2014 IL App (1st) 122455-U

SECOND DIVISION
September 30, 2014

No. 1-12-2455

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. 11 CR 5624
	)	
ANDRIEL WINSTON,	)	Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon concurred in the judgment.
Justice Neville dissented.

O R D E R

¶ 1 ***Held:*** The trial court's denial of the motion to quash arrest and suppress evidence was proper under the fourth amendment.

¶ 2 Following a bench trial, defendant Andriel Winston was convicted of possession of a controlled substance pursuant to section 402 of the Illinois Controlled Substances Act (the Act) (720 ILCS 570/402(c) (West 2010)) and sentenced to two years in prison. On appeal, defendant

contends that the trial court erred in denying his motion to quash arrest and suppress evidence. We affirm.

¶ 3 Defendant was charged by indictment with one count of possession of controlled substance "in that he knowingly and unlawfully possessed a substance containing, heroin, a controlled substance other than as authorized in [the Act]."

¶ 4 Prior to trial, defendant filed a motion to quash arrest and suppress evidence, alleging that he was illegally seized in violation of the fourth amendment. At the hearing on the motion, Officer Lawrence Ryan testified that around 9:19 p.m. on March 15, 2011, he was on patrol with two other officers in the area of 8026 South Exchange Avenue. While driving in an unmarked patrol car, he saw defendant standing near the passenger side sliding door of a parked van at 8026 South Exchange. Defendant appeared to be talking to the driver of the van, and engaging in what appeared to be a drug transaction. Without activating their lights, the officers made a U-turn and pulled up six feet behind the van. All three officers exited the car. Officer Ryan approached defendant, without displaying his weapon. Another officer talked to the driver while the third acted as a "guard" for the other officers. Officer Ryan asked defendant, "What's your business in the area?" Defendant responded "I'm talkin [*sic*] to my boy here." Officer Ryan saw the van's sliding door was ajar and when he looked in the rear passenger area of the van, he observed a clear plastic bag on the floor, and recovered it immediately. Upon further inspection, Officer Ryan found it to contain four smaller plastic bags "containing white powder substance." When he retrieved it defendant said "that's mine. I dropped it." Defendant was then arrested. Officer Ryan acknowledged that a police report authored by his partner, and approved by him, initially stated that he ordered defendant to the rear of the car, and then he observed a small plastic bag behind the driver's seat. He said he reviewed the report and told his partner the report

erroneously indicated that the drugs were found behind the driver's seat and that the sequence of events in the report was inaccurate because he did not order defendant to the rear of the car until after he recovered the drugs.

¶ 5 Following testimony, defense counsel argued that defendant was unlawfully seized before Officer Ryan discovered the narcotics inside the van. Counsel argued that there was "a show of police force" in this case. He emphasized that the officers "parked their car within six feet of the van where Mr. Winston was at. Not only did they park there, but there's three officers, and there's one officer acting as a guard." Counsel concluded that the circumstance indicated that defendant was not free to leave. The State argued that defendant was not seized until after Officer Ryan discovered the narcotics, noting that the officers did not block the movement of the van and that the officers were in unmarked vehicles and not in uniform.

¶ 6 The trial court denied defendant's motion. The court found that "when the officers approached the defendant to talk, they did not have probable cause, reasonable articulable [suspicion], consent or a warrant." However, the police did not seize defendant by parking their car behind the van, as defendant was standing outside the van and was not a passenger. Also, the court found that defendant did not have standing to contest the search of the van. Once Ryan retrieved the bag of suspect narcotics, and defendant admitted possession, the police had probable cause to arrest him. The court denied defendant's motion to suppress.

¶ 7 At trial, Officer Ryan gave a consistent account of how he stopped defendant. He added that once he retrieved the plastic bag from the van the driver repeatedly shouted at defendant "don't do me this way." Defendant then admitted that the drugs belonged to him. Defendant was arrested and the drugs were inventoried. The parties stipulated that the substance found inside the plastic bag tested positive for 1.5 grams of heroin.

¶ 8 The defense called two witnesses, Hasan Cunningham and defendant. Cunningham testified that he was the driver of the van. He and defendant had driven to 75th Street and Yates and parked on Exchange Avenue. Defendant got out of the van to make a phone call. He saw a police officer driving a Chevy Tahoe with its lights flashing make a U-Turn in his direction. A police officer approached him and asked for his driver's license and insurance. The officer then walked Cunningham to the back of the vehicle and handcuffed him to defendant. One of the officers began to search the van and soon returned with "some plastic." Cunningham denied that the plastic bag belonged to him or defendant.

