

NOTICE
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2019 IL App (4th) 160623-U
NO. 4-16-0623
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
May 24, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Woodford County
MITCHELL GLANTZ,)	No. 16CF24
Defendant-Appellant.)	
)	Honorable
)	Charles M. Feeney III,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding defendant failed to adequately preserve his claim for review.

¶ 2 In February 2016, the State charged defendant, Mitchell Glantz, with defacing identification marks of firearms (720 ILCS 5/24-5(b) (West 2014)) and unlawful possession of cannabis (720 ILCS 550/4(a) (West 2014)). As to the firearm charge, the State alleged, on January 30, 2016, defendant “knowingly had in his possession a firearm that had the manufacturer’s serial number removed by it being scratched away.”

¶ 3 In March 2016, defendant filed a motion to suppress evidence obtained from a search of his vehicle. Defendant claimed the search was unlawful because a police officer (1) did not have a valid legal justification to initiate a traffic stop, (2) unlawfully prolonged the traffic

stop, and (3) asserted a continued seizure of defendant's person without reasonable suspicion by asking him to answer more questions after being pulled over and while seated in the police vehicle. The State disagreed with each of defendant's claims, maintaining (1) the officer had a valid legal justification to initiate a traffic stop, (2) the traffic stop was not unlawfully prolonged, and (3) defendant's continued interaction with the officer after the traffic stop ended was consensual. Following a May 2016 hearing, the Woodford County circuit court denied defendant's motion.

¶ 4 In June 2016, the State dismissed the cannabis charge, and trial court conducted a stipulated bench trial on the firearm charge. The court found defendant guilty. In August 2016, the court sentenced defendant to 30 months' conditional discharge and 200 hours' public service. The court also ordered defendant to pay certain fines and fees and complete a substance abuse evaluation and any recommended treatment.

¶ 5 Defendant appeals, arguing the trial court erred in denying his motion to suppress. Defendant claims, for the first time, the search of his vehicle was unlawful because the officer altered the nature of the consensual encounter following the traffic stop by calling for a canine unit, which amounted to a seizure without reasonable suspicion. We conclude defendant failed to adequately preserve this claim for review and affirm the trial court's judgment.

¶ 6 I. BACKGROUND

¶ 7 A. Motion to Suppress

¶ 8 In his March 2016 motion to suppress, defendant alleged an unlawful search of his vehicle occurred because the police officer "did not have a valid legal justification" to "seize [him] and his vehicle" or to "conduct a search of [his] vehicle." Defendant later filed a

memorandum in support of his motion to suppress. In that memorandum, defendant claimed the officer (1) “did not have a valid legal justification to initiate a traffic stop” and (2) “unlawfully prolonged the traffic stop.” As to his claim suggesting the traffic stop was unlawfully prolonged, defendant asserted the evidence would show the officer obtained probable cause to search his vehicle only after the “mission” of the traffic stop concluded and during a time in which the officer failed to convey he was free to leave. Specifically, defendant asserted (1) the “mission” of the traffic stop concluded when the officer told him, “dude that’s really all I have for the traffic stuff” and (2) the officer “continued the stop” by failing to release him or tell him that he was free to leave. As supporting authority, defendant contended the “principles” of *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), were “exceedingly applicable to the case at hand.”

¶ 9 B. Suppression Hearing

¶ 10 At the May 2016 hearing on defendant’s motion to suppress, the trial court heard testimony from defendant and the police officer who conducted the stop and search of defendant’s vehicle, Deputy Nathan Campbell. The court also received an audio and video recording of the encounter between defendant and Deputy Campbell and a photograph of a written warning Deputy Campbell issued to defendant. The following is gleaned from the evidence presented.

¶ 11 In the early morning hours of January 30, 2016, defendant was driving eastbound on Interstate 74, near Goodfield, Illinois. At the time, defendant was in the process of moving from Ottumwa, Iowa, to Charleston, South Carolina. He was driving a sport utility vehicle, which he recently purchased in Iowa. Defendant’s belongings and his dog were inside the vehicle. A temporary registration tag was attached to the inside of the rear window of the

vehicle.

