2017 IL App (1st) 150515-U
Order filed: October 20, 2017

FIFTH DIVISION

No. 1-15-0515

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 C4 40563
	)	
MARVIN PIERCE,	)	Honorable
	)	Gregory Robert Ginex and
Defendant-Appellant.	)	Carol A. Kipperman,
	)	Judges Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to suppress evidence when the totality of the circumstances known to police officers at the time of defendant's arrest would lead a reasonable person to believe that defendant had been driving under the influence of drugs.

¶ 2 Following a bench trial, defendant-appellant Marvin Pierce was found guilty of possession of a controlled substance, driving under the influence of drugs, driving while there is any amount of a controlled substance in the urine, and running a red light. He was sentenced to 24 months' probation. On appeal, defendant contends that the trial court erred when it denied his

motion to quash arrest and suppress evidence because the police lacked probable cause to arrest him for driving under the influence of drugs. He further contends that the fines and fees order should be corrected to reflect the vacation of a certain assessment and the proper amount of presentence custody credit. We affirm, but direct the clerk of the circuit court of Cook County to correct the fines and fees order.

¶ 3 Defendant's arrest and prosecution arose out of a March 23, 2012, traffic stop in Elmwood Park, Illinois. At the hearing on the motion to quash arrest and suppress evidence, defendant testified that he was arrested without a warrant and, having not committed a crime. Police recovered certain drugs from defendant's vehicle. He gave the police his driver's license and documents as car rental insurance information. At the police station, he submitted to a urine test after he was shown a paper indicating that he "automatically" lost his "CDL" for a year if he did not "volunteer" to do so. Defendant did not consent to the search of his vehicle.

¶ 4 During cross-examination, defendant testified that he had been driving north on Harlem Avenue, made a left turn onto Grand Avenue, and the police stopped his vehicle. He denied being at the intersection of 76th Street and Grand Avenue and denied that he almost collided with another vehicle that was turning right into the intersection. Defendant drove "slowly" through the intersection because he was trying to "locate" where he was. He was looking for the Montclair Building. Defendant acknowledged that he was alone in the vehicle and that a bag of clothes was in the front passenger area. He "found out later" that approximately 27 packets of cocaine were recovered from under that bag. Defendant admitted that the two pills recovered from the cup holder of the car belonged to him and his "girl."

¶ 5 After exiting the vehicle, defendant blew into a portable Breathalyzer machine and the result was "000." He performed certain field sobriety tests, including the "walk and turn test,'" "the pen" test, and a walking test.

¶ 6 Defense counsel objected to defendant's testimony as to the field sobriety tests arguing that the tests were only relevant as to a determination of whether a driver was under the influence of alcohol. The State responded that the tests were "also used to determine impairment to operate a vehicle," and the trial court overruled the objection.

¶ 7 Defendant was arrested after officers told him that he failed the field sobriety tests. At the police station, after receiving his *Miranda* rights, defendant stated that he was "clean;" that he had just rented the vehicle; and that the pills recovered from the car were his. Defendant did not understand why his urine tested positive for PCP; he thought that it would only test positive for marijuana.

¶ 8 Michael Barrile, an Elmwood Park police officer since 2011, testified that he observed a near collision at the intersection of 76th Street and Grand Avenue where both vehicles needed to brake. The officer pulled over a blue Toyota. The driver parked the Toyota with two wheels on the sidewalk and two wheels on the street. Officer Barrile identified defendant in court as the driver of the Toyota. When he approached the vehicle and asked for a driver's license and proof of insurance, defendant "started talking" rather than looking for the documents. Defendant stated that he was lost and looking for "Monte Carlo or Montclair." Officer Barrile described defendant as being "very hyper, very stimulated," and explained that defendant was "fidgety, very talkative, [and] talked fast." After two or three requests, defendant provided his driver's license. Defendant did not provide proof of insurance or any rental documents. Once other officers arrived, defendant was asked to exit the vehicle.

