2014 IL App (1st) 120527-U

FIFTH DIVISION
May 9, 2014

No. 1-12-0527

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. 10 CR 19102
	)	
WARREN PEARSON,	)	Honorable
	)	Carol M. Howard
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justice Palmer concurred in the judgment.
Presiding Justice Gordon specially concurred.

O R D E R

¶ 1 ***Held:*** Denial of defendant's pretrial motion to quash and suppress evidence affirmed; error in admission of prior consistent out-of-court statement was harmless; mittimus corrected; judgment affirmed.

¶ 2 Following a bench trial, defendant Warren Pearson was convicted of possession of a controlled substance with intent to deliver and sentenced as a Class X offender to six years' imprisonment. On appeal, he contends that the trial court erred in denying his motion to quash

arrest and suppress evidence. He further contends that the trial court improperly allowed the State to introduce an inadmissible out-of-court statement to bolster the credibility of its sole witness, and requests that his mittimus be corrected.

¶ 3 Prior to trial, defendant filed a motion to quash arrest and suppress evidence. He alleged that his conduct was such that no reasonable person could infer that he was in violation of any law, that he had a reasonable expectation of privacy in his vehicle, that the police did not display a warrant, and that he did not consent to the stop, search, seizure or arrest that occurred. As a consequence, defendant alleged that the stop, seizure and arrest in this case were unreasonable.

¶ 4 At the suppression hearing, Chicago police officer Derek Glowacki testified that at 9:50 a.m. on September 6, 2010, he was in uniform patrolling in a marked vehicle with his partner, Officer Urban, in the area of Cortez Street and Lavergne Avenue in Chicago when he observed defendant standing on the northeast corner of that intersection with three other people. The officer did not recall if he knew defendant, but was aware that one or two of the other individuals there had previously been arrested for possession of a controlled substance. Officer Glowacki testified that this area was a high narcotics area, and that he had made numerous arrests on that specific corner for drug sales.

¶ 5 Two minutes after noticing defendant, Officer Glowacki set up a surveillance 75 feet from the area where defendant was standing. The officer, with the use of binoculars, observed a black male approach defendant, and engage in a brief conversation. Defendant and the unknown person then walked eastbound on the north side of Cortez Street to a parked silver Pontiac car. From a distance of 50 feet, Officer Glowacki observed defendant accept money from this person,

open the trunk of the vehicle, take out a red backpack therefrom, and remove a clear plastic bag from the backpack. He then removed an unknown item from the bag, which he tendered to the person, before placing the backpack in the trunk of the vehicle, and shutting the trunk. Officer Glowacki acknowledged that he could not see what was in the plastic bag.

¶ 6 Officer Glowacki further testified that he saw defendant walk back to the corner of Cortez Street and Lavergne Avenue and rejoin those assembled there. A few minutes later, another black male approached defendant, and they walked to the same vehicle defendant had gone to earlier. Defendant accepted money from this person, opened the trunk of the vehicle, removed the backpack, took out the plastic bag from the backpack, and removed an item from it, gave the person the item, and the person left. Following that, the officer observed defendant engage in the same transaction with a third person.

¶ 7 Officer Glowacki testified that he did not hear defendant yell rocks, blows, or anything like that, but he believed the three transactions involving the car were narcotics sales because he had seen many other narcotic transactions similarly conducted on that corner. The total surveillance time of the three transactions was 20 minutes.

¶ 8 Officer Glowacki reconvened with his partner, and they approached defendant who was in front of 1032 North Lavergne Avenue. Officer Glowacki announced his office to defendant and asked him if he had anything illegal on him such as guns or weapons. He searched defendant and found $133 on him, as well as a key. Officer Glowacki testified that he believed that he would find the tools used to commit the crime in the trunk of the car, and went straight to the trunk, opened it and found the plastic bag in the backpack which contained four smaller bags

each containing 13 bags of suspect heroin. The officer acknowledged that he did not have a warrant to search defendant or the vehicle.