¶ 12 Around 5:30 a.m., defendant stopped at a rest stop to use the restroom, get something to drink, and feed his dog. He stayed at the rest stop for approximately 15 to 20 minutes. During that time, Deputy Campbell arrived at the rest stop in his patrol vehicle and observed a vehicle, later determined to be defendant's, without license plates. Deputy Campbell exited his vehicle and approached defendant's vehicle. Defendant was not inside. Deputy Campbell noticed a strong odor of air fresheners emitting from the vehicle even though the windows and doors to the vehicle were closed. Defendant testified he purchased a three-pack of air fresheners and decided to use all three air fresheners at the same time because he wanted to keep his vehicle smelling like a "new car" and was concerned about his dog going to the bathroom during the drive. Deputy Campbell testified he also discovered registration attached inside the rear window of defendant's vehicle. Deputy Campbell was unfamiliar with the registration and was unable to confirm the registration by a computer search. Instead of waiting for defendant to return to his vehicle, Deputy Campbell ended his inquiry. He left the rest stop, drove a few miles east along Interstate 74, and then stopped in the median to monitor eastbound traffic. Shortly thereafter, Deputy Campbell activated audio and video recording equipment in his vehicle. The video showed the view from the dashboard of the patrol vehicle looking forward through the windshield.

¶ 13 Defendant returned to his vehicle, left the rest stop, and continued eastbound on Interstate 74. Defendant drove past Deputy Campbell's parked vehicle. Deputy Campbell exited the median and followed defendant. He observed defendant's vehicle cross over a fog line. Deputy Campbell also observed defendant was driving 55 miles per hour in a 70 mile-per-hour

zone. Deputy Campbell activated his overhead lights, and defendant immediately pulled over.

¶ 14 After both vehicles were stopped, Deputy Campbell exited his vehicle and approached the passenger side of defendant's vehicle. Deputy Campbell testified he noticed the same odor of air fresheners during his approach to defendant's vehicle. Deputy Campbell informed defendant he was stopped because he did not have a license plate outside his vehicle and illuminated. Deputy Campbell requested a driver's license and proof of insurance. Defendant gave Deputy Campbell his driver's license but indicated he did not have an insurance card printed as he had just purchased the vehicle. Deputy Campbell indicated he would be only issuing a warning and asked defendant to accompany him to the patrol vehicle so he could complete a written warning. Defendant did so. Deputy Campbell testified he observed defendant to be wearing a T-shirt that depicted "Smokey the Bear" and said something to the effect of, "get your Smokey on."

¶ 15 After Deputy Campbell and defendant entered the front seat of Deputy Campbell's vehicle, the video was switched to show the view from the dashboard looking backward into the patrol vehicle. Only defendant can be seen in the video. Deputy Campbell asked defendant several questions while completing the written warning. Defendant answered all of Deputy Campbell's questions. At one point, defendant informed Deputy Campbell his dog's name was "Ziggy" and his girlfriend had picked that name because the dog had some black "zigzags" on its side.

¶ 16 Deputy Campbell completed a written warning for "Improper Display of Plates" and then gave it to defendant. Along with the warning, Deputy Campbell returned defendant's drivers license and informed defendant of the need to print a copy of his insurance card as soon

as possible. After a discussion about where defendant purchased his vehicle, Deputy Campbell stated: “Well, uh, dude that’s really all I have for the traffic stuff but if you don’t mind me asking you a couple other questions is that alright?” Defendant responded, “Sure.” Defendant testified Deputy Campbell’s statement made him feel as if he could not return to his vehicle and drive away; instead, he believed he was “being detained” and if he attempted to leave he would be “resisting an arrest.” Defendant also testified he believed he could not refuse Deputy Campbell’s request to answer additional questions because Deputy Campbell was “a person of authority” and he “didn’t want to go against him.”