¶ 9 Officer Barrile had previously arrested people for driving under the influence (DUI), and had received training regarding "DUI arrests," that is, driving under the influence of alcohol, drugs or other substances. After observing defendant's driving and parking of the Toyota, he believed that defendant was "under the influence of something." After field tests were conducted and defendant was arrested, defendant consented to the search of his vehicle. Officer Barrile was later present at the police station when defendant agreed to give a urine sample after receiving the warnings to motorists.

¶ 10 Officer Brian Hock, who had been an Elmwood Park police officer for four years, testified that he administered certain video recorded field sobriety tests to defendant. Defense counsel, again, objected to any testimony as to the tests and the objection was overruled.

¶ 11 Officer Hock first administered the Horizontal Gaze Nystagmus Test, or the HGN evaluation. Officer Hock told defendant to follow the tip of a pen with his eyes. Officer Hock testified that he observed nystagmus, that is, the involuntary jerking of the eyes. He explained that defendant's eyes "were looking smooth pursuit, 45 degree angle and on—at maximum deviation." Officer Hock also observed defendant had vertical gaze nystagmus, which indicated that he was under the influence of some type of narcotic.

¶ 12 Officer Hock then explained the "walk and turn test" and conducted the test. Defendant "failed a couple of indicators." Officer Hock then administered the "one leg stand" test. Defendant started the test prior to Officer Hock telling him to do so, and defendant "swayed to maintain balance" while Officer Hock was "giving instruction." After observing defendant's performance on the tests, Officer Hock concluded that defendant showed signs of impairment and was under the influence. When Officer Hock asked defendant whether he had drunk alcohol

or took anything that prevented him from driving and if there was anything illegal in the vehicle, defendant answered no.

¶ 13 Officer Hock made hundreds of arrests for driving under the influence of alcohol and drugs and had received training on DUI arrests including driving under the influence of drugs. Officer Hock acknowledged that the result of defendant's portable Breathalyzer test was 0.0 but, also, testified that a Breathalyzer test only detects alcohol and that narcotics do not register. Officer Hock identified a surveillance video and testified that it truly and accurately showed defendant's performance of the field sobriety tests. The trial court granted the State's request to play the video and overruled defendant's objection that the tests were only relevant as to alcohol related offenses. The video was then played for the court.

¶ 14 In the video, Officer Hock walked up to defendant and moved an object back and forth in front of defendant's face. Portions of this interaction are blocked from view because officers were standing between the camera and defendant. At this time, a male voice stated that defendant almost collided with another vehicle going through an intersection and that defendant pulled up on the sidewalk when parking. Also at this time, defendant can be overheard saying that he is looking for "Montclair," that he has not seen his children for three months and that he does not know where the "f*** place is." Officer Hock next instructed defendant to place his feet together, his hands at his sides, and to not do anything until Officer Hock tells him to. Officer Hock told defendant to place his right foot in front of his left foot. Defendant placed one foot in front of the other and began to walk forward. Officer Hock told him to step back. Defendant placed his foot back, swayed and placed his arms at waist level. Officer Hocks told defendant to take nine heel-to-toe steps forward and nine heel-to-toe steps backward. Defendant leaned forward as Officer Hock spoke and the officer then demonstrated the test. As defendant stepped

forward, he stepped out of the heel-to-toe formation at step two, then completed the nine steps and turned around.

¶ 15 Prior to the last test, Officer Hocks asked defendant whether he had any health issues and defendant responded that he was shot "last year." Officer Hock instructed defendant to raise one foot from the ground and count until told to stop. Defendant sought to comply. After swaying, he placed his foot down at the count of 17. After the completion of this test, defendant continued to talk and made gestures with his arms. Defendant also asked questions about directions. Defendant stated that he has been awake for eight hours, had been driving for three months and was finally home where he could see his wife and babies. Officer Hock told defendant that he thought defendant had been "drinking a little bit or doing something." Officer Hock administered a portable Breathalyzer test and then repeated the test. At this point, defendant said that he was stabbed in the heart and was "DOA." Officer Hock then gave the portable Breathalyzer to a different officer because he thought he was "screwing it up." After defendant took a third portable Breathalyzer test, a person said: "Well, you haven't been drinking." Another person said that something was "all over the place" and "eyes are constricted."

