2017 IL App (1st) 153462-U

No. 1-15-3462

Order filed November 22, 2017

Sixth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 15270
	)	
PETER WADE,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Where the arresting officer properly searched defendant incident to arrest, the trial court did not err in denying defendant's motion to quash arrest and suppress evidence. The fines, fees, and costs order is corrected.

¶ 2 Following a bench trial, defendant Peter Wade was convicted of aggravated unlawful use of a weapon (AUUW) and sentenced to four years and six months in prison. On appeal, defendant contends that the trial court erred in denying his motion to quash arrest and suppress evidence. He argues that the police had no lawful reason to perform a *Terry* frisk of his person

because he was not armed and dangerous and there was no indication that the frisking officer felt his safety was threatened by the presence of a folded pocket knife. Defendant also challenges the fines and fees imposed by the trial court. For the reasons that follow, we affirm and order correction of the fines, fees, and costs order.

¶ 3 Defendant was arrested in Chicago on August 16, 2014. After the State charged him with four counts of AUUW and two counts of unlawful use of a weapon by a felon, defendant filed a motion to quash arrest and suppress evidence. In the motion, defendant argued that he was unlawfully stopped, detained, and searched by the police, that the search produced a weapon, and that therefore, the weapon should be suppressed.

¶ 4 At the hearing on the motion, defendant called Chicago police officer Jaeho Jung, who was the arresting officer. Jung testified that about 1 p.m. on the day in question, he was on routine patrol in an unmarked car when he saw a minivan run a red light. He followed the minivan for three blocks. During this time, Jung determined that the license plate on the minivan was registered to a different vehicle. Jung activated his lights, at which point the minivan immediately pulled over. Jung exited his car and approached the driver's window of the minivan. While he did not see any "bulges" on the driver at that time, he did smell both burnt and fresh cannabis coming from the car. Jung asked the driver for his license, which he produced, and his registration, which he did not. The driver indicated to Jung that he did not know who owned the minivan. Due to the smell of cannabis and the driver's failure to produce proof of registration, Jung asked the driver to get out of the minivan.

¶ 5 Jung testified that when the driver got out of the minivan, he did not notice any suspicious bulges about his person. However, he did see a folding knife clipped to the inside of

the driver's "front pocket," with the clip on the outside. Jung removed the knife. When defense counsel asked, "[T]here is nothing illegal about a folding knife, sir, is there?" Jung answered, "It was just for my safety, sir." After removing the folding knife, Jung patted down the driver. He felt an object toward the left side of the front of the driver's waist. Jung stated that he "kind of felt it a little more, and the shape of it was a pistol, and I could, like the outline of it was a pistol." Accordingly, Jung told the driver not to move and handcuffed him. Jung then told another officer at the scene to remove the pistol. When defense counsel asked whether this weapon was "what you arrested [defendant] for," Jung responded, "I believe there is other charges, but that's one of them, I believe, yes." Finally, Jung acknowledged that in his police report, he did not mention that the minivan smelled of cannabis or that the driver did not know who owned the minivan.

¶ 6 On cross-examination, Jung identified defendant as the driver of the minivan and stated that the minivan had two occupants. Jung clarified that while he was following the minivan, his partner, Officer Hernandez, ran its license plate. After Jung curbed the minivan, he approached the driver's side while Hernandez approached the passenger's side. He explained that he asked defendant to step out of the minivan for a "variety of reasons," including defendant's having run a red light, the smell of cannabis, the license plate not being registered to the minivan, a cracked windshield, the lack of insurance, and defendant's stated ignorance of who owned the minivan. Jung agreed that defendant was "arrested for and ticketed for all these offenses" and indicated that all of those offenses were included in the arrest report. Jung also related that one of the reasons defendant stepped out of the minivan was because he wanted to see the license plate. In response to questioning by the prosecutor, Jung agreed that he recovered the knife from

defendant for officer safety, adding, "And I informed [defendant] of that too. He was fine with that." Jung also agreed that after he recovered the knife, he proceeded to conduct a further patdown for his safety, during which he felt the object which was recovered and eventually determined to be a loaded semiautomatic pistol. Finally, Jung testified that he also recovered a small bag of cannabis from the driver's door handle, and agreed that "defendant was then arrested and taken to the station and processed."

¶ 7 Following arguments, the trial court denied defendant's motion to quash arrest and suppress evidence. In doing so, the trial court stated that it found Jung's testimony regarding the basis for the stop credible. After observing that an arrest for a minor offense punishable by a fine does not violate the fourth amendment or the Illinois constitution, the court made the following conclusion:

> "[B]ecause the officers credibly testified regarding the traffic violations and because they have authority to arrest for that fine-only offense whether or not it is customary, because the officers have the authority to ask the driver of the vehicle out of the vehicle, and because the weapon was found on the defendant's person, the defendant's motion to quash and suppress is denied."