¶ 9 Defendant testified that he, Cunningham, and a third passenger were in a van parked at 8026 South Exchange. He claimed that the third man went to the liquor store while he stood outside the van to answer a phone call. He saw a Chevy Tahoe drive past, with flashing lights, and make a U-turn. Police officers then jumped out of their car, ran up to the van and yelled at defendant. He claimed that the police officers were armed during the encounter. He did not obey the officer's orders and gave the officers "a little attitude." He was taken to the rear passenger area of the van, and handcuffed to Cunningham. Two of the officers entered the rear of the van, and Ryan came back saying he found "dope." The officer asked who the drugs belonged to, and defendant responded that it was not his and he cursed at the officer. Defendant maintained that Cunningham was speaking to the officer when he stated "don't do this to me." He was taken to the police station. He denied that he admitted possession of the drugs.

¶ 10 The court found defendant guilty of possession of a controlled substance, noting that Officer Ryan was credible, and that defendant and Cunningham were not. Defendant filed a motion for new trial arguing, *inter alia,* that defendant was under arrest before police found the narcotics. The motion was denied. The court sentenced defendant to two years in prison.

¶ 11 On appeal, defendant argues that the trial court erred in denying his motion to quash arrest and suppress evidence maintaining that Officer Ryan violated his fourth amendment rights because a reasonable person would not have felt free to leave under the circumstances.

¶ 12 We review a trial court's ruling on a motion to suppress evidence pursuant to a two-part test. *People v. Colyar*, 2013 IL 111835, ¶24. First, the reviewing court affords "great deference to the trial court's factual findings, and will reverse those findings only if they are against the manifest weight of the evidence." *Id*. We review *de novo* the ultimate question of whether the arrest should be quashed and the evidence suppressed. *Id*. As defendant does not contest the facts, arguing instead that, even under Officer Ryan's version of events, he was unlawfully seized, our review is *de novo*. *Id*.

¶ 13 Both the fourth amendment to the United States Constitution (U.S. Const., amend. IV) and article I, section 6, of the Illinois Constitution (Ill. Const. 1970, art. I, § 6) protect individuals from unreasonable searches and seizures. *People v. Garcia*, 2012 IL App (1st) 102940, ¶4. The stop of a vehicle and the detention of its occupants constitute a "seizure" under the fourth amendment. *People v. Cosby,* 231 Ill.2d 262, 273–274 (2008). "A person is seized when, by means of physical force or a show of authority, the person's freedom of movement is restrained." *Id*. (citing *United States v. Mendenhall*, 446 U.S. 544, 553 (1980)). Our supreme court has provided a framework that we must follow in making a determination as to whether a person has been seized, and to assist in determining whether a reasonable person believes he or she is not free to leave. See *People v. Leach*, 2011 IL App (4th) 100542. *Mendenhall* sets forth several examples that may indicate a seizure, including (1) the threatening presence of several police officers, (2) the display of a weapon by an officer, (3) some physical touching of the person by the officer, and (4) the use of language or tone of voice indicating compliance with the

officer's request might be compelled. *Mendenhall*, 446 U.S. at 554. These factors are not exhaustive, and a seizure can be found on the basis of other coercive police behavior similar to the *Mendenhall* factors. *People v. Leach*, 2011 IL App (4th) 100542, ¶ 9. However, in the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. *Mendenhall*, 446 U.S. at 555.

¶ 14 In order to determine whether the trial court erred when it denied defendant's motion to quash arrest and suppress evidence, we must look to the *Mendenhall* factors. Initially, we note that the first *Mendenhall* factor is absent. Defendant was standing beside a van talking to Cunningham on a public street when, without activating their lights, the officers made a U-turn and pulled-up six feet behind the van. Officer Ryan and another officer approached the van on foot. Officer Ryan asked defendant what "his business was." Defendant responded that he was talking. Shortly thereafter, Officer Ryan looked through the open sliding door of the van and observed a plastic bag on the floor of the van, which he suspected contained narcotics. Officer Ryan retrieved the bag and noticed a white power substance consistent with narcotics. Defendant, without being questioned, immediately admitted that the narcotics belonged to him, and he was arrested. There is no evidence to suggest that Officer Ryan or the other officers approached in a threatening manner.

