No. 2—09—1318
Order filed April 6, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellant,	)	
v.	)	No. 09—CF—1139
LEONARD GOLDMAN,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: The trial court properly granted defendant's motion to suppress evidence; in light of the conflicting evidence, the court was entitled to find that the stop was not justified by a traffic violation or by an attempt to evade the police; as for the search of the car, the police had only a hunch that what they saw inside was cannabis, and the court was entitled to reject their testimony that they smelled bagged cannabis from outside the car, the doors and windows of which were shut; the State's inevitable-discovery argument was forfeited.

Defendant, Leonard Goldman, was charged with unlawful possession of a substance containing cannabis, with the intent to deliver (720 ILCS 550/5(d) (West 2008)), and unlawful possession of a substance containing cannabis (720 ILCS 550/4(d) (West 2008)). He moved to

suppress evidence that he alleged the police discovered by searching his car. The trial court granted the motion. The State appeals (see Ill. S. Ct. R. 604(a) (eff. July 1, 2006)). We affirm.

We summarize the evidence from the hearing on defendant's motion. In his case, defendant testified as follows. On April 14, 2009, at about 9:30 p.m., he parked his car on the street. Defendant used his turn signal as he pulled over and did not hit the curb. He exited, locked the doors, and started walking toward his grandmother's house. A police car drove up with its lights flashing, and two officers got out and told him to stop. Defendant obeyed; the officers did not have to tell him more than once to stop. The officers then ordered defendant to put his hands up. They searched him and asked what he was doing. Defendant responded that he was going to his grandmother's house. He did not tell them that he and some friends had earlier smoked some cannabis in the car. The officers removed the keys from defendant's pocket, returned to his car, unlocked it, and entered it. Defendant had not given them permission to do so; there were no warrants out for his arrest; and he was doing nothing illegal. The officers arrested defendant.

The State first called George Lill, an Aurora police officer. On direct examination, he testified as follows. On April 14, 2009, at about 9:28 p.m., Lill and Officer Brett Zollers were riding north in the area of Montgomery Road and Waterford, with one car between theirs and defendant's car. Lill saw defendant make a quick turn toward the curb, without using the turn signal; one of the rear tires went up and over the curb. Defendant's car was parked at an angle to the curb, with the rear sticking out into the traffic lane. The driver's door opened, and defendant, the only occupant, exited. Defendant then tried to lock the car's doors. Lill activated the squad car's overhead lights and spotlight, and he and Zollers exited. Lill told defendant to stop, but defendant "didn't necessarily stop" and did not obey Lill's order to get back into his car. Defendant seemed confused and it appeared that he might flee on foot.

Lill testified that he and Zollers approached defendant, who was standing in the center of the roadway, "further beyond" his car. As Lill got "maybe half the distance" between the squad car and defendant's car, he smelled a strong odor of cannabis coming from defendant's car. Lill asked defendant why there was an odor of "unburned" cannabis; defendant said that "earlier in the day, he had smoked weed with his friends, but he wasn't high anymore." Lill then secured defendant and took him to the squad car. Zollers, using his flashlight, peered through the car window. The officers conversed briefly and took the car keys from defendant. Both of them searched defendant's car. In plain view in the center console was a clear plastic baggie containing "plantlike material," which Zollers had seen before. On the floorboard was a grocery bag holding several "larger, clear plastic baggies with plantlike substance" that later field-tested positive for cannabis.

Lill testified that the squad-car camera had videotaped the incident. The tape was played in court and admitted as People's exhibit No 1.

Lill testified on cross-examination as follows. He and Zollers had been heading west on Montgomery Road when defendant turned onto Four Seasons. For various reasons, including that defendant's car turned within a traffic circle, the squad car's camera did not "pick up that initial angle." The rear passenger-side wheel of defendant's car went up over the curb. When the officers approached defendant, all of the windows of defendant's car were up and the doors were locked. Lill became concerned for his safety because defendant was not obeying any of his commands to stop and was fidgeting and gesturing with his hands. Defendant did not give the officers permission to take his keys or search his car. The officers searched and handcuffed defendant before either officer looked in through the windows of defendant's car. They handcuffed him because of his driving infractions and his erratic behavior after the stop had begun. Lill's police report mentioned the traffic infractions, but not the erratic behavior, as the reason for handcuffing defendant.