¶ 8 At trial, Officer Jung testified to substantially the same set of facts he related at the hearing on the motion to quash arrest and suppress evidence. He specified that he noticed the minivan's cracked windshield at the same time he observed it run the red light. Jung related that after he curbed the minivan, he informed defendant of the reason for the stop and requested his driver's license, insurance, and proof of registration. Defendant was unable to produce proof of insurance or registration information for the minivan, and Jung also noticed the smell of cannabis

coming from the minivan, so he "kind of wanted [defendant] out of the car." Jung testified that at this point, defendant stated that he wanted to look at the license plate as well, so he stepped out of the minivan.

¶ 9 When defendant got out of the minivan, Jung noticed a folding knife in defendant's pants pocket. He directed defendant to turn around and informed him he "would be removing the knife for my safety." Defendant "was cool with that," so Jung "continued to do the protective pat down," during which he felt an object shaped like a pistol on defendant's left side in the area of his waistband. Jung told defendant not to move, handcuffed him, and directed another officer to recover the object, which turned out to be a semiautomatic pistol. Jung then asked defendant whether he had a firearm owner's identification (FOID) card, and defendant answered that he did not. Finally, Jung testified that after another officer on the scene read defendant his *Miranda* rights, defendant stated that he carried a gun for protection because he was once shot in the leg while he was fixing his car.

¶ 10 Chicago police officer B. Thomas testified that he assisted Officer Jung in defendant's arrest. When he arrived on the scene, Jung was speaking with defendant, who was in the minivan's driver's seat. Defendant then got out of the car and Thomas saw Jung remove a knife from defendant's waistband. Thomas also testified that he saw a two-tone semiautomatic handgun in defendant's waistband. At Jung's direction, Thomas retrieved the gun, which was uncased and loaded, from the left side of defendant's waistband. Thomas removed the gun's magazine and then kept it on his person for transport to the police station, where it was inventoried.

¶ 11 The State introduced into evidence documents from the Illinois State Police indicating that defendant had never been issued a FOID card or a concealed carry permit, as well as a certified statement of conviction showing that defendant had been convicted of possession of a controlled substance in 2002.

¶ 12 Defendant made a motion for a directed finding, which the trial court denied.

¶ 13 Defendant testified that he worked as a mechanic for a man named Juanito Juarez or Juanito Gomez, who bought cars through internet auctions, had defendant fix them, and then sold them for a profit. The minivan in question belonged to a man named Russell Ware. Defendant stated that Ware had purchased the minivan from him and then brought the minivan back and had repairs done to it. On the day in question, defendant and his passenger, Jamal Artist, were driving the minivan to Hammond, Indiana to pick up another car from an auction.

¶ 14 Defendant testified that when he drove through the intersection identified by Officer Jung, the light was green, not red. As he crossed the intersection, he noticed two unmarked police cars exiting a gas station ahead of him. One of the police cars "bolted out" into traffic, and defendant slammed on his brakes to avoid colliding with it. The other police car followed defendant for about two blocks before it pulled defendant over. An officer, whom defendant identified as Officer Jung, approached his window and asked to see his license, which defendant produced. Jung told defendant that he had been pulled over because his middle brake light was out and because the license plate on the minivan was registered to a different vehicle. Defendant explained to Jung that the plate belonged to his sister, and that he had put it on the minivan because Ware took his plate off the minivan when he dropped it off at the shop.

¶ 15 Jung opened the minivan's door and asked defendant to step out. As defendant stepped down, Jung told him to place his hands on the side of the minivan. He then searched defendant and found a pocket knife clipped to the upper right pocket of his jeans, as well as $2,375 in his pocket. In court, defendant explained that he was carrying the cash so that he could pay for the car he was picking up in Indiana. Defendant testified that Jung searched around his waist area but found nothing. In particular, he denied that Jung found a gun. Jung handcuffed defendant and led him around to the other side of the minivan, where another officer had handcuffed Artist. The officers then searched the minivan. During the search, one of them announced that he had found a gun.

¶ 16 Defendant testified that the only time he saw a gun was on a desk at the police station, when the police were leading him to the bathroom. He denied telling the police that he had been shot while working on his car. Instead, defendant stated that he had once accidentally shot himself in the leg, and showed the court the entry and exit wounds on his left calf.

¶ 17 On cross-examination, defendant stated that he told Jung the minivan belonged to Russell Ware, but acknowledged that he did not have registration paperwork for the minivan to show the police. He testified that he told Jung the minivan's middle brake light could not have been out, as that model vehicle did not have a middle brake light. Defendant denied that the minivan's windshield was cracked, and denied that he asked Jung if he could get out of the minivan to look at the license plate.