¶ 9 At the close of evidence and argument, the court denied defendant's motion to quash arrest and suppress evidence finding on the testimony presented that the officer had probable cause to "stop" defendant. The court noted that the officer observed three hand-to-hand transactions in an area known for high narcotics activity and believed one or two of the individuals standing with defendant were previously engaged in such activity. The court further noted that when police initially stopped defendant he was not yet arrested, and that the officer then retrieved the key to the trunk, opened it, and found the red backpack which held the plastic bag containing heroin.

¶ 10 At trial, Officer Glowacki testified similarly to the chronology of events and observations that he gave at the suppression hearing. He added that he used binoculars sporadically throughout his surveillance of defendant, that he had a clear and unobstructed view of the three hand-to-hand transactions defendant engaged in, and believed them to be narcotics transactions. The officer explained that, during each transaction, defendant was tendered currency by a person, then went to the trunk of the silver Pontiac car with that person and used a key to open the trunk from which he retrieved a red backpack and a large plastic bag from that backpack. He then pulled out an item from the bag and handed that item to each person in the three transactions. When he approached defendant and announced his office, he conducted a pat-down of defendant during which he felt a key in his left pocket. He then used the key to open the trunk of the car defendant had gone to during the three transactions, and inside the red backpack, he saw a large

plastic bag with four smaller bags inside each of which held over 50 foil packets containing heroin. The officer acknowledged that he might have previously arrested defendant.

¶ 11 On cross-examination, Officer Glowacki stated that he did not note in his two police reports that he used binoculars to view the three transactions. He also stated that there were no dogs present in the yards nearby where defendant conducted the transactions.

¶ 12 On redirect, the officer was asked if he testified at a preliminary hearing that he used binoculars at times during the surveillance. Defendant objected that this was not a prior consistent statement which can be used to rehabilitate an omission in a police report. The State noted that prior consistent statements are relevant to rehabilitate the witness based on the impeachment. Defendant replied that a prior consistent statement must precede the omitted statement, and since the statement in question was made after the officer created the police reports, it cannot be used to rehabilitate an omission from a police report. The court overruled the objection, stating that it would "let it in for whatever it is worth." The officer then testified that he had previously testified at a preliminary hearing that he used binoculars during the surveillance.

¶ 13 The parties stipulated that 52 items were recovered in the packages and that they weighed 11.5 grams. The parties further stipulated that the forensic scientist examined 24 of the 52 items, and determined that they weighed 5.3 grams and tested positive for heroin.

¶ 14 Defendant testified that his girlfriend's grandfather owned the silver Pontiac. On September 6, 2010, he borrowed that car and drove to 4940 West Cortez Street to visit his family who resided there. Defendant testified that he did not put anything in the trunk of the car and

had not driven it before. After visiting with his family for about 30 minutes, he walked down to the corner of Cortez Street and Lavergne Avenue to talk with some friends, and recalled that dogs were barking in the backyard of some nearby buildings.

¶ 15 Defendant further testified that he was not going back and forth between the corner where he was standing and where the car was parked, and that nothing unusual happened while he was talking to his friends there. However, while he was conversing with his friends, police arrived, "jumped out on" him, and asked him what he had in his pocket. They then removed the keys from him, and "hit the alarm." Officer Glowacki went straight to the trunk of the car, opened it, and found a red backpack with narcotics in it. Defendant denied that he was committing any crimes when police arrived.

¶ 16 At the close of evidence, the court found defendant guilty of possession of a controlled substance with intent to deliver. In doing so, the court found that defendant's testimony that the officer went straight to the trunk corroborated the officer's testimony. The court stated that it would be more inclined to believe that the officer did not observe defendant engage in the transactions he testified to if defendant had testified that the officers searched the entire car, including the trunk and then found the red backpack. However, the officer knew to go directly to the car and pull out the bag in the trunk, and, therefore, the court believed that the officer observed defendant handling the backpack. The court further found that the number of packages involved, more than 50, was greater than what is normally carried for personal use, and found defendant guilty of possession with intent to deliver.