Lill testified that Defendant's exhibit No. 1, two photographs, depicted eight individually-wrapped bags of cannabis. One was much smaller than the others; this was the one that Zollers had first seen. The other seven bags had been inside the grocery bag. The exhibit is not in the record on appeal.

Lill testified on redirect examination that, because the squad car's camera had been facing forward in the traffic circle, the "angle" prevented it from picking up the traffic violations. Zoller's prior contacts with defendant, including car chases, were a factor in the decision to stop him. As Lill approached defendant, he smelled unburned cannabis; the odor was "very strong" and did not dissipate while Lill stood by the car.

Zollers testified as follows. He and Lill drove north on Four Seasons and approached an intersection that had a traffic circle. As defendant's car negotiated the circle, it went "up and over the curb," then "turned around the turnabout." The officers continued north, and defendant's car moved abruptly, pulling in "rather quickly" nose-first to the curb. The rear was sticking about two feet into the road. Lill activated the squad car's lights, and the officers exited. At that point, the only offenses that Zollers had seen defendant commit were driving his car's wheels over the curb and stopping the car with the rear protruding into the middle of the road, which, Zollers testified, could have impeded traffic. Defendant exited his car and began to walk away. Lill told him to return to the car and approached. Zollers checked defendant's car; nobody was inside.

Zollers went to join Lill. Passing defendant's car, he smelled unburned cannabis from inside, even though the windows were rolled up and the doors were locked. Lill placed defendant into custody. Zollers returned to defendant's car, shined his flashlight, and looked in through the driver's window. On the center console was "a small bag of plantlike material." Based on his training, Zollers "felt strongly that it was possibly cannabis." Lill took the car keys from defendant, and the

officers searched the car. Zollers identified Defendant's exhibit No. 1 as photographs of the eight bags recovered from the car. All of the bags were tied up. The seven larger ones had been found inside the grocery bag; Zollers did not recall whether the grocery bag had been tied up.

Christopher Coronado, an Aurora police officer, testified as follows. On April 14, 2009, at about 9:30 p.m., he arrived at the scene of the stop. Lill was detaining defendant. As Coronado approached Lill, he could smell the odor of unburned cannabis. After standing near the driver's side of defendant's car, he realized that the smell was coming from inside the car.

The parties rested. The court admitted the two exhibits. The trial judge commented, "We have a freeze frame on People's No. 1 that we have been looking at this afternoon. I am unable to see the rear end of that car sticking out into the traffic lane." The judge could not "see an angle" or "see the rear end of this car in the lane of traffic." He noted, "The vehicle in front seems to block our vision most of the time."

The parties proceeded to arguments, primarily on whether *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710 (2009), validated the search of defendant's car. The prosecutor asserted that *Gant* prohibited the officers from using the traffic stop as a basis for searching the car, but not from searching if they had probable cause to believe that the car contained marijuana—which they did, as three experienced officers had smelled the odor of unburned marijuana emanating from the car.

The judge explained his decision as follows. Defendant's version of his initial encounter with the officers "appear[ed] from the video to be the closest version." He continued:

> "First of all, in this video, there is a car in between. This Court saw no erratic driving. This Court couldn't tell the turn signal, but would accept that there may not have been a turn signal. Didn't see the car parked on an angle. The door was closed and the

defendant was out of the car when the officer got there. The Court did not see the tire hit the curb.

So now, the Court has questions about the initial probable cause for the stop. There may have been probable cause for the stop for a turn signal, but he pulled in. It wasn't really a turn. He just angled over on the street and parked his car, so the Court questions that. The officer then says there was a clear plastic baggy [*sic*] with green leafy substance in plain view."

The judge noted that the car's doors had been locked and the windows rolled up. The alleged cannabis shown in Defendant's exhibit No. 1 was "all in plastic bags." The judge continued:

"The officer didn't smell burnt cannabis at the time, he smelled unburned cannabis. He searched the defendant. He handcuffed the defendant. The defendant was put in the squad car *** [and the officers then] go back and they look in the windows of the defendant's car.

Now, their looking in the windows of the car is a search. Now, Gant says that that search is not incident to the arrest. *** And then the officer again says he smelled unburnt cannabis.