¶ 16 During cross-examination, Officer Hock testified that he was familiar with the National Highway Traffic Safety Administration (NHTSA). He was unfamiliar with defendant's normal gait. Officer Hock did not smell marijuana. Officers searched defendant's vehicle because he consented and was under arrest for DUI.

¶ 17 Detective David Ransom testified that he took part in the search of the vehicle after defendant gave permission. He recovered a Ziploc baggie that contained smaller baggies filled with a chunky white substance from underneath a bag of clothes on the front passenger floorboard. Ransom believed this substance was crack cocaine. Another officer found two pills.

¶ 18 At the close of testimony, the trial court commented that part of the defense theory appeared to be based upon the contention "that the [field] sobriety tests are not relevant for driving under the influence of narcotics." Defense counsel then stated: "that's from the NHTSA, and I can show the State also. I'll show you now." The State asked that the arguments "be put in the form of legal memoranda" and the court continued the matter for arguments.

¶ 19 At a later court date, after defendant had submitted case law, and both sides had orally argued, the court denied defendant's motion to quash arrest and suppress evidence. The court found the officers to be credible, defendant to be not credible, and that the field sobriety tests were relevant. Defendant filed a motion to reconsider, which the trial court denied.

¶ 20 The matter proceeded to a bench trial where Officer Barrile testified consistently with his testimony at the suppression hearing. He also testified that, as defendant approached the 76th Street intersection, he slowed his vehicle and then accelerated into the intersection where there was a near collision with another vehicle. When the officer activated his lights, defendant pulled over the Toyota, struck the curb, and drove partially onto the sidewalk. Officer Barrile observed that defendant appeared to be stimulated, fidgety, and very talkative. The officer further testified that, after he was given his *Miranda* warnings, defendant stated that the pills were for him and his girl and that he was holding the cocaine for someone. The officer again testified that, based on his training and experience, he believed defendant to be under the influence of something.

¶ 21 Officer Hock's testimony was also consistent with his testimony at the suppression hearing. Officer Hock further testified that he had received training in "DUI detection" from the Cook County Sheriff's Office, as well as other trainings, and was certified for all standardized and nonstardardized field sobriety tests. He had previously made hundreds of DUI arrests, including arrests where people were under the influence of alcohol or other drugs. When he

arrived at the scene, the officer observed that defendant had "an excited attitude," and was "very talkative." Although Officer Hock did not smell alcohol on defendant's breath, defendant's eyes were bloodshot and watery. Officer Hock escorted defendant to a sidewalk area and administered certain field sobriety tests. At the conclusion of the tests, Officer Hock did not believe that defendant was under the influence of alcohol, however, he did believe that defendant was under the influence of "some type of narcotic or drug or combination thereof." This opinion was based upon defendant's performance during the field sobriety tests as well as defendant's "excited attitude" and that defendant was "very sweaty."

¶ 22 Defendant's statement to the police was read into the record. Defendant said that he was lost and was not under the influence. Defendant also stated that the "ecstasy pills belonged to him and his lady," however, the "crack" was not defendant's; rather, he was holding it for someone.

¶ 23 The State presented evidence as to the recovery of the two pills and baggies from defendant's vehicle and that defendant had provided a urine sample. Forensic scientist Cynthia Woods testified that defendant's urine testified positive for the presence of cannabinoid and PCP. Forensic scientist Jamie Hess testified that the two pills weighed 0.5 grams and tested positive for the presence of N-Benzylpiperazine or BZP, and that the contents of 10 of the plastic baggies recovered from defendant's vehicle weighed 1.1 grams and contained cocaine.

¶ 24 Defendant testified and denied using drugs or alcohol and had no knowledge of the baggies of drugs. Although an officer asked him to exit his vehicle because his eyes were dilated and he was acting fidgety, he was just acting like he usually did.