¶ 17 Deputy Campbell asked defendant several additional questions. Deputy Campbell began by informing defendant he was not interested in writing “big tickets” but was “more hit the highway looking for large amounts of drugs, *** DUIs, and stuff like that.” Defendant immediately assured Deputy Campbell “nothing like that” was in his vehicle but stated he did have a “pellet gun.” Deputy Campbell asked if defendant had any “paraphernalia,” “cannabis,” or “large amounts of currency,” to which defendant answered in the negative. Deputy Campbell asked if he walked “the dog” around defendant’s vehicle would it “alert on it,” to which defendant indicated he did not believe so. Deputy Campbell informed defendant he was asking that question because he noticed defendant had his belongings inside the vehicle and it was possible for an “alert” if other individuals smoked “pot” around his belongings. Defendant responded, “I mean, hey, I hang around people. There’s a bag of dirty clothes in there so. I mean, that’d be the only thing he’d alert on though.” Deputy Campbell asked if defendant smoked “pot,” to which defendant answered in the negative. Defendant acknowledged, however, he had smoked before and the last time he smoked was approximately a month and a half earlier.

Deputy Campbell asked, "If, instead of walking a dog around, would there be any issue if I wanted to search the vehicle?" Defendant inquired into the basis for why Deputy Campbell wanted to search his vehicle and whether Deputy Campbell smelled something when he approached his vehicle. Deputy Campbell stated he did not smell anything but "noticed some things." Defendant responded, "I'm only shaky around cops." Defendant maintained he did not understand why Deputy Campbell would want to search his vehicle and assured nothing illegal was inside. Deputy Campbell responded, "Well, if there's nothing in there then I am sure I won't find anything man, it's completely up to you. That's one of the ways I do it. I have other ways but I try to cooperate and be nice with folks, you know what I mean, but completely up to you." Defendant maintained he believed no reason existed for a search.

¶ 18 After further discussion as to why Deputy Campbell wanted to search defendant's vehicle, defendant complained about how he should have been further along in his drive. Deputy Campbell responded, "Well, I don't, I don't want to hold you up. I'm just, that's, I mean there's ways I can and there's way I do stuff but that's why I'm asking your consent. That would be the quickest way for me." Defendant declined to give his consent. After declining, defendant stated he was becoming "aggravated" and then began to explain a situation that occurred the day before involving a hold being placed on his checking account. During defendant's explanation, Deputy Campbell can be heard in the audio and video recording quietly saying, "31 [inaudible], canine please." Defendant then ends his explanation of the situation that occurred the day before by saying, "It's one thing after another, man. Alright. Do what you have to do but I'm not giving you my consent." Deputy Campbell then asked, "Do you mind waiting for a canine?" Defendant responded, "Sure." Deputy Campbell informed defendant waiting for a canine "may be a while."

¶ 19 Moments later, a discussion continued between defendant and Deputy Campbell as to why Deputy Campbell wanted to search defendant's vehicle. Defendant asked Deputy Campbell, "What's the probable cause?" Deputy Campbell responded, "It's not probable cause." Defendant then stated he knew "a little bit of his rights. You don't have probable cause that's why you have to get the canine because you think I got some *** dope in there." Deputy Campbell informed defendant, "I'm not saying I do have probable cause. The reason I want the canine here is because the canine can give me probable cause." Approximately a minute later, Deputy Campbell noticed a substance on defendant's lap that he believed to be "shake," or cannabis residue. He then cancelled the request for a canine. Deputy Campbell discovered the suspected cannabis residue within 15 minutes of stopping defendant's vehicle. Deputy Campbell placed defendant in the rear of the patrol vehicle and then he and another officer performed a search of defendant's vehicle.

