport*, 392 Ill. App. 3d 19, 21 (2009), for the proposition that a defendant's nervousness and criminal history is not enough to raise reasonable suspicion. In *Davenport*, the officer was on Interstate 80 when he observed a vehicle and pulled it over for speeding. *Id.* The officer observed that all three occupants in the car appeared to be nervous and discovered that the driver had prior arrests, including an arrest for possession of controlled substances. *Id.* Based on the occupants' reactions and his knowledge that Interstate 80 was the main corridor for transportation of illegal drugs, he suspected that the vehicle contained contraband. *Id.* at 22. The officer asked the defendant for permission to search the vehicle, and the defendant declined. *Id.* at 21. The officer gave the driver a warning ticket, told the occupants that they were free to leave, and detained the vehicle. *Id.* at 22. The officer conducted a canine sniff, despite defendant's denial of consent, and found cannabis in the vehicle. *Id.* Defendant was arrested. *Id.* at 21. At pretrial, defendant filed a motion to suppress evidence. *Id.* at 20. The trial court denied the motion, determining that defendant was not illegally detained because the officer had reasonable suspicion of criminal activity that "authorized his investigation into possible drug trafficking." *Id.* at 23. On appeal, the First District reasoned that the officer's suspicion based on his knowledge of Interstate 80 and the occupants' nervousness only amounted to a mere hunch considering the officer issued a warning ticket and told the occupants they were free to go. *Id.* at 28. Therefore, the court found that the officer unlawfully seized defendant. *Id.*

¶ 20 The State relies on *People v. Collins*, 2015 IL App (1st) 131145, to support its argument that the officer had reasonable suspicion to continue his investigation of the TV. In *Collins*, the officer pulled defendant over for speeding. *Id.* ¶ 7. The officer asked him why he was speeding, and defendant replied that his car was overheating and he was trying to get to a gas station. *Id.* This response had not made sense to the officer because defendant had passed two gas stations. *Id.* The officer took defendant's license and discovered that defendant was on MSR. *Id.* The officer returned to defendant's vehicle and asked him if he was on MSR, if he had narcotics in the vehicle, and if the officer could search the vehicle. *Id.* ¶ 8. The defendant denied having drugs in the vehicle, stated that he was on MSR, and consented to the search. *Id.* The officer found cocaine in the trunk and arrested defendant. *Id.* ¶¶ 4, 8. Defendant filed a motion to quash arrest and suppress evidence, arguing that the stop was an invalid seizure because it was unreasonably prolonged, and the trial court denied the motion. *Id.* ¶ 4. On appeal, the First District found that defendant had reasonable suspicion to prolong the stop because defendant gave an illogical explanation of driving to the gas station. Furthermore, the court believed the officer's questioning about narcotics was reasonable because he learned defendant was on MSR for drug possession.

¶ 21 Here, although there are reasonable alternative explanations for the observations that caused Taylor's suspicion, we cannot say that his suspicion was baseless or unreasonable. Unlike *Davenport* in which the officer merely relied on the defendant's nervousness, Taylor observed defendant's nervous demeanor and a large, unboxed TV wedged in the vehicle that still had the packaging labels on the screen. When Taylor searched defendant's criminal record, the results showed he had been arrested for burglary. Taylor testified that, at this point, he suspected the TV might be stolen based on defendant's nervousness, the TV in the backseat, and defendant's arrest

for burglary. Similar to *Collins* wherein the First District found the officer's questioning was reasonable when he learned about the defendant's MSR, it would be reasonable for Taylor to further question defendant about the TV when he discovered defendant was arrested for burglary. Based on these circumstances, we believe Taylor had reasonable suspicion to further investigate whether the TV was stolen. See *People v. Mata*, 178 Ill. App. 3d 155, 160-61 (1988) (citing *United States v. Cortez*, 449 U.S. 411, 419 (1981)) ("[a] trained police officer is given a great deal of latitude in assessing the 'whole picture' based upon the totality of the circumstances" when determining whether the officer has reasonable suspicion that a crime was committed). Therefore, we find that the trial court's ruling was not against the manifest weight of the evidence.

