

2014 IL App (2d) 131298-U
No. 2-13-1298
Order filed November 18, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellant,)	
v.)	No. 13-CF-0804
)	
KURT NASH,)	Honorable
)	Mark L. Levitt,
Defendant-Appellee.)	Daniel B. Shanes,
)	Judges, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶1 *Held:* The trial court erred as a matter of law in granting the defendant's motion to suppress evidence gathered as a result of a post-arrest search of the vehicle he was driving. We reversed the trial court's holding that the search was unjustified and remanded for further proceedings.

¶2 Defendant, Kurt Nash, was charged by indictment with one count of unlawful possession of a controlled substance, in violation of 720 ILCS 570/402(c) (West 2012), in that he, on or about March 26, 2013, knowingly and unlawfully had in his possession a substance containing cocaine. On July 17, 2013, the indictment was amended to include armed violence, unlawful possession of a firearm by a gang member, and unlawful possession of weapons by a felon.

Defendant filed pretrial motions (1) to quash his arrest and suppress evidence; and (2) to suppress his confession. The State appeals the trial court's order granting, in part, defendant's motion to quash his arrest and suppress evidence. We reverse and remand for further proceedings.

¶3

I. BACKGROUND

¶4 On March 26, 2013, Lake County Sheriff's Deputy Steven Campobasso, while on routine patrol in Waukegan, Illinois, observed defendant driving a 2003 Chevy Impala at 51 m.p.h. in a 35 m.p.h. zone. After effecting a traffic stop, Campobasso arrested defendant for speeding and also for possession of a controlled substance.

¶5 On April 24, 2013, defendant was charged by indictment with one count of unlawful possession of a controlled substance, in violation of 720 ILCS 570/402(c) (West 2012), in that he, on or about March 26, 2013, knowingly and unlawfully had in his possession one gram or more, but less than five grams, of a substance containing cocaine. On July 17, 2013, the indictment was amended to include three additional counts: (1) armed violence, "in that he, while armed with a dangerous weapon, a 9mm [*sic*] pistol, performed acts prohibited by 720 ILCS 570/402(c), in that the said defendant knowingly possessed less than 15 grams of a substance containing cocaine, a controlled substance ***"; (2) unlawful possession of a firearm by a streetgang member, in that he "knowingly possessed a firearm *** in Waukegan Illinois, without a valid FOID card, and is a known streetgang member in violation of 720 ILCS 5/24-1.8(a); and (3) unlawful possession of weapons by a felon, in that he, having been convicted of a felony for aggravated unlawful use of weapons, "knowingly possessed a firearm to wit a 9 mm pistol [*sic*], in violation of 720 ILCS 5/24-1.1(a)[.]"

¶6 On August 14, 2013, defendant filed a motion to quash arrest and suppress evidence that challenged the legality of the traffic stop and subsequent search and seizure. Defendant sought to suppress all physical evidence discovered as a result of the search of himself and the vehicle he was driving.

¶7 On August 26, 2013, defendant filed a motion to suppress his confession. In his motion, defendant alleged that he was interrogated repeatedly without receiving “Miranda Warnings.” He claimed that he did not understand his constitutional rights under Miranda, that he did not knowingly waive those rights, and that his statement was not voluntary. After a hearing on the motions, the trial court denied defendant’s motion to suppress his confession. The trial court held that the search of the vehicle was unjustified, and granted, in part, defendant’s motion to suppress evidence. The State filed a certificate of impairment and a notice of appeal on October 28.

¶8 At the hearing on the motions on September 14, 2013, Deputy Stephen Campobasso of the Lake County Sheriff’s Department testified that, shortly after midnight on March 26, 2013, he observed a 2003 Impala traveling at excessive speed. Campobasso followed the vehicle into a private parking lot of a multi-unit apartment complex and pulled up behind it with his Mars lights activated. Defendant was driving. As Campobasso exited his squad car, defendant was getting out of his vehicle. Campobasso saw defendant drop a clear, plastic bag of a white powdery substance as he got out of the vehicle. Campobasso asked defendant for his driver’s license and proof of insurance. Defendant provided only his driver’s license and asked why he had been stopped. Campobasso told him the reason for the stop was that he had been speeding. Defendant asked why he was being detained and Campobasso advised him that was because of the baggie that he had dropped on the ground. Defendant denied dropping the baggie that was

still on the pavement next to the driver's side door. Campobasso searched defendant and found a black digital scale and a cell phone, which were placed back in defendant's pockets. In addition, Campobasso testified that he smelled a strong odor of cannabis on defendant's person. Campobasso then handcuffed defendant in order to further investigate the baggie. At this point Campobasso was alone, with a backup officer en route.