¶ 20 Defendant, when describing his conversation with Deputy Campbell, testified in part, to the following:

"And he asked if he could search my car, and I asked him why did he want to. And he said he didn't want to go into all that right now. And he said if he—I can deny the search, but he will get a [canine], then walk the [canine] around the car. If the [canine] alerts, then he would—he had probable cause to go in the car and search it. And I said that's fine. So that's when he called the [canine][.]"

Defendant did not testify to hearing Deputy Campbell say, "31 [inaudible], canine please." Deputy Campbell testified he did not tell defendant he was going to ask for a canine.

¶ 21 Deputy Campbell testified he wanted to continue a conversation with defendant after issuing the written warning because he suspected criminal activity based on his experience and observations. Specifically, Deputy Campbell noted (1) a strong odor of air fresheners suggested an individual may be using air fresheners to cover another odor, (2) defendant's T-shirt was a "pun" for "smoking marijuana," (3) "Ziggy" was a name "often used in drug culture" to reference "Zigzag rolling papers," and (4) defendant's nervousness. At another point during his examination, Deputy Campbell noted he found defendant driving under the speed limit to be "an indicator" and the fact defendant immediately pulled over after he activated his overhead lights to be suspicious. Finally, Deputy Campbell noted he recalled defendant stating a canine may alert on the vehicle because he had dirty clothes in his vehicle that he may have worn around friends who smoked cannabis. Deputy Campbell testified he would have let defendant leave after the written warning was issued had defendant asked to do so.

¶ 22 Defendant argued suppression was warranted because Deputy Campbell (1) did not have a valid legal justification to initiate the traffic stop and (2) unlawfully prolonged the traffic stop. Defendant also argued, citing *United States v. Mendenhall*, 446 U.S. 544, 553 (1980), and *People v. Murray*, 137 Ill. 2d 382, 390, 560 N.E.2d 309, 313 (1990), he remained "seized" even after Deputy Campbell indicated he was done with "the traffic stuff" because Deputy Campbell exerted a "show of authority" by asking him to answer more questions after being pulled over and while seated in the police vehicle. Defendant asserted a reasonable person would not feel free to leave unless an officer indicated such action was allowed. Defendant further asserted Deputy Campbell did not have reasonable suspicion to seize him beyond the traffic stop where the officer's observations concerning the air fresheners, defendant's T-shirt,

and defendant's dog's name had reasonable innocent explanations and Deputy Campbell's observation concerning any nervousness was incredible.

¶ 23 The State argued suppression was not warranted as Deputy Campbell had a valid legal justification to initiate the stop and did not unlawfully prolong the stop. The State asserted the traffic stop ended when Deputy Campbell returned defendant's driver's license and told him "that's really all I have for the traffic stuff" and then a consensual encounter followed where defendant could have left if he desired to do so. In so arguing, the State highlighted, in part, defendant's agreement to wait for a canine.

¶ 24 In response to the State's argument, defendant maintained he remained detained throughout his contact with Deputy Campbell. Defendant asserted a reasonable person would not feel free to leave unless an officer indicated such action was allowed. Defendant did not address the State's comment concerning his agreement to wait for a canine.

¶ 25 C. Written Order

¶ 26 Following the suppression hearing, the trial court entered a detailed written order denying defendant's motion to suppress. The court began by summarizing the evidence presented. When doing so, the court did not address Deputy Campbell's request for a canine. The court found Deputy Campbell had a lawful and valid basis for conducting a traffic stop and did not unlawfully prolong the traffic stop. The court found the traffic stop concluded after Deputy Campbell gave defendant the written warning, returned his driver's license, and stated "that's really all I have for the traffic stuff" and the continued conversation between Deputy Campbell and defendant was consensual. In concluding the continued conversation was consensual, the court noted defendant declined to give consent to search his vehicle and then shortly thereafter

agreed to wait for canine. The court did not address Deputy Campbell's request for a canine.