¶ 15 Defendant cites *United States v. Kerr*, 817 F.2d 1384 (9th Cir. 1987) and *People v. Kveton*, 362 Ill. App. 3d 822 (2005) to argue that the particular way in which the officers arrived on the scene would convey to a reasonable person that he was being targeted for an investigation, and thus not free to leave. We reject this argument. In *Kerr*, the officers approached the scene and purposefully blocked movement of the defendant's vehicle, effectively immobilizing the

defendant. In *Kveton*, although the court did not expressly determine whether defendant's car was blocked, in determining whether a reasonable person would not feel free to leave, the court stated that the arresting officer "push[ed] the limit of what is a defense versus a voluntary encounter on the street." *People v. Kveton*, 362 Ill. App. 3d 822, 830 (2005). We do not find this is the case here. In this case, the officers merely pulled up behind the van defendant was standing beside with the intent to further investigate their suspicions. We agree with the trial court that defendant was not seized until after defendant admitted that the narcotics belonged to him.

¶ 16 Likewise, the second, third and fourth *Mendenhall* factors are absent. There was no evidence that any of the officers displayed a weapon or made physical contact with defendant upon arriving on the scene. Under Officer Ryan's version of events, he did not have his gun displayed when he approached defendant, nor did he use language or a tone of voice indicating that compliance with his request was required. Although the presence of three officers may have been subjectively threatening to defendant, there were no *Mendenhall* factors or other coercive actions to indicate that a reasonable person would have felt that he was not free to leave under the circumstances. *Leach*, 2011 IL App (4th) 100542, ¶ 9.

¶ 17 In *People v. Luedemann*, 222 Ill. 2d 530 (2006), our supreme court held that encounters with the police, based on similar facts, are not seizures but are consensual encounters in which a defendant could refuse to answer an officer's questions and walk away. We find that *Luedemann* extends to the facts of the instant case and we must follow its direction. The encounter between defendant and Officer Ryan was consensual and defendant could have refused to answer the officer and walked away. "It is well settled that a seizure does not occur simply because a law enforcement officer approaches an individual and puts questions to that person if he or she is willing to listen." *Id*. at 551 (citing *People v. Gherna*, 203 Ill.2d 165, 178 (2003); *United States*

v. Drayton, 536 U.S. 194, 200 (2002)). Because the evidence does not show that Officer Ryan engaged in unconstitutional coercive behavior, we find that the trial court properly denied defendant's motion to quash arrest and suppress evidence.

¶ 18 Defendant alternatively argues that the cumulative effect of the abrupt arrival of the officers, the presence of three officers with one standing as a "guard," and the questioning by Officer Ryan was enough for a reasonable person to believe they were not free to leave. However, even if we combine these factors, they are not enough to find that a seizure occurred. Considering the totality of the circumstances, what defendant is describing is a consensual encounter that does not implicate the fourth amendment. See *Id*. at 544 (a consensual encounter involves "no coercion or detention and therefore does not involve a seizure.") Officer Ryan admittedly approached defendant in order to investigate his suspicion that a narcotics transaction was taking place. However, Officer Ryan's actions prior to finding the bag of narcotics did not amount to a seizure because defendant's movement was not unconstitutionally constrained. See *Cosby*, 231 Ill. 2d at 273.

¶ 19 Finally, defendant cites *Brendlin v. California*, 551 U.S. 249 (2007) to argue that defendant was seized because, as a passenger in Cunningham's van, he expected that "a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety." In *Brendlin*, the Court considered the issue of whether a passenger had standing to contest a search and seizure of a car is seized during a traffic stop finding a reasonable person in the passenger's position had standing because he would not feel free to leave. *Id.* at 257. Unlike the defendant in *Brendlin*, in the instant case, defendant is not raising an issue of standing, he was not a passenger in Cunningham's van at the time Officer Ryan approached him nor was there a show of authority consistent with a traffic stop. At the time

that Officer Ryan approached defendant, he was merely standing beside the van on a public parkway. Thus, he was not seized under the rationale of *Brendlin*.

¶ 20 For the foregoing reasons, we affirm the judgment of the Circuit court of Cook County.

¶ 21 Affirmed.

¶ 22 JUSTICE NEVILLE, dissenting.

¶ 23 In this case, three plain clothes police officers were traveling northbound in an unmarked car when they observed the defendant standing on the passenger side of a van talking to a man seated in the driver's seat. However, they did not observe the defendant committing a crime. Nevertheless, the officers made a u-turn, parked six feet behind the van, exited the car at 9:18 p.m., surrounded the defendant to conduct a "field interview," (with one officer standing "guard"), and asked the defendant "What's your business in the area?"

¶ 24 The majority finds that the defendant was not seized by the police officers until after he admitted the drugs were his, and holds that the police officers did not seize the defendant in violation of the Fourth Amendment of the United States Constitution.

¶ 25 I think the defendant was seized when three plain clothes police officers, without probable cause, without a reasonable articulable suspicion, without consent or a warrant, surrounded the defendant *at night* and started questioning him. Therefore, because I believe the three police officers violated the Fourth Amendment of the United States Constitution, I respectfully dissent.