¶ 17 Defendant filed a post-trial motion alleging, in relevant part, that the trial court erred in

denying his motion to quash arrest and suppress evidence where police lacked probable cause to believe that he had committed a crime, and that Officer Glowacki's testimony was incredible. He also alleged that the trial court erred in allowing a prior consistent statement from Officer Glowacki at the preliminary hearing on his use of binoculars to conduct the surveillance. Defendant alleged that this statement was not in the officer's police reports, and that impeachment by omission does not trigger the admissibility of a prior consistent statement. The trial court denied the motion.

¶ 18 On appeal, defendant first contends that the trial court erred in denying his motion to quash arrest and suppress evidence. He maintains that Officer Glowacki searched his person and car without a warrant or probable cause, and that the searches were not justified as a valid search incident to an arrest or as a protective pat-down search pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968).

¶ 19 In reviewing a trial court's ruling on a motion to suppress, we accord great deference to the trial court's factual findings and credibility determinations, and we will reverse those findings only if they are against the manifest weight of the evidence. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). However, we review *de novo* the trial court's ultimate legal ruling denying defendant's motion to suppress. *Sorenson*, 196 Ill. 2d at 431. In doing so, we may consider the entire record, including the trial testimony. *People v. Robinson*, 391 Ill. App. 3d 822, 830.

¶ 20 Probable cause exists where the facts and circumstances known to the officers at the time of the arrest are sufficient to warrant a person of reasonable caution to believe the suspect committed an offense. *People v. Sims*, 192 Ill. 2d 592, 614 (2000). Probable cause is based on

the totality of the circumstances confronting the officers at the time of the arrest. *Sims*, 192 Ill. 2d at 615. "A police officer's factual knowledge, based on prior law-enforcement experience, is relevant to determining whether probable cause existed." *People v. Harris*, 352 Ill. App. 3d 63, 67 (2004). Further, "[t]he standard for determining whether probable cause is present is probability of criminal activity, rather than proof beyond a reasonable doubt." *People v. Lee*, 214 Ill. 2d 476, 485 (2005).

¶ 21 The evidence here shows that Officer Glowacki had previously made several narcotics arrests on the corner of Cortez Street and Lavergne Avenue in Chicago, and knew this area to be one of high narcotics activity. In addition, defendant was standing there with people who the officer knew had previously been arrested for narcotics-related incidents. After setting up a surveillance, the officer observed defendant conduct three hand-to-hand transactions with three separate individuals who approached him. In each transaction, the officer observed the person engage defendant in conversation, and hand him money. After that, defendant and the person walked up to the silver Pontiac where defendant opened the trunk with a key, and retrieved a red backpack. He then removed a plastic bag from the backpack, and an item from that bag, which he handed to the person. The officer testified that these transactions were similar to previous narcotics transactions he had observed at that corner, and that he believed defendant was engaged in narcotics transactions. " 'Although an isolated act may appear innocent, a series of similar transactions, by virtue of the repetition, may be sufficient to support an arrest.' " *People v. Grant*, 2013 IL 112734, ¶ 17 (quoting *People v. Taylor*, 167 Ill. App. 3d 64, 67 (1987)).

¶ 22 We conclude that based on the totality of these circumstances, Officer Glowacki had probable cause to arrest defendant immediately after observing defendant conduct three separate hand-to-hand narcotics transactions with the individuals who approached him. See *Harris*, 352 Ill. App. 3d at 67 (concluding the officer had probable cause to arrest based on his knowledge and experience after observing the defendant engage in three separate hand-to-hand narcotics transactions); *People v. Rucker*, 346 Ill. App. 3d 873, 888-89 (2003) (the totality of the circumstances supported probable cause after the officer observed the defendant engage in four narcotics transactions with pedestrians and individuals in a vehicle); *People v. Ortiz*, 355 Ill. App. 3d 1056 (2005) (finding that the police officer's stopping of a truck traveling in tandem with another vehicle during a narcotics surveillance satisfied probable cause based on the officer's knowledge and experience); *Taylor*, 167 Ill. App. 3d at 67 (Probable cause to arrest existed where officer observed five transactions with the defendant and had intelligence of drug activity in the area).