¶ 18 Following closing arguments, the trial court found defendant guilty on all charges. Defendant filed a motion for a new trial, which the court denied. At sentencing, the trial court merged all the counts into count 1, which charged AUUW based on defendant carrying on his

person an uncased, loaded, and immediately accessible handgun without having been issued a concealed carry permit. The court imposed a sentence of four years and six months as well as $834 in fines, fees, and costs. The record does not include a postsentencing motion.

¶ 19 On appeal, defendant's first contention is that the trial court erred in denying his motion to quash arrest and suppress evidence. When reviewing a trial court's ruling on a motion to suppress, we may consider the testimony given at trial in addition to the testimony provided at the suppression hearing. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). We give great deference to the trial court's findings of fact and will reverse those findings only if they are against the manifest weight of the evidence. *People v. Cregan*, 2014 IL 113600, ¶ 22. In contrast, the trial court's ultimate legal ruling on whether evidence should be suppressed is reviewed *de novo*. *Id.* Here, no factual or credibility dispute exists. Accordingly, our review in the instant case is *de novo*.

¶ 20 Defendant asserts that Officer Jung had no lawful reason to perform a frisk of his person pursuant to *Terry v. Ohio*, 392 U.S. 1 (1989). He argues that once Jung removed the knife from his pocket, Jung had no reason to believe he was armed and dangerous. Defendant further argues that there was no indication Jung subjectively felt his safety was threatened at any time, or that Jung suspected defendant had any other weapons on his person before conducting the *Terry* frisk. According to defendant's argument, the gun discovered during the course of the improper *Terry* frisk should have been suppressed and, because the State cannot prove its case without that evidence, his conviction should be reversed outright.

¶ 21 The State has re-framed the issue on appeal. Instead of characterizing the encounter between defendant and Jung as a *Terry* frisk, the State asserts that Jung had probable cause to

arrest defendant at the time of the patdown, and therefore properly searched defendant incident to arrest. We are mindful that the State seems to have changed its theory of the case on appeal, as the prosecutor who questioned Jung at the hearing on the motion to quash arrest and suppress evidence asked him about the "patdown for your safety" and then referred to "a protective patdown" in arguing against defendant's motion. Nevertheless, as noted above, our review of the trial court's decision on the motion to suppress is *de novo*. As such, there is no impediment to our considering whether the search that Jung performed was proper as a search incident to arrest.

¶ 22 Defendant concedes in his reply brief that "Jung had probable cause to arrest [him] for any of the traffic violations he committed." He maintains, however, that because he was not arrested until after Jung frisked him and discovered the gun, the search cannot be considered to be incident to arrest and *Terry* principles should apply instead. In essence, defendant's argument is that a search, even when it is supported by probable cause, may not be deemed to be incident to arrest unless it takes place after the actual arrest occurs.

¶ 23 We reject defendant's position.

¶ 24 There is no dispute that in this case, probable cause existed to arrest defendant for several traffic offenses. Indeed, the arrest report lists four possibilities: disobeying a red stop light (Chicago Municipal Code § 9-8-020(c)(1) (added July 12, 1990); see also 625 ILCS 5/11-306(c) (West 2014)); driving with a cracked windshield (Chicago Municipal Code § 9-76-210(b) (added March 26, 1996); see also 625 ILCS 5/12-503 (West 2014))); operating a vehicle without evidence of registration (625 ILCS 5/3-701 (West 2014)); and operating an uninsured motor vehicle (625 ILCS 5/3-707 (West 2014)). The failure to obey traffic laws constitutes a petty offense. 625 ILCS 5/11-202 (West 2014).

¶ 25 Police officers may conduct a search of a defendant incident to their authority to arrest that defendant for a traffic violation or a petty offense. *People v. Brannon*, 2013 IL App (2d) 111084, ¶¶ 20, 23; see also *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). Contrary to defendant's argument in this case, an officer may conduct a search incident to arrest before actually arresting the defendant. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."); *People v. Little*, 322 Ill. App. 3d 607, 612 (2001); *People v. Kolichman*, 218 Ill. App. 3d 132, 139, 140-43 (1991); *People v. Miller*, 212 Ill. App. 3d 195, 200 (1991); *People v. Rossi*, 102 Ill. App. 3d 1069, 1073 (1981). This principle was explained by Justice Harlan in his concurrence in *Peters v. New York*, 392 U.S. 40, 77 (1968), as follows:

> "Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is no case in which a defendant may validly say, 'Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search was invalid because he did not in fact arrest me until afterwards.' "

Finally, we observe that there is no requirement that a defendant be subsequently charged with or convicted of the offense that gave the police probable cause to arrest. *Kolichman*, 218 Ill. App. 3d at 141; *Rossi*, 102 Ill. App. 3d at 1073.