¶ 22 II. Public Defender Fee

¶ 23 Next, defendant argues that the trial court improperly ordered him to pay a $500 public defender fee without conducting a hearing as prescribed in section 113-3.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1 (West 2016)). The State contends that defendant waived this argument because he agreed to the imposition of the public defender fee as part of his agreed sentence.

¶ 24 Section 113-3.1 states:

> "Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the

> affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a) (West 2016).

¶ 25 Under section 113-3.1, the trial court is required to conduct a hearing. *People v. Romanowski*, 2016 IL App (1st) 142360, ¶ 40; 725 ILCS 5/113-3.1(a) (West 2016). The court also must give defendant notice of the hearing and an opportunity to present evidence regarding his or her ability to pay. *People v. McClinton*, 2015 IL App (3d) 130109, ¶ 11. During the hearing, the focus is on the costs of representation, the defendant's circumstances, and the foreseeable ability of the defendant to pay. *Id.* "The procedural safeguards are necessary to meet the demands of due process." *Id.* This issue is reviewed *de novo*. *Id.* ¶ 39.

¶ 26 Although defendant agreed to the public defender fee in the agreed-upon sentence, the agreement does not negate the trial court from conducting the necessary statutory safeguards guaranteed to defendant under section 113-3.1. Section 113-3.1 requires that defendant have an opportunity to present evidence on his ability to pay the fee at a hearing. The record shows that defendant agreed to the fee without being informed that it was discretionary and dependant on his ability to pay and without the opportunity to present evidence on his financial circumstances to the court. Moreover, there is no evidence that the court inquired into defendant's ability to pay.

¶ 27 The States cites *People v. Dunlap*, 2013 IL App (4th) 110892, to support its argument that the public defender fee was proper. In *Dunlap*, the trial court conducted a hearing on whether to impose a public defender fee. *Id.* ¶ 5. The court mentioned defendant's ability to work and gave defendant an opportunity to present evidence on the imposition of the fee. *Id.* The defendant did not present any evidence, and the trial court imposed a $400 public defender fee. *Id.* Defendant appealed the court's decision, arguing that the court had failed to consider his affidavit of financial condition. *Id.* ¶ 11. The Fourth District determined that defendant had waived his argument because "he affirmatively acquiesced not only to the amount of the reimbursement, but also to the materials the court relied upon to arrive at the amount of reimbursement." *Id.*

¶ 28 We believe *Dunlap* is distinguishable from this case because the trial court in *Dunlap* conducted a hearing and gave defendant an opportunity to present evidence, whereas the trial court in this case did not conduct a hearing on defendant's ability to pay the fee. Therefore, we hold that the trial court erred when it imposed the $500 public defender fee.

¶ 29 When the trial court imposes the public defender fee without conducting a hearing within 90 days of the entry of the final order, the fee is vacated. *Romanowski*, 2016 IL App (1st) 142360, ¶¶ 40, 44 (determining no inquiry was made as to defendant's ability to pay within the 90-day period). When the trial court holds "some sort of hearing" within 90 days of the entry of the final order but does not fully comply with section 113-3.1(a), the fee is vacated and the case is remanded for a new hearing in compliance with the statute. *People v. Somers*, 2013 IL 114054, ¶¶ 15, 20 (holding that some hearing took place when court inquired about defendant's job prospects, future income, and ability to work); *McClinton*, 2015 IL App (3d) 130109, ¶¶ 16-18 (finding "some sort of hearing" took place when trial court determined defendant was able to

work and had the ability to reimburse the county for services he received from the public defender during sentencing).

¶ 30 Similar to *Romanowski*, there is no evidence that the trial court conducted any sort of hearing on defendant's ability to pay the fee within the 90-day period. Therefore, we vacate the fee, but will not remand this case for a new hearing. Defendant states that he did not preserve this issue on appeal and that the issue should be reviewed for plain error. However, defendant's failure to object does not result in waiver when the trial court did not follow the statutory requirements for a hearing on defendant's ability to pay. See *People v. McClinton*, 2015 IL App (3d) 130109, ¶ 12 ("A defendant does not waive his due process right to the procedural safeguards described by section 113-3.1 by failing to object when those safeguards are not met.").

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of McDonough County is affirmed in part and vacated in part.

¶ 33 Affirmed in part and vacated in part.