2019 IL App (1st) 162793-U

No. 1-16-2793

Order filed March 15, 2019

Fifth Division

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. 15 CR 7404
	)	
OCTAVIUS HURST,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court was correct in denying defendant's motion to quash arrest and suppress evidence where police had probable cause to search defendant for evidence of drugs. We affirm defendant's conviction for aggravated unlawful use of a weapon.

¶ 2 Following a bench trial, defendant, Octavius Hurst, was convicted of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (3)(A-5) (West 2016)) and sentenced to one year in prison. On appeal, defendant argues that the trial court erred in denying his motion to

quash arrest and suppress evidence because police lacked reasonable suspicion to conduct a protective pat-down search. We affirm.[1]

¶ 3 Defendant was charged with nine counts of AUUW based on his possession of a firearm on April 10, 2015. The trial court later took judicial notice that the charges of possession of cannabis (720 ILCS 550/4(b) (West 2016)), possession of drug paraphernalia (720 ILCS 600/3.5(a) (West 2016)), failure to wear a seatbelt (625 ILCS 5/12-603.1 (West 2016)), and failure to provide proof of insurance (625 ILCS 5/3-707 (West 2016)) were dismissed at the branch court. Prior to trial, defendant moved to quash arrest and suppress evidence, arguing that his arrest, following an illegal search and recovery of a firearm, was unlawful.

¶ 4 At the suppression hearing, the following evidence was presented. Defendant testified that on April 10, 2015, about 10:45 p.m., he was working as a pizza delivery driver and driving his girlfriend's car. He testified that he was wearing his seatbelt and did not violate any traffic laws at that time. He was pulled over, and two Illinois State Police troopers approached his vehicle. Trooper Lamar Horton came to the driver's side of the vehicle, and defendant stated he had to open the door to speak with him because the window mechanism was broken. Defendant handed his driver's license to Horton and began looking for proof of insurance for the vehicle. After checking defendant's license, Horton returned to the vehicle. He asked defendant to step outside to the rear of the vehicle. Defendant complied and placed his hands on the trunk of his car. Horton searched defendant and found a loaded firearm in his waistband. Defendant was then placed under arrest. A further custodial search revealed cannabis and drug paraphernalia in defendant's coat pocket. Defendant testified that he had smoked cannabis three hours before

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

work, he had not smoked in the vehicle, and there was not any cannabis on the floorboard of the vehicle that day. He also stated that the vehicle was insured but he did not have time to locate the insurance card.

¶ 5 Trooper Horton testified that on April 10, 2015, he was patrolling the Englewood area with his partner, Trooper Teresa Allen, and canine partner, Bruce. Horton observed a vehicle turn onto a street and the driver, later identified as defendant, was not wearing a seatbelt. After pulling alongside the vehicle, his partner confirmed that defendant was not wearing a seatbelt. The troopers conducted a traffic stop on the vehicle. Horton approached the vehicle and spoke to defendant through the rolled-down driver's side window. He smelled burnt cannabis emitting from the vehicle and, with the light from his flashlight, observed cannabis on the driver's side floorboard. After receiving defendant's license, Horton checked for possible warrants. When he walked back to the vehicle, he informed defendant that he could smell cannabis and subsequently asked defendant to step out of the vehicle to conduct a "protective pat-down." During the pat-down, Horton felt a gun barrel in defendant's waistband, and defendant was handcuffed following recovery of the firearm. Horton continued searching defendant and found cannabis and drug paraphernalia in defendant's coat pocket. On cross-examination, Horton testified that the cannabis observed on the floorboard was not recovered and inventoried.

¶ 6 The trial court granted defendant's motion to quash arrest and suppress evidence, stating that the officers were required to ask defendant if he had a firearm owner's identification (FOID) card prior to arresting him for the possession of the firearm and, thus, the arrest was unlawful, pursuant to *People v. Holmes*, 2015 IL App (1st) 141256, *rev'd* 2017 IL 120407.

¶ 7 The State then filed a motion for reconsideration of the motion to suppress. The State argued that Horton had probable cause to arrest defendant prior to the search, and thus, the firearm would have inevitably been discovered in a search incident to a custodial arrest.

¶ 8 Defendant argued that Horton had no intention of arresting defendant for any of those offenses and the testimony did not support a finding that he would have arrested defendant for those offenses.

¶ 9 After hearing arguments from both sides, the trial court ruled in favor of the State and denied the motion to quash arrest and suppress evidence. The trial court reasoned that the search was pursuant to defendant's arrest for failure to produce proof of insurance and thus valid.