¶ 26 We conclude that in this case, Jung properly searched defendant incident to arrest. Because probable cause to arrest existed independent of the fruits of the search, the exact timing of the arrest and the search is of no importance. See *Rawlings*, 448 U.S. at 111 n. 6. Accordingly, we affirm the trial court's judgment denying defendant's motion to quash arrest and suppress evidence.

¶ 27 Defendant's second contention on appeal is that this court should vacate three assessments that were improperly imposed by the trial court and should grant him presentence custody credit against a fourth. He acknowledges that he did not challenge his fines and fees in a postsentencing motion. Nevertheless, defendant argues that we may reach his arguments regarding fines and fees under the doctrine of plain error or, in the alternative, that trial counsel was ineffective for failing to preserve the issues. The State has responded to defendant's arguments regarding forfeiture as follows:

> "Defendant recognizes that he has forfeited his challenges to the trial court's fines, fees, and costs order by failing to object and forgoing any post-sentencing motion. However, the Illinois Supreme Court has determined that error in the fees, fines, and costs order is second-prong plain error that affects the integrity of the judicial system. [Citation.] Additionally, the Appellate Court has determined that a trial counsel's failure to ensure that a defendant receive the monetary credit he is due is ineffective assistance of trial counsel. [Citation.] Therefore, as the People note that the fines, fees, and costs order contains errors, they submit the following: A. Inapplicable Fees and Fines Should Be Vacated.

*** B. Defendant Is Entitled to Presentence Incarceration Credit for an Eligible Fine."

¶ 28 We need not address defendant's argument on this issue under the doctrine of plain error because "[t]he rules of waiver also apply to the State, and where, as here, the State fails to argue that defendant has forfeited the issue, it has waived the forfeiture." *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. Here, because the State does not argue defendant's forfeiture, we will address the merits of defendant's challenge to the imposition of various assessments. The propriety of the fines and fees imposed by the trial court is reviewed *de novo*. *People v. Green*, 2016 IL App (1st) 134011, ¶ 44.

¶ 29 Defendant argues, and the State correctly concedes, that the $5 Electronic Citation Fee (705 ILCS 105/27.3e (West 2014)), the $5 Court System fee (55 ILCS 5/5-1101(a) (West 2014)), and the $100 Streetgang Fine (730 ILCS 5/5-9-1.19 (West 2014)) must be vacated. The $5 Electronic Citation Fee does not apply to felonies (*People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46), the $5 Court System fee applies only to vehicle offenses (*People v. Williams*, 394 Ill. App. 3d 480, 483 (2011)), and the Streetgang Fine applies only to street gang members (730 ILCS 5/5-9-1.19 (West 2014)). Here, defendant was convicted of a felony that is not a vehicle offense, and there was no evidence of gang membership. Therefore, we vacate all three assessments and direct the circuit court to correct the fines, fees, and costs order accordingly.

¶ 30 Next, defendant argues that he is entitled to $5-per-day presentence custody credit against the $15 State Police Operations Fee (705 ILCS 105/27.3a(1.5) (West 2014)). Under section 110-14(a) of the Code of Criminal Procedure of 1963, an offender who has been assessed one or more fines is entitled to a $5-per-day credit for time spent in presentence custody as a result of

the offense for which the sentence was imposed. 725 ILCS 5/110-14(a) (West 2014). It is well-established that the presentence custody credit applies only to reduce fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 599 (2006). Our supreme court has held that claims for $5-per-day credit may be raised at any time and stage of court proceedings, and that if the basis for granting such credit is clear and available from the record, an appellate court may grant the relief requested. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008); see also *People v. Brown*, 2017 IL App (1st) 150203, ¶ 36.

¶ 31 The State agrees with defendant that he is entitled to presentence incarceration credit against the $15 State Police Operations Fee. We accept the State's concession and hold that this assessment is a fine against which defendant may receive $5-per-day credit for the time he spent in presentence custody. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31. Defendant notes that because he spent 405 days in presentence custody, his *per diem* credit totals $2,025. However, the amount credited may not exceed the total amount of the fines imposed. 725 ILCS 5/110-14(a) (West 2014). Here, the only fines subject to offset by the $5-per-day credit are the $15 State Police Operations Fee and the $30 Fine to Fund Juvenile Expungement (730 ILCS 5/5-9-1.17 (West 2014)). Accordingly, defendant's $5-per-day presentence custody credit is limited to $45. We order the circuit court to correct the fines, fees, and costs order to reflect this credit.

¶ 32 For the reasons explained above, we vacate the $5 Electronic Citation Fee, the $5 Court System fee, and the $100 Streetgang Fine, and order the circuit court to correct the fines, fees, and costs order to reflect that defendant is entitled to $45 worth of $5-per-day presentence custody credit against his remaining fines. The total amount of fines, fees, and costs is reduced from $834 to $679.

¶ 33 Affirmed; fines, fees, and costs order corrected.