¶ 23 Once the officer approached defendant and patted him down, defendant was under arrest. Therefore, any items seized from defendant after his custodial arrest were proper, including the keys and the United States currency.

¶ 24 Since " '[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to [that] arrest requires no additional justification.' " *People v. Cregan*, 2014 IL 113600, ¶ 28 (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)). This search area generally includes the initial or extended area of the defendant's control. *New York v. Belton*, 453 U.S. 454, 460-61(1981).

Here, once the officer had probable cause to arrest defendant, the search of his person was proper.

¶ 25 In addition, the search of the vehicle was also proper for the two reasons discussed below. First, in *Arizona v. Gant*, 556 U.S 332 (2009), the Supreme Court held that although "*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of a vehicle," a search of a vehicle incident to a recent occupant's arrest is justified "when it is reasonable to believe that evidence of the offense might be found in the vehicle." *Gant*, 556 U.S. at 335. In the instant case, we interpret defendant's conduct of going to the trunk of the car after a brief exchange with another individual, opening the trunk, removing the backpack, removing a bag from the backpack and something from that bag, handing something to the individual, then replacing the backpack and closing the trunk of the vehicle on three separate occasions as defendant occupying the vehicle for the purpose of distributing narcotics. Moreover, here the officer's observed defendant opening the trunk of the car, removing something from the backpack, replacing the backpack, and closing the trunk of the car during what the officer, in his experience, believed were three separate narcotics transactions. Based on his observations, the officer had more than ample evidence to reasonably believe evidence of the offense, the narcotics, might be found in the vehicle.

¶ 26 Second, the officer properly searched the vehicle based on the automobile exception to the warrant requirement. Under that exception, police officers may search a vehicle without a warrant "if there is probable cause to believe that the automobile contains evidence of criminal

activity that the officers are entitled to seize." *People v. James*, 163 Ill. 2d 302, 312 (1994) (citing *Carroll v. United States*, 267 U.S. 132 (1925)). In the present case, there was more than sufficient evidence to show the officers had probable cause to believe there was evidence of criminal activity in the vehicle. Based on the officer's observations, we conclude the search of the car, and the recovery of the backpack and the narcotics contained within were proper.

¶ 27 In reaching this conclusion, we note that the number of transactions alone makes it unlikely that they were innocent exchanges such as paying off a bet, splitting the cost of dinner or even simple handshakes. *Rucker*, 346 Ill. App. 3d at 888. Moreover, during each exchange defendant had to unlock the trunk of the car where the red backpack was located and retrieve the item from the plastic bag. Although the officer acknowledged that he could not see what was in the plastic bag, we find that probable cause is not dependent on the officer's prior visual observation of a narcotics substance. See *Rucker*, 346 Ill. App. 3d at 889 (citing *People v. Love*, 199 Ill. 2d 269, 280 (2002)). In sum, the totality of the circumstances observed by the officer, his knowledge of the area and his experiences as a police officer support the finding of probable cause for the arrest immediately after the officer observed defendant engage in three hand-to-hand narcotics transactions.