¶ 10 The case proceeded to a bench trial, where Horton testified consistently with his testimony at the suppression hearing. When asked whether the search was a protective pat-down or a search incident to arrest, he responded that the search was a protective pat-down. He also added that the arrest occurred after the search. The parties stipulated that defendant did not have a FOID card or a concealed carry license.

¶ 11 The trial court found defendant guilty as charged. Defendant moved for a new trial, which the court denied. At sentencing, the court merged the counts and sentenced defendant to one year in prison for AUUW based on his lack of a concealed carry permit (count I). 720 ILCS 5/24-1.6 (a)(1), (3)(A-5) (West 2016).

¶ 12 On appeal, defendant contends that the trial court erred when it denied his motion to quash arrest and suppress evidence. Defendant argues that Horton did not have the requisite reasonable suspicion that he was armed and dangerous prior to the "protective pat-down."

¶ 13 In reviewing a trial court's ruling on a motion to suppress, the reviewing court applies a two-part standard of review because a ruling on a defendant's motion to quash arrest and suppress evidence typically involves questions of both fact and law. *People v. Williams*, 2016 IL App (1st) 132615, ¶ 32. The trial court's factual findings are given great deference and will only be reversed if they are against the manifest weight of the evidence. *People v. Holmes*, 2017 IL 120407, ¶ 9. However, the trial court's ultimate ruling on the motion is a question of law that is reviewed *de novo*. *Id.*

¶ 14 We first note that the trial court made the following factual findings relevant to this appeal in its ruling on the suppression motion. The court found that defendant was driving without wearing a seatbelt and without proof of insurance and that Horton conducted a pat-down of defendant and recovered a firearm from defendant's waistband. The court also noted that Horton observed what appeared to be cannabis in the vehicle and smelled the odor of cannabis. After reviewing the record, we conclude that these findings are not against the manifest weight of the evidence. We now review *de novo* whether the search and seizure was a violation of the fourth amendment.

¶ 15 The Illinois Constitution (Ill. Const. 1970, art I, § 6) and the fourth amendment of the United States Constitution (U.S. Const., amend. IV) protects against unreasonable searches and seizures. *Holmes*, 2017 IL 120407, ¶ 25. The fourth amendment imposes a standard of reasonableness "upon the exercise of discretion by law enforcement officers to safeguard the privacy and security of individuals against arbitrary invasions." *People v. McDonough*, 239 Ill. 2d 260, 266 (2010). As such, "[r]easonableness under the fourth amendment generally requires a warrant supported by probable cause." *People v. Sanders*, 2013 IL App (1st) 102696, ¶ 13.

¶ 16 However, there are exceptions to the warrant requirement. Our supreme court has recognized three types of police-citizen encounters that do not constitute an unreasonable seizure: (1) arrests, which must be supported by probable cause; (2) brief investigatory stops, often referred to as "*Terry* stops," which require a reasonable, articulable suspicion of criminal activity; and (3) consensual encounters that do not involve coercion and, thus, do not implicate fourth amendment protections. *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006).

¶ 17 As a threshold matter, the parties dispute the type of encounter that occurred in this case. Defendant argues that it was a *Terry* stop while the State claims that it was an arrest. The State does not contend that the officer had reasonable suspicion that defendant was armed and dangerous. Rather, the State claims that prior to the search Horton had probable cause to arrest defendant for any, or all, of the following three offenses: failure to wear a seatbelt, failure to provide proof of insurance, and possession of cannabis. The State maintains that the search was incident to an arrest for any of those offenses. This was the reasoning relied upon by the trial court in denying defendant's motion to suppress.

¶ 18 However, a reviewing court may affirm a trial court's decision for any appropriate reason supported by the record, regardless of whether the trial court relied on those grounds. *People v. Williams*, 193 Ill. 2d 306, 349 (2000). We also note that Horton's stated reasoning for the search does not conclusively determine the legality of the search. See *Whren v. U.S.*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). An officer's actions are viewed objectively and are not based on the actual motivations of the officers involved. *McDonough*, 239 Ill. 2d at 272. Thus, Horton's subjective determination that it was a "protective pat-down" does not confine our review to only that search

classification. Rather, we undertake our own assessment of whether Horton's search was proper. See *People v. Wear*, 229 Ill. 2d 631, 644 (2008) (stating that an officer's testimony and subjective beliefs about a search and seizure are not relevant to the court's objective analysis of the circumstances). After examining the totality of the circumstances, we determine that this was not a violation of the fourth amendment for the reasons set out below. See *People v. Moss*, 217 Ill. 2d 511, 518 (2005) ("Reasonableness is measured in objective terms by examining the totality of the circumstances.").