¶ 25 The trial court found defendant guilty of the possession of a controlled substance, driving under the influence of drugs, driving while there is any amount of a controlled substance in the

urine, and running a red light. Defendant was sentenced to 24 months' probation and has appealed.

¶ 26 On appeal, defendant argues that the trial court erred when it denied his motion to quash arrest and suppress evidence because the police lacked probable cause to arrest him for driving under the influence of drugs.

¶ 27 Our review of the trial court's ruling on a motion to quash arrest and suppress evidence presents questions of both fact and law. *People v. McCarty*, 223 Ill. 2d 109, 148 (2006). At a hearing on the motion, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, and drawing reasonable inferences from the evidence presented. *People v. Ballard*, 206 Ill. 2d 151, 162 (2002). We review the trial court's factual findings for clear error, giving due weight to any inferences drawn from the facts by the fact finder, and will not disturb those findings unless they are against the manifest weight of the evidence. *People v. Hackett*, 2012 IL 111781, ¶ 18. The trial court's ultimate ruling on the motion is a question of law which we review *de novo*. *Id.* In reviewing a trial court's ruling on a motion to suppress, we may consider evidence adduced at trial as well as at the suppression hearing. *People v. Richardson*, 234 Ill. 2d 233, 252 (2009).

¶ 28 Defendant argues that this court should review the "entire issue" *de novo* because the trial court's "factual findings are based on documentary evidence equally available" to this court. In support of this argument, defendant cites *People v. Shaw*, 2015 IL App (1st) 123157.

¶ 29 In *Shaw*, this court found that a surveillance video, as well as police testimony, directly contradicted the victim's testimony, rendering his testimony not credible as to a central issue. *Id.* ¶ 26. In so doing, the court noted that a trial court does not occupy a position that is superior to the appellate court when evaluating evidence that is not live testimony. *Id.* ¶ 29 (citing *People v.*

Radojcic, 2013 IL 114197, ¶ 34 (where the only evidence presented by the State was transcripts from the grand jury)). The court therefore concluded that a reviewing court will give great deference to the trial court's factual findings, including its credibility assessments, unless the record shows that those findings are against the manifest weight of the evidence. *Id*. ¶ 30. The court further stated that an appellate court "give[s] less deference to a trial court's determinations of fact when they are based on evidence other than live witness testimony." *Id*. ¶ 29.

¶ 30 Defendant argues that, in this case, as in *Shaw*, the determination of whether the trial court's findings are against the manifest weight of the evidence does not depend on witness credibility, but instead depends on the video recording made at the time of his arrest. He, therefore, concludes that we should not give deference to the trial court's factual findings. We disagree.

¶ 31 The trial court in this case considered the testimony of Officers Barrile and Hock and defendant, as well as the video recording when denying the motion to quash arrest and suppress evidence. The video recording did not significantly contradict the officers' testimony. As the court stated in *Shaw*, this court is in the same position as the trial court when evaluating video evidence. However, we will defer to the trial court's factual findings, unless the record shows that those findings are against the manifest weight of the evidence.

¶ 32 "Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Wear*, 229 Ill. 2d 545, 563 (2008). The existence of probable cause is based on the totality of the circumstances at the time of the arrest. *Id*. at 564. "Officers are allowed to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an

untrained person." (Internal quotation marks and citations omitted.) *People v. Ciborowski*, 2016 IL App (1st) 143352, ¶ 78.

¶ 33 "With regard to drug intoxication, Illinois courts have generally held ' "that the testimony of police officers that a defendant was under the influence of drugs would be sufficient, provided that the officers had relevant skills, experience, or training to render such an opinion." ' " Id. ¶ 79 (quoting *People v. Foltz,* 403 Ill. App. 3d 419, 424 (2010) (quoting *People v. Vanzandt,* 287 Ill. App. 3d 836, 845 (1997))).