¶ 28 Defendant, nonetheless, contends that the officer did not believe that he had probable cause to arrest prior to his search of him and the car. In support of this contention, defendant points to a question posed to the officer at the suppression hearing, namely, whether he placed defendant under arrest after he took the keys from him, and his response that he did not know what he would find in the trunk. We observe, however, that the State's objection to this question

was sustained by the court. In addition, defendant does not contest the court's ruling on this objection until his reply brief, in violation of the Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), prohibiting new arguments from being raised in reply, nor did he contend in his post-trial motion that the court's ruling was erroneous, in order to preserve it for review. *People v. Enoch,* 122 Ill. 2d 176, 186 (1988). As such, we find that he has forfeited it for appeal.

¶ 29 In any event, probable cause is an objective standard and the officer's subjective belief as to the existence of probable cause is not determinative of whether the officer had probable cause to arrest defendant. *People v. Chapman,* 194 Ill. 2d 186, 218-29 (2000). Here, the officer testified at trial that he believed the three transactions involving the car were narcotics sales because he had seen many other narcotic transactions similarly conducted on that corner, and, although not "determinative," it is apparent the officer believed that he had probable cause to arrest defendant at that point.

¶ 30 Notwithstanding, defendant cites a plethora of cases which he claims establishes that there was no probable cause in this case. However, as the State notes, each of these cases are readily distinguishable from the instant case. In *People v. Oliver,* 368 Ill. App. 3d 690, 694 (2006), *e.g.*, the reviewing court held, contrary to defendant's contention that no probable cause was present in its case, that defendant was prejudiced based on the due process violation resulting from the detective's presentation of deceptive evidence to the grand jury of drug activity which he had not personally witnessed and misstated the number of transactions. Here, by contrast, the officer specifically testified to his observations of three separate transactions by defendant which provided probable cause to believe that defendant was engaged in drug sales.

¶ 31 *People v. Byrd*, 408 Ill. App. 3d 71, 77-78 (2011), *People v. Holliday*, 318 Ill. App. 3d 106, 111 (2001), *People v. Blake*, 268 Ill. App. 3d 737, 738, 741 (1995), and *People v. Moore*, 286 Ill. App. 3d 649, 653 (1997), also cited by defendant for his contention that there was no probable cause in this case, are also readily distinguishable as in each of these cases, there was but a single hand-to-hand transaction, as opposed to the three here, which made it unlikely that they were innocent exchanges. *Oliver*, 368 Ill. App. 3d at 697; *Rucker*, 346 Ill. App. 3d at 888. We also find *People v. Rainey*, 302 Ill. App. 3d 1011, 1015 (1999), factually distinguishable from the case at bar in that defendant in *Rainey* placed an item in his mouth, unlike here where the officer observed three transactions, in which items were obtained from a bag in a locked car trunk.

¶ 32 Defendant next contends that the trial court erred in allowing the State to introduce a prior consistent out-of-court statement from Officer Glowacki that he used binoculars during the surveillance. He maintains that the prior statement which was made at the suppression hearing was inadmissible because it did not rebut an allegation by the opposing party that the officer fabricated testimony and had a motive to lie; did not precede the statement introduced to impeach the officer's credibility, namely the police reports which omitted any information regarding the use of binoculars; and did not precede the onset of any motive to fabricate testimony. The State concedes that the statement was improperly admitted, but maintains that it was harmless error.

¶ 33 Generally, statements made prior to trial are inadmissible for the purpose of corroborating trial testimony or rehabilitating a witness; rather, such statements are admissible in

only two circumstances, 1) where there is a charge that the witness has recently fabricated the testimony, or 2) where the witness has a motive to testify falsely. *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010). In addition, the prior consistent statement must have been made before the alleged fabrication or motive to lie arose. *McWhite*, 399 Ill. App. 3d at 641.