¶ 19 The reasonableness of a traffic stop, like the one involved here, is generally analyzed under the principles contained in *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). *People v. Jones*, 215 Ill. 2d 261, 270 (2005). Under *Terry*, the fourth amendment allows an officer to make an investigatory stop of an individual without probable cause to arrest as long as there is a reasonable suspicion of criminal activity. *People v. Juarbe*, 318 Ill. App. 3d 1040, 1049 (2001). In order to justify that detention, an officer must point to specific, articulable facts which, when taken together, make the intrusion reasonable. *Id* at 1049-50.

¶ 20 In this case, the initial traffic stop was reasonable. Horton testified that he pulled defendant over because he, and his partner, observed that defendant was not wearing a seatbelt. This is a traffic violation, and thus, an investigatory stop following that observation is a reasonable seizure under the fourth amendment. See *Jones*, 215 Ill. 2d at 270 (finding that the officer's traffic stop was justified where he observed the defendant driving without operating tail lights).

¶ 21 Our inquiry does not end with determining that the initial seizure of defendant did not run afoul of the fourth amendment. We must also determine whether the officer's subsequent search was proper.

¶ 22 An officer may search a defendant for evidence of criminal activity if there is probable cause to do so. *People v. Holliday*, 318 Ill. App. 3d 106, 111 (2001); *People v. Morquecho*, 347 Ill. App. 3d 382, 386 (2004). "Probable cause exists when the facts and circumstances within the officer's knowledge are sufficient to warrant a reasonable person in believing that a crime has been committed[.]" *Holliday*, 318 Ill. App. 3d at 111. We must examine the circumstances leading to the search and decide whether those facts, "viewed from the standpoint of an objectively reasonable law enforcement officer, amount to probable cause." *Jones*, 215 Ill. 2d at 274.

¶ 23 It is well established that distinctive odors, such as that of cannabis, can be persuasive evidence of criminal activity. *People v. Stout*, 106 Ill. 2d 77, 87 (1985). More recently, Illinois courts have repeatedly held that the distinctive smell of burning cannabis emanating from a vehicle will provide officers familiar with and trained in the detection of controlled substances with probable cause to search a vehicle and all persons seated therein. See *In re O.S.*, 2018 IL App (1st) 171765, ¶ 26 and cases cited therein. This has remained true following the decriminalization of possession of less than ten grams of cannabis. *Id.* ¶¶ 26-30 ("Given that Illinois prohibits the knowing possession of marijuana and prohibits operating a vehicle while impaired and under the influence of marijuana, the distinctive odor of marijuana was indicative of criminal activity[.]").

¶ 24 Here, Horton observed cannabis on the driver's side floorboard of defendant's vehicle and detected the odor of cannabis. After checking for warrants, Horton returned to the vehicle and advised defendant that he smelled burnt cannabis and asked him to step out of the vehicle. Horton's observations provided him with sufficient evidence of criminal activity to create probable cause for a search for evidence of a crime. See *In re O.S.*, 2018 IL App (1st) 171765, ¶ 30 (concluding that the officer had probable cause to search vehicle and its occupants after smelling marijuana and observing a marijuana cigarette behind the ear of a passenger). As such, the search and seizure of defendant did not violate the fourth amendment. Because the firearm was recovered during the lawful search for evidence of criminal activity the trial court did not err in denying defendant's motion to quash arrest and suppress evidence.

¶ 25 In reaching this conclusion, we briefly note that although there was no foundation evidence regarding Horton's familiarity with and training in the detection of controlled substances, it was defendant's responsibility to object to Horton's testimony regarding the smell of cannabis. See *People v. Brooks*, 2017 IL 121413, ¶ 22 (when a defendant files a motion to suppress evidence, he bears the burden of proof at a hearing on the motion); 725 ILCS 5/114-12(b) (West 2016) ("The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant."). By failing to object to Horton's testimony regarding his familiarity with the smell of cannabis, defendant has waived any challenge thereto. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (stating the rule of wavier is particularly appropriate in such circumstances because defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof). Moreover, the failure to elicit testimony

regarding the officer's experience with controlled substances is not necessarily fatal to the determination of probable cause, but it is a relevant factor in considering the totality of the circumstances. *People v. Jackson*, 331 Ill. App. 3d 158, 164 (2002). As stated herein, the circumstances involved in this case support a finding of probable cause for the search.

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.