¶ 34 Officers Hock and Barrile testified to their training in making DUI arrests, including their experience in arresting persons who were under the influence of alcohol or drugs. Officer Hock also testified to his training and certification for performing field sobriety tests. The officers' testimony established their relevant skills and experience and training to render an opinion that defendant was driving under the influence of drugs at the time he was pulled over.

¶ 35 Further, the facts testified to by the officers support a finding that defendant was driving under the influence of drugs when pulled over, and thus, that there was probable cause to arrest for DUI. Specifically, Officer Barrile testified he pulled over defendant's vehicle after it almost collided with another vehicle, and that defendant parked the car with two wheels on the sidewalk. When he asked defendant for a driver's license and proof of insurance, defendant started talking rather than producing the documents. Officer Barrile described defendant as "very hyper, very stimulated," and fidgety. The video confirms that defendant was talkative throughout the time he was detained, and did so in a very animated and exaggerated manner. Officer Barrile testified that based on his training, he believed defendant was "under the influence of something."

¶ 36 Officer Hock testified that defendant was very sweaty and talkative with an excited attitude, and his eyes were bloodshot and watery. Defendant failed multiple field sobriety tests. Officer Hock concluded, based on his training, that defendant was under the influence of drugs or narcotics.

¶ 37 The totality of the circumstances testified to by the officers and depicted in the video, including the inferences made by the officers, based on their experience and specialized training, would lead a reasonable person to believe that defendant was under the influence of drugs, or some other substance, at the time of his arrest. See *Wear*, 229 Ill. 2d at 564.

¶ 38 Citing *People v. Day,* 2016 IL App (3d) 150852, defendant, however, contends that Officer Hock did not administer the field sobriety tests in accordance with the NHTSA manual and, therefore, any results he obtained are unreliable, and could not serve as the basis for Officer Hock's conclusion that defendant was impaired.

¶ 39 Although the record reflects that counsel apparently showed the manual to the State and the trial court during the suppression hearing, Officer Hock was not cross-examined with regard to his alleged compliance with, or deviation from, the guidelines of the NHTSA manual. This court declines defendant's invitation to review Officer Hock's testimony and actions in light of the guidelines of the NHTSA manual when this issue was not raised before the trial court at the suppression hearing. See *People v. Vasquez*, 388 Ill. App. 3d 532, 543 (2009) (an argument not raised before the trial court is forfeited on appeal).

¶ 40 We are, also, unpersuaded by defendant's reliance on *Day*. In *Day*, the arresting officer testified at a hearing on the defendant's petition to rescind a summary driver's license suspension that he did not observe anything in the defendant's driving which indicated that the defendant was under the influence; rather, he pulled the defendant over due to excessive exhaust system

noise. During the officer's interaction with the defendant, the defendant did not mumble or slur his words, however, the officer detected a strong odor of alcohol coming from the defendant's mouth. The officer then administered several field sobriety tests, including the one leg stand test and the walk and turn test, in the rain. Although the officer testified that it was improper to administer these tests on wet pavement, he asserted that "he did not feel that it was 'too wet or too rainy' to administer the tests" to defendant. *Day*, 2016 IL App (3d) 150852, ¶ 17. The trial court, ultimately, granted the defendant's motion to rescind the summary suspension, finding that the officer did not have probable cause to arrest the defendant for DUI, as there was no driving violation, the defendant had performed reasonably well on the field sobriety tests, and the officer had " 'tap danced a little bit about the rain issue.' " *Id*. ¶ 18.

¶ 41 On appeal, the appellate court found that the officer testified "explicitly and repeatedly" that he did not properly administer certain field sobriety tests, that is, it was improper to administer them on wet pavement and while it was raining. *Id*. ¶ 28. The appellate court concluded that the improper administration of the field sobriety tests rendered the results of those tests inherently less reliable, and that the trial court therefore properly gave the officer's testimony as to the results of those tests less evidentiary weight. *Id*. ¶ 29.

¶ 42 The appellate court then turned to the officer's actual observations and concluded that the defendant's alleged failures on the field sobriety tests were "technical in nature and few in amount." *Id*. ¶ 30. That is, the defendant's performance on the field sobriety tests was "largely satisfactory." *Id*. ¶ 31.