Officer Zollers testifies to pretty much the same. He said he saw a tire go up and over the curb. None of us could see that in the video. He said he saw an abrupt movement to pull the car over. None of us could see that in the video. He said he [*sic*] looked like the defendant would flee. That was very hard to tell in the video."

The judge noted that, in the tape, defendant saw Lill and held out his arms, and Lill immediately grabbed him and pushed him against the car. Zollers arrived and defendant was

handcuffed and placed into the squad car. Turning to Zollers' testimony that he could smell the odor of unburned cannabis, the judge explained:

> "The defendant's exhibit shows all of these bags and it almost appears as though they were double bagged in plastic. So small bags, on top of a big bag, *** inside a car with doors closed and windows up and they are able to make an immediate sensory perception that they could smell unburnt under those conditions. The Court has grave questions on that, if that actually is possible with all of this stuff being bagged and double bagged in plastic."

The judge "question[ed] the probable cause to go back on the smell and that all of this material is double bagged in plastic." He concluded:

> "Perhaps a dog could smell through this. The Court questions whether human beings could. The Court would question if this evidence were right here in Court, now double bagged in plastic, if we could all smell it."

The court granted defendant's motion. The State appealed. On appeal, the State argues first that the court erred in holding that the police obtained the cannabis through an unconstitutional search of defendant's car. The State asserts that, after Zollers looked into the car and saw apparent cannabis, the officers could properly open the car and search for cannabis. In so arguing, the State disputes both the trial court's conclusion that defendant had been seized before Zollers looked into the car and its assumption that Zollers' look was a search under the fourth amendment. The State contends second that, even if the police did seize defendant before Zollers looked in through the car window, the stop was proper either for a traffic offense or because the officers reasonably suspected that defendant had disobeyed a peace officer (see 625 ILCS 5/11—203 (West 2008)).

The State also argues that, even if the police violated defendant's fourth amendment rights, the evidence should be admitted under the inevitable-discovery doctrine. However, at the trial level,

the State never raised this contention, thus depriving defendant of any opportunity to introduce evidence or argument to rebut it. Therefore, this ground for reversal is forfeited, and we do not consider it. See *People v. Stanitz*, 367 Ill. App. 3d 980, 983-84 (2006).

We turn to the arguments that are properly before us. We note that, although defendant has not filed a brief, we may decide the appeal on its merits. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). In reviewing a trial court's ruling on a motion to suppress, we accept the court's factual findings unless they are against the manifest weight of the evidence, but we address *de novo* the ultimate question of whether the evidence should have been suppressed. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004).

Before moving to the specific issues, we point out that the trial court made two potentially serious errors of law. First, the court incorrectly implied that the officers needed probable cause to stop defendant's car. However, a traffic stop requires reasonable suspicion, a lesser standard. *People v. Rozela*, 345 Ill. App. 3d 217, 225 (2003). Second, the court held that Zollers' flashlight-enhanced view into the interior of defendant's car was, in itself, a search that triggered the fourth amendment. However, "[i]t is well settled that the use of a flashlight to illuminate a vehicle located on a public way is not a fourth amendment search." *People v. Luedemann*, 222 Ill. 2d 530, 561 (2006). Having noted these errors, we acknowledge that we review the trial court's judgment, not the reasons that it gave for the judgment. *People v. Cleveland*, 342 Ill. App. 3d 912, 915 (2003).

For ease of explanation, we first address the State's second nonforfeited argument. The State contends that the officers had reasonable suspicion to stop defendant for (1) a traffic offense; and (2) attempting to flee from the scene of the stop.

Turning to the first asserted ground, we note that, although the trial judge mistakenly spoke in terms of "probable cause," his comments, especially those based on the tape, imply that he found

essentially no basis for concluding that defendant had committed a traffic offense. Having reviewed the record, including the tape, we cannot say that this conclusion is against the manifest weight of the evidence. Defendant testified that he did not commit any traffic offenses; the officers testified that they saw him make an illegal turn and drive his car onto the curb. This conflict in the testimony was, of course, for the trial judge to resolve. The judge chose to believe defendant.