¶ 26 First, I agree with the trial court's finding that "when the officers approached the defendant to talk, they did not have probable cause, reasonable articulable [suspicion], consent or a warrant." I also agree with the trial court's finding that the police did not seize the defendant

by parking their car behind the van, as defendant was standing outside of the van and was not a passenger.

¶ 27 Second, I also agree with the majority that a person is seized when, by means of physical force or a show of authority, the person's freedom of movement is restrained. I also agree with the majority that *U. S. v. Mendenhall*, sets forth factors we must consider to determine if a seizure has occurred: (1) the threatening presence of several police officers, (2) the display of a weapon by an officer, (3) some physical touching of the person by the officer, and (4) the use of language or tone of voice indicating compliance with the officer's request might be compelled. *U. S. v. Mendenhall*, 446 U.S. 544, 553 (1980). However, Mendenhall also established that police have seized a person within the meaning of the fourth amendment when, "in view of *all* of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (Emphasis added.) *Mendenhall*, 446 U.S. at 554.

¶ 28 Therefore, I disagree with the majority's finding that the first and fourth *Mendenhall* factors are absent. I would find that a reasonable person in defendant's shoes would not have believed he was free to leave.

¶ 29 The majority finds that the first *Mendenhall* factor was absent because there was no evidence that Officer Ryan or the other officers approached the defendant in a threatening manner.

¶ 30 I think the majority and the trial court failed to consider how threatened a reasonable person would feel when a police car makes an abrupt u-turn, three plain clothes police officers hurriedly exit the car and surround the person *at night* and ask him, "What is your business in this area?" The majority's failure to consider the aforementioned evidence brought them to an erroneous conclusion with respect to the first *Mendenhall* factor.

¶ 31 The majority also felt there was no evidence of the fourth *Mendenhall* factor, that the language or tone of the officer indicated that compliance with the officer's request was compulsory.

¶ 32 I also disagree with this finding because the majority once again failed to consider all of the evidence on record. I think being abruptly surrounded, at night, by three plain clothes officers, who hurriedly exit their car, would make any reasonable person feel compelled to answer an officer's question, "What is your business in this area?"

¶ 33 While the majority acknowledges that the presence of three officers might be subjectively threatening, I submit that the presence of two or more officers has also been found to be objectively threatening *and coercive*. *See People v. O' Campo*, 377 Ill. App. 3d 150, 157-61 (2007); *see also People v. Cosby*, 231 Ill.2d 262, 304-06 (Freeman, J., dissenting in part).

¶ 34 I believe that any reasonable person would believe he was not free to leave when three police officers make a u-turn in an unmarked car, hurriedly exited the car and started asking him questions at night. *See People v. Kveton*, 362 Ill. App. 3d 822, 835-36 (2005).

¶ 35 I also believe that the language the officer used ("What is your business in this area?"), and the fact that there were three officers surrounding the defendant at night, would make the defendant and any reasonable person feel that answering the question was compulsory. *See People v. Jackson*, 389 Ill. App. 3d 283, 287-89 (2009).

¶ 36 The majority finds that it "must follow" *Luedemann* because it is "based on similar facts." However, *Luedemann* makes it clear that the "free to leave" language in Mendenhall applies to people seized by police officers walking down a street. Luedemann, 225 Ill. 2d at 550. *Luedemann* applies different rules to people seized by police officers in parked vehicles. See *People v. Luedemann*, 322 Ill. 2d 530, 550 (2006), citing *People v. Glorna*, 203 Ill 2d. 165, 178

(2003) (a police officer did not seize a DUI defendant who was seated in his car when the officer observed an open bottle). Therefore, because Winston was standing on the street when he was seized by the police, the majority's reliance on *Luedemann* is misplaced.

¶ 37 When I consider that the three officers: 1) made an abrupt u-turn and hurriedly exited the car, 2) surrounded the defendant at night, 3) asked an investigative question which led to the defendant's statement "That's mine [the bag of drugs]. I dropped it.", 4) did not have probable cause, 5) did not have a reasonable articulable suspicion, and 6) did not have consent or a warrant, it is clear to me that the officers violated the defendant's Fourth Amendment protections against unlawful seizures. Therefore, the majority erred when it affirmed the trial court's ruling without considering the evidence that established that the three police officers seized the defendant and violated the Fourth Amendment of the United States Constitution.

¶ 38 Accordingly, the defendant's statement was the fruit of an unlawful seizure and should be suppressed and his conviction reversed. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963).