¶ 43 Additionally, the appellate court found that the improper administration of the field sobriety tests, in and of itself, significantly impaired the probative weight that could be given to those tests and, moreover, considering the weather conditions, that the defendant's performance

on the tests was reasonable. *Id*. ¶ 32. We, therefore, concluded that the results of the field sobriety tests would not have led a reasonably cautious person to believe that the defendant was impaired by alcohol. *Id*.

¶ 44 However, in the case at bar, Officer Hock never admitted that he administered the field sobriety tests improperly. Moreover, even accepting defendant's conclusion that the field sobriety tests were administered improperly, the actual observations which gave rise to an officer's conclusion that a person is under the influence still carry probative weight. *Id*. ¶ 30.

¶ 45 Here, Officers Barrile and Hock testified that they had been trained in effectuating DUI arrests and had previously arrested individuals under the influence of alcohol and drugs. In addition to the officers' training and experience, the facts observed by the officers at the time of defendant's arrest constituted probable cause to support the arrest. Specifically, defendant drove erratically, parked irregularly, was "hyper," talkative and fidgety, and did not immediately provide his driver's license when requested to do so by the officer. These facts were enough for a reasonable person to believe that defendant was under the influence of drugs. See *Wear*, 229 Ill. 2d at 564. Therefore, the trial court did not err when it denied defendant's motion to quash arrest and suppress evidence. See *Hackett*, 2012 IL 111781, ¶ 18.

¶ 46 Defendant next contends that his fines and fees order must be corrected. He argues that the trial court erred by assessing the $100 Court System fine (see 55 ILCS 5/5-1101(d) (West 2012)), and by failing to apply 104 days of presentence custody credit against his fines. It is well settled, however, that a defendant forfeits a sentencing issue that he fails to raise in the trial court, through both a contemporaneous objection, and a written postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant acknowledges that he failed to preserve these issues for appeal because he did not challenge the fines and fees order in the trial court. He urges

this court, however, to review his claims under the plain-error doctrine or Ill. S. Ct. R. 615(b) (1) (eff. Aug. 27, 1999).

¶ 47 However, the State does not argue that he forfeited appellate review of his challenge to the fines and fees order, and has, therefore, forfeited any forfeiture argument. See *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000) (rules of waiver and forfeiture apply to the State).

¶ 48 Moreover, although defendant's request for presentence credit is raised for the first time on appeal, section 110-14 of the Code of Criminal Procedure of 1963 permits this court to award a defendant presentence custody credit on "application of the defendant." 725 ILCS 5/110-14 (West 2012). Claims for presentence custody credit under section 110-14 may be raised "at any time and at any stage of court proceedings, even on appeal in a postconviction petition." *People v. Caballero*, 228 Ill. 2d 79, 88 (2008). Granting credit is a simple ministerial act that promotes judicial economy by ending any further proceedings over the matter. *People v. Woodard*, 175 Ill. 2d 435, 456-57 (1997).

¶ 49 We will, therefore, address the merits of defendant's claims.

¶ 50 The propriety of court-ordered fines and fees is reviewed *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 51 First, defendant contends and the State concedes, that the $100 Court System fine was improperly assessed on defendant's first violation of section 11-501 of the Illinois Vehicle Code. See 55 ILCS 5/5-1101(d) (West 2012) (a county may enact a "$100 fee for the second and subsequent violations of section 11-501 of the Illinois Vehicle Code"). We, therefore, vacate this fine.

¶ 52 Defendant next contends that he is entitled to $5 for each day he spent in presentence custody. See 725 ILCS 5/110-14(a) (West 2012). Here, defendant spent 104 days in presentence custody, and is, therefore, entitled to $520 of presentence custody credit.

¶ 53 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and vacate the $100 Court System fine. We further direct the clerk of the circuit court of Cook County to correct the fines and fees order to reflect a $520 presentence custody credit for a new total due of $1,794.

¶ 54 Affirmed; fines and fees order corrected.