¶ 27 D. Stipulated Bench Trial and Sentencing

¶ 28 In June 2016, the trial court conducted a stipulated bench trial on the firearm charge. By agreement, the court took judicial notice of the parties' stipulated facts, which included photographs of a defaced firearm discovered inside defendant's vehicle and the evidence presented at the suppression hearing. The parties' stipulated facts provide, in part, the following: "Deputy Campbell asked, 'Do you mind waiting for a canine?' The defendant stated[,] '[S]ure', indicating that he was fine waiting for a canine. Deputy Campbell requested through dispatch a canine unit to travel to his location." Based on the stipulated evidence, the court found defendant guilty.

¶ 29 In August 2016, the trial court sentenced defendant to 30 months' conditional discharge and 200 hours' public service. The court also ordered defendant to pay certain fines and costs and to complete a substance abuse evaluation and any recommended treatment.

¶ 30 This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 On appeal, defendant argues the trial court erred in denying his motion to suppress, claiming, for the first time, the search of his vehicle was unlawful because Deputy Campbell altered the nature of the consensual encounter following the traffic stop by calling for a canine unit, which amounted to a seizure without reasonable suspicion. The State disagrees, asserting the request for a canine unit alone did not transform the consensual encounter into a seizure and, even if it did, Deputy Campbell had the necessary reasonable suspicion to seize defendant.

¶ 33 The State, when addressing whether a request for a canine unit during a consensual encounter would transform a consensual encounter into a seizure, notes defendant’s argument “requires the assumption that defendant was aware that Deputy Campbell had requested a canine unit prior to the point of time that Deputy Campbell asked defendant if he would wait for a canine unit” and asserts that assumption “is not a necessary conclusion” based on the evidence presented at the suppression hearing. In reply, defendant does not dispute his argument assumes he in fact heard Deputy Campbell request a canine but asserts the “manifest weight of the record” demonstrates he heard the request. This discussion between the parties highlights a threshold issue of claim preservation.

¶ 34 In *People v. Hughes*, 2015 IL 117242, ¶ 10, 69 N.E.3d 791, the defendant filed a pretrial motion to suppress, claiming his confession made to the police was involuntary. At the hearing on the motion to suppress defense counsel made only two limited arguments as to why the defendant’s statements were involuntary, namely because the detectives (1) “[hand]cuffed [the] defendant too uncomfortably” (*id.* ¶ 11) during his transit to the interrogation room and (2) questioned the defendant without first informing him of his *Miranda* rights (*id.* ¶ 10). After the trial court denied the motion to suppress, the defendant’s statements were used at his trial and he was convicted of two counts of first degree murder. *Id.* ¶¶ 15, 22.

¶ 35 On appeal, the defendant argued the trial court erred in denying his motion to suppress, claiming his confession was involuntary. *Id.* ¶ 25. The defendant asserted various grounds not raised in the trial court to support his claim his confession was involuntary, such as his young age, lack of education, lack of sleep during the interrogation, emotional distress due to his grandfather’s death, and substance abuse. *Id.* The State argued the defendant should be “

‘estopped’ ” from raising these additional grounds “ ‘based upon his affirmative waiver’ ” of these issues by not raising them in his motion to suppress. *Id.* ¶ 26. The appellate court, with one justice dissenting, concluded the issue was not forfeited because the defendant had raised the general issue of voluntariness before the trial court and argued “sufficiently similar theories” and, even if it was forfeited, it was reviewable as plain error. *Id.* ¶ 27. The court found the confession was involuntary based on the additional grounds defendant argued on appeal and should have been suppressed. *Id.*