Had the tape strongly favored the officers' version of the encounter, the situation might be different. However, we agree with the trial judge that the tape is essentially useless as documentation of any traffic offenses. Defendant's car cannot be seen going through the traffic circle; after the squad car enters the traffic circle, we do not see defendant's car until well after it has been parked. At this point, the tape does not allow us to say whether any part of the car is on the curb, and, although the rear of the car does appear to be angled out slightly into the road, it is far less than the two feet to which Zollers testified and less than the 12 inches permitted by law (see 625 ILCS 5/11—1304(a) (West 2008)). Any protrusion clearly does not impede traffic, as the tape shows a car driving by defendant's car with ample room to spare. Thus, we do not disturb the trial court's finding that there was no reasonable suspicion to stop defendant for a traffic offense.

We turn next to whether the officers had reasonable suspicion to stop defendant for disobeying them or trying to flee (see 720 ILCS 5/31—1(a) (West 2008)). Again, the testimony clashed on this issue; defendant said that he did not try to flee, but Lill stated that defendant was disobeying his commands to stop and gesturing with his hands. The trial judge concluded that any attempt by defendant to flee was "very hard to tell in the video," in which defendant held out his arms and was immediately grabbed and handcuffed. Having seen the video, we decline to disturb the trial judge's decision. Defendant can be seen exiting his car, briefly looking back, taking a step forward, and immediately turning around and allowing the officers to secure him. Lill's police report

did not mention defendant's behavior as a reason to stop him. There were several other cars on the street, so it was not obvious whom the officers wanted to stop. The trial judge reasonably concluded that defendant's momentary hesitancy did not create a reasonable suspicion that he was attempting to evade the officers or obstruct the stop (which would have been curious for one on foot to try against officers in a police car).

We turn to the State's primary argument for reversing the suppression order: that, regardless of the propriety of the stop of defendant, Zollers' view of the interior of defendant's car, plus the fact that three officers smelled the odor of unburned marijuana, provided probable cause to search the car for contraband. The State correctly notes that, in general, if the police have probable cause to believe that a vehicle contains contraband, they may search any place therein where there is probable cause to believe that the contraband will be found. *United States v. Ross*, 456 U.S. 798, 825 (1982); *People v. Schrems*, 224 Ill. App. 3d 988, 998 (1992).

We agree with the State that the trial court erred insofar as its suppression order was based on the assumption that Zollers' flashlight-assisted view itself was a search. Nonetheless, the State's argument suffers from two defects that allow us to uphold the trial court despite its error of law.

First, in arguing the motion, the State did not cite Zollers' observations as a basis for the search, but instead relied on the three officers' testimony that they smelled unburned marijuana. Thus, the State has forfeited its plain-view argument. Moreover, the evidence for the plain-view argument is tenuous. Zollers stated that he saw a "small bag of plantlike material," which he "felt strongly was *possibly* cannabis." (Emphasis added.) Testimony that "plantlike material," not further described, is "possibly cannabis" conveys a mere hunch, or, perhaps, reasonable suspicion. Therefore, even Zollers' testimony about his observations would contribute little to the State's argument.

Second, recognizing that Zollers' examination of the vehicle's inside and the subsequent search took place only after defendant had been detained, the State contends, "It is true that the officers took the key to the van from defendant, but under the inevitable discovery rule [argued elsewhere in the State's brief] the search of the van was lawful because it would have taken place even without the key. Moreover, the detention of defendant was lawful because the police had reasonable grounds to suspect that he had committed an offense by attempting to walk away from a traffic violation." We give these words their natural import as a concession that, because the search of the car was the fruit of the prior detention of defendant's person, it cannot be upheld unless we accept either (1) the State's inevitable-discovery argument or (2) the State's argument that the officers had reasonable suspicion to seize defendant. As we have held that the former argument is forfeited and that the latter argument is without merit, we may reject the State's second nonforfeited ground for reversing the suppression order.

Although we need not go further, we note that, although the issue is close, the trial court appears to have been within its prerogative in rejecting the officers' testimony that they smelled the odor of unburned cannabis from inside defendant's car. The judge noted that, at the time, the vehicle's doors were locked, the windows were rolled up, and the cannabis was "double bagged in plastic." We do not have the photographs of the cannabis bags, so we have no reason to disturb the trial judge's description of them. Although the officers' testimony was consistent and not directly contradicted, the judge could have found it inherently implausible, or, at the least, could have concluded that any olfactory evidence was not sufficiently reliable to provide probable cause to conclude that cannabis was inside the vehicle.

The order of the circuit court of Kane County is affirmed.

Affirmed.