¶ 34 Here, defendant did not allege that Officer Glowacki recently fabricated the testimony or had a motive to testify falsely, but rather, sought to impeach the officer's trial testimony that he used binoculars during the surveillance because it was not noted in his police reports of the incident. This is not an allegation of fabrication or motive to lie. *McWhite*, 399 Ill. App. 3d at 642. Moreover, the State sought to rehabilitate the officer by admitting his prior consistent suppression testimony that he used binoculars during the surveillance, a statement made after any motive to fabricate or lie would have arisen, *i.e.*, when the officer created his police reports. *McWhite*, 399 Ill. App. 3d at 642. These statements were not admissible under either prior consistent statement exception. We thus agree that admission of the statement was an abuse of discretion (*McWhite*, 399 Ill. App. 3d at 640-41), but find that its admission in this case was harmless error (*People v. Klimawicze*, 352 Ill. App. 3d 13, 29-30 (2004)).

¶ 35 To determine whether this trial error was harmless, we must consider whether the verdict would have been different if the evidence had not been admitted, a determination made on a case-by-case basis. *McWhite*, 399 Ill. App. 3d at 643. Here, the court did not specifically find that the officer's prior statement that he used binoculars bolstered his credibility, noting that it would "let it in for whatever it is worth," and did not refer to it when deciding the credibility of the witnesses. Rather, it found that the officer's testimony regarding his observations of

defendant unlocking the trunk of the car to obtain an item from a red backpack was corroborated by defendant's testimony that the officer went straight to the trunk to remove the red backpack. This corroboration, and the fact that the surveillance was conducted within 50 to 75 feet of defendant's activity, leads us to conclude that, even without the prior statement concerning the officer's use of binoculars during his surveillance, the verdict would have been the same. *McWhite*, 399 Ill. App. 3d at 643. Moreover, the State's evidence was not diminished by defendants' testimony that police just jumped him, and immediately went to his car and opened the trunk even though he claimed he had not been walking back and forth to that car and opening the trunk. *People v. Mullins*, 242 Ill. 2d 1, 25 (2011). For these reasons, we conclude that the admission of the prior statement was harmless error. *Klimawicze*, 352 Ill. App. 3d at 29-30.

¶ 36 Finally, defendant contends, the State concedes and we agree that the mittimus should be corrected to reflect defendant's conviction of possession of a controlled substance with intent to deliver rather than manufacturing or delivery of a controlled substance. Defendant was charged, in relevant part, with delivery of a controlled substance under section 570 of the Illinois Controlled Substances Act (720 ILCS 570/401 (West 2012)), and we, therefore, order the mittimus to be corrected to accurately reflect the offense of which he was convicted, *i.e.*, possession of a controlled substance with intent to deliver. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 37 In light of the foregoing, we affirm the judgment of the circuit court of Cook County and order the mittimus corrected as indicated.

¶ 38 Affirmed; mittimus corrected.

¶ 40 Presiding Justice Gordon, specially concurring:

¶ 41 I concur in the result but I must write separately to provide a key step in the analysis.

¶ 42 Namely, the fact that defendant was already in custody and the fact that the vehicle was parked down the block do not affect the applicability of the automobile exception in the case at bar. Because the automobile exception is justified by both the exigency created by the inherent mobility of vehicles and the relatively minimal expectation of privacy that people have in automobiles (*California v. Carney*, 471 U.S. 386, 391 (1985)), the applicability of the exception does not turn on whether the vehicle's occupant has already been taken into custody or whether the risk of mobility is gone. *United States v. Johns*, 469 U.S. 478, 487-88 (1985) (upholding a search of packages seized from automobiles which occurred three days after the occupants' arrest); *Michigan v. Thomas*, 458 U.S. 259, 261 (1982) ("the justification to conduct such a warrantless search does not vanish once the car has been immobilized"); *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) ("[t]he probable-cause factor [was] still obtained at the station house and so did the mobility of the car," even though the vehicle was impounded). Thus, even if a vehicle was "not actually moving," if it is "readily mobile" and "use[d] as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling," then "the overriding societal interests in effecting law enforcement justify an immediate search before the vehicle and its occupants become unavailable," as long as the police have probable cause to search. *Carney*, 471 U.S. at 392-93.

¶ 43 For the foregoing reasons, I specially concur.