¶ 36 On appeal to the supreme court, the State argued the defendant had “affirmatively waived those arguments raised on appeal that were not raised before the trial court” and that “intentional waiver” applies “when arguments are deliberately not made.” *Id.* ¶ 33. The State also argued the situation was analogous to “the invited error rule, wherein a party cannot complain of error that it brought about or participated in.” *Id.* Finally, the State argued “a court of review should decline to answer a question for which no adequate record has been developed due to a party’s chosen strategy.” *Id.* The supreme court agreed with the State “on the threshold question of claim preservation[,]” noting defendant’s “reasons for suppression in the trial and appellate courts, while not factually hostile to one another, are almost wholly distinct from one another.” *Id.* ¶¶ 37, 40. The court explained the defendant in the trial court had “presented no evidence and produced no argument as to sleep deprivation, food deprivation, the defendant’s education, his age, his grief at the loss of his grandfather, his lack of exposure to the criminal justice system, or his abuse of drugs and alcohol.” *Id.* ¶ 41. The court noted “[a]ll of this information was available to the defendant at the time of the suppression hearing, either through his own personal knowledge or his review of the interrogation video.” *Id.* The court found the

defendant's own failure to raise the additional grounds to support his claim his confession was involuntary precluded both the trial court from having the opportunity to review those grounds and the State from having the opportunity to present evidence or argument the defendant's confession was voluntary even as against these challenges. *Id.* ¶ 44. Further, the court found, “[b]ecause defendant failed to produce an adequate record for the appellate court to review voluntariness under these new theories, the appellate court ought not to have decided these factual issues anew.” *Id.* ¶ 46. The supreme court reversed the appellate court's judgment (*id.* ¶ 50), concluding the “defendant did not adequately preserve” his claims for review (*id.* ¶ 45).

¶ 37 Defendant, as he did before the trial court, raises the issue of whether the search of his vehicle was lawful. On appeal, however, defendant asserts an alternative claim as to why the search was unlawful—that he was seized without reasonable suspicion when Deputy Campbell requested a canine unit. This alternative claim is wholly distinct from the claims defendant raised in the trial court. At no point in the proceedings below did defendant argue the request for a canine amounted to a seizure. Had defendant done so, the State would have had the opportunity to challenge defendant's claim through argument, cross-examination, and any other evidence of its own and the trial court would have had the opportunity to address the merits of the claim. See 725 ILCS 5/114-12(b) (West 2014) (“The motion [to suppress evidence] shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant.”); *People v. Ramirez*, 2013 IL App (4th) 121153, ¶ 60, 996 N.E.2d 1227 (“A motion to suppress is, in effect, a pleading to the extent that it frames the issues to be determined in a pretrial hearing on the

motion. The fundamental role of a pleading is to give an opposing party notice of the pleader's position concerning the facts and law so that the opposing party can begin to prepare his defense. A pleading thus both defines and limits the areas of consideration at a trial or other evidentiary hearing ***, by enabling the court to determine the relevance of offered evidence.” (Internal quotation marks omitted.)).

¶ 38 Moreover, defendant's failure to raise his claim in the proceedings below has deprived this court of an adequate record to reach its merits on appeal. Deputy Campbell testified he did not tell defendant he was requesting a canine unit. Defendant, who necessarily would have the personal knowledge of whether he heard Deputy Campbell request a canine, did not testify to hearing Deputy Campbell state, “31 [inaudible], canine please,” or to his understanding that such a statement was a request for a canine. Instead, defendant's testimony focused on whether he felt as if he was free to leave at the moment the traffic stop ended. On appeal, defendant relies on the audio and video recording to support his assertion the “manifest weight of the record” demonstrated he heard Deputy Campbell's request for a canine. The recording, however, does not clearly support such a finding. Deputy Campbell quietly stated, “31 [inaudible], canine please” while defendant was explaining the situation that occurred with his checking account. Defendant did not address the statement in his comments that followed. At best, the recording creates a disputed factual issue.

¶ 39 In summary, defendant's failure to raise his claim in the proceedings below deprived (1) the State of the opportunity to challenge defendant's claim through argument, cross-examination, and any other evidence of its own; (2) the trial court of the opportunity to address the merits of defendant's claim, including any disputed factual issues; and (3) this court of an

adequate record to address the merits of defendant's claim. We conclude defendant, like the defendant in *Hughes*, failed to adequately preserve his claim for review.

¶ 40

III. CONCLUSION

¶ 41 We affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 42

Affirmed.