¶9 Campobasso placed defendant in the rear of his squad car. The interior audio recorder was on. Campobasso went back to investigate the baggie, that contained a "white, rock-like substance" that appeared to be cocaine (subsequent testing by the crime lab confirmed the substance was cocaine). After the backup officer arrived, Campobasso tried to investigate the vehicle, but it was locked. Defendant had keys on a lanyard around his neck, but none unlocked the vehicle's doors. Defendant told Campobasso that he only had an ignition key and always left the vehicle unlocked.

¶10 Defendant's girlfriend, Latonya Benjamin, came out of the apartment building. She told Campobasso that the vehicle was hers but that she could not get into the vehicle. She stated that the keys were still at a repair shop where she had picked up the vehicle earlier in the evening. She indicated she would call a locksmith.

¶11 At some point, defendant attempted to move his handcuffs from behind him to in front of him and he tangled himself up with one arm in front and one in back, with the handcuffs between his legs. Defendant then complained that the handcuffs were too tight so the officers had to take the handcuffs off and put two separate cuffs on him, one on each hand and then handcuffed together.

¶12 Campobasso testified that the intended search of the vehicle was incident to defendant's arrest. Campobasso believed there was "evidence of criminality within the vehicle" because, as

defendant was exiting the vehicle, he dropped what Campobasso believed to be a controlled substance. Additionally, Campobasso believed there was evidence in the vehicle because a digital scale was found on defendant's person, and because of "the interference I was being run and the distractions that were trying to be done by people around the apartment complex to get me away from that vehicle." Campobasso called for a K-9 unit to sniff the vehicle but none was available. He was unable to enter the vehicle because it was locked. Campobasso did not believe he had the authority to force entry into the vehicle to search for contraband. He stated that Benjamin was being disruptive, and there was another male approaching. At this point the backup officer had arrived. Campobasso called for a tow truck to remove the vehicle from the parking lot.

¶13 The next day, a "K-9 sniff" of the vehicle was conducted, and a search warrant issued. As a result of the ensuing search, evidence was seized, including a 9 mm handgun that was found in the console located between the driver and the passenger seats.

¶14 On cross examination, Campobasso testified that the video recorder is a loop system that records what is happening directly in front of the squad car to the DVD if the Mars lights are on. Additionally, the audio recording is on inside the squad car and there is also a portable microphone that is attached to the officer's shoulder that is manually activated. Campobasso did not read defendant his Miranda warnings nor did Campobasso question defendant about the drugs after he was taken into custody. About 15 minutes later, Campobasso called for a tow truck, and waited another 15-20 minutes for the tow truck to arrive. After that, defendant complained of "chest pains or tightness in his chest or something" so an ambulance was called and defendant was transported to the hospital. Ultimately, defendant was released to the county jail.

¶15 On redirect examination, Campobasso testified that he did not give defendant Miranda warnings, nor did anyone tell defendant not to use his cell phone. The audio recording remained on because the squad's Mars lights were on. Campobasso did not conduct a field test on the substance in the baggie.

¶16 Latonya Benjamin testified that she lived in the apartment complex with defendant and her two daughters. She owned the vehicle and the license plates were registered to her. Two keys were required to operate the vehicle, "one to unlock and one to start the ignition." She had two sets of keys. On March 25, the evening before this incident, she and defendant went to the car repair shop to pick up the vehicle, but one set of car keys was unavailable, so they paid the bill and left with the vehicle and only one set of keys. The vehicle had dirty rags and towels in the back seat and the gas tank was low on fuel. The repair shop told them that the vehicle had to be driven to test the catalytic converter. She and defendant went home to the apartment, but their daughter was sick so Benjamin woke defendant and asked him to go to the pharmacy. He had the one set of keys with him.

¶17 In the early morning hours of March 26, Benjamin was awakened by flashing lights in the parking lot. When Benjamin looked out the window, she saw defendant with Campobasso. She went outside and asked him what was happening. Campobasso told her that defendant was under arrest and they were seizing her vehicle. The police asked her to unlock it but defendant had the keys. Benjamin stated that when she attempted to explain to the police officers which key to use, they told her to stay back.

¶18 Benjamin identified a photograph of the center console in the vehicle. She did not consent to a search or a seizure of her vehicle. She never used the center console nor did she

keep a gun or cocaine in the vehicle. Neither she nor defendant opened the console after they picked up the vehicle.

¶19 Deputy Timothy Fitch, Lake County Sheriff's Department, testified that on March 26, 2013, he was called to the scene to assist Campobasso in a traffic stop. When Fitch arrived, defendant was handcuffed in the back seat of the squad car. Defendant had become "tangled up" in his handcuffs and Fitch helped Campobasso rehandcuff him. Campobasso called the tow company and filled out the paperwork; Fitch followed the tow truck to the lot.

¶20 On cross examination, Fitch testified that to his knowledge the stop was a traffic stop. The apartment complex and the parking lot at the address are privately owned. Latonya Benjamin was the owner of the vehicle. She was fully licensed and there were no outstanding warrants for her or holds on the vehicle.

¶21 On recross, Fitch testified that the vehicle was locked and that Benjamin said she did not have a key for it. She called someone to unlock it but no one came. The vehicle was towed pursuant to the arrest of defendant.

¶22 The trial court denied the motion to suppress defendant's statements. The trial court then denied the motion to suppress regarding the evidence that was seized as a result of the initial arrest, *i.e.*, the powdery substance in the baggie that later proved to be cocaine, but granted the motion to suppress regarding any evidence that was obtained as a result of the seizure and search of the vehicle, *i.e.*, the gun found in the console.

¶23 In making its ruling, the trial court found that the following evidence was "largely undisputed." The case originated from a traffic stop after Campobasso observed the Impala speeding. The trial court determined that probable cause existed for Campobasso to make the traffic stop, and, therefore, was justified under *Terry v. Ohio*, 392 U.S. 1 (1968). Campobasso

observed defendant drop a baggie of white powdery substance. Campobasso conducted a pat down search of defendant, which yielded a black digital scale and a cell phone. Those items were placed back in defendant's pockets, defendant was handcuffed, and Campobasso retrieved the baggie. Although Campobasso suspected the substance in the baggie was cocaine, he did not perform a field test. At this point, the Impala was parked and locked, and defendant placed inside the squad car. Defendant's girlfriend, the owner of the Impala, had come out of the apartment building and refused consent to search the vehicle. .

¶24 The trial court then framed the issue as “whether the officer had some grounds at that point to justify the search of the vehicle as it sat in that parking lot in its locked condition.” The trial court ultimately ruled that the search of the vehicle was not justified:

¶25 “I have exhaustively looked at all of these concepts including inevitable discovery, the seizure of the car for possible later forfeiture proceedings, some type of seizure for purposes of investigation consistent with the officer's arrest for possession of a controlled substance, and I simply believe that when you have to engage in that type of legal wrangling in order to try to justify the actions that were undertaken, not at that time, but following the seizure of the vehicle and the subsequent search with later attained warrant or not, I simply find that that type of activity is not reasonable under the circumstances.”

¶26 Thereafter, the State timely filed a certificate of impairment and a notice of appeal.

¶27 II. ANALYSIS

¶28 The question we must answer is whether a search of the vehicle at the scene pursuant to the arrest of defendant would have been justified under the circumstances. The concomitant issue is whether towing the vehicle in lieu of a search at the scene was proper.¹

¹ There is no question that the search warrant properly issued the day after the vehicle

¶29 The burden of proving the unlawfulness of a search and seizure on a motion to suppress rests with defendant. *People v. Clark*, 394 Ill. App. 3d 344, 347 (2009). “Review of a ruling on a motion to suppress evidence can present a question of law, questions of fact, or both. [Citation]. A reviewing court must give great deference to the trial court’s findings of fact and should reverse them only if they are against the manifest weight of the evidence. [Citation].” *People v. Marcella*, 2013 IL App (2d) 120585, ¶24. “A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident.” *People v. Tate*, 367 Ill. App. 3d 109, 113 (2006). However, we review *de novo* the ultimate legal question of whether a motion to suppress should be granted. *People v. Sorenson*, 196 Ill. 2d 425, 430-31 (2001); *Marcella*, 2013 IL App (2d) 120585, ¶24. In this review, we undertake our own assessment of the facts in relation to the issues and draw our own conclusions when deciding what relief should be granted. *People v. Hackett*, 2012 IL 111781, ¶18. We hold that “the likelihood of discovering offense-related evidence” authorized the search in this case. See *Arizona v. Gant*, 556 U.S. 332, 344 (2009).

¶30 The initial and paramount issue to be decided in such cases is whether probable cause to search the automobile exists at the scene of the stop. *People v. Wiggins*, 45 Ill. App. 3d 85, 88 (1976). Probable cause exists when the totality of the facts and circumstances known to the officers at the time of the entry is such that a reasonably prudent person would believe that the suspect is committing or has committed a crime. *People v. Slavin*, 2011 IL App (2d) 100764, ¶20. The standard for determining whether probable cause is present is the probability of criminal activity, rather than proof beyond a reasonable doubt; in other words, probable cause does not demand a showing that the belief that the suspect has committed a crime is more likely true than

was towed and the K-9 unit was brought in.

false. *Id.* Courts have found exigent circumstances, such that a search without a warrant is reasonable, to exist in a variety of fact situations; “many of these have included probable cause to believe that contraband was being transported in the vehicle searched on the roadside [citation] ***.” *People v. Jones*, 45 Ill. App. 3d 307, 309 (1977).

¶31 Certainly, in this case, the dropped baggie of a suspicious substance, together with the scale and cell phone found in defendant’s pockets, provided probable cause to search the vehicle, and, therefore, it could have been searched on the spot. See *People v. Brannon*, 2013 IL App (2d) 111084, ¶25 (officers who found cannabis in defendant’s jacket pocket and observed other suspicious behavior that occurred in an area known for drug activity were justified in conducting a warrantless search of vehicle in which defendant was a passenger). The evidence indicates that the officers would have been justified if they had searched the car at the scene rather than towing it and later searching pursuant to a warrant.

¶32 However, the vehicle was locked and defendant did not have a door key to unlock it. “[W]here probable cause to search an automobile exists at the scene of a highway stop, the police may postpone the search and later conduct a valid warrantless search of the automobile at the police station even though the occupants of the vehicle are in police custody. [Citations.]” *Wiggins*, 45 Ill. App. 3d at 88. The United States Supreme Court has stated that “[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.” *Chambers v. Maroney*, 399 U.S. 42, 52 (1970).

¶33 One alternative to towing the vehicle would have been leaving it parked at the apartment building, but any contraband connected to defendant could have been lost. Benjamin, refusing

consent to search, claimed to have no keys and told the officers that she would have to call a locksmith. We view her testimony in this regard as unbelievable; she stated that she and defendant picked up the car with a set of keys from the repair shop and drove it home, but that no keys were available to unlock it. Benjamin testified that another set of keys was at the repair shop. Given her relationship to defendant, it is reasonable to assume that she could have obtained the keys the next day and removed the gun from the console, before the officers returned with a search warrant for the vehicle. Campobasso's testimony was that no one could produce the keys to the vehicle; the owner, Benjamin, did not produce proof of insurance; and there was continued interference of other individuals at the scene. Campobasso observed defendant drop a baggie of a suspicious substance, and believed that evidence of a crime was concealed in the car.

¶34 Campobasso testified that, rather than force entry into the vehicle in order to search, he decided to have it towed. He was justified in doing so. Under the circumstances, Campobasso and Fitch acted prudently and justifiably, and in good faith.

¶35 We conclude that the trial court's factual determinations were not against the manifest weight of the evidence and must be upheld. However, applying *de novo* review to the ultimate question of whether the search of the vehicle was lawful, we determine, as a matter of law, that the search pursuant to a warrant on the day following defendant's arrest was justified under the circumstances. This search yielded evidence that supports the added counts in the amended indictment. Therefore, we reverse that portion of the trial court's order that granted, in part, the motion to suppress, and remand the case for further proceedings consistent with this opinion.

¶36

III. CONCLUSION

¶37 For the reasons stated, we affirm the portion of the judgment of the circuit court of Lake County denying defendant's motion to suppress his statements and his motion to suppress regarding the evidence that was seized as a result of the initial arrest, *i.e.*, the powdery substance in the baggie that later proved to be cocaine. We reverse the portion of the judgment of the circuit court of Lake County pertaining to the suppression of the firearm, and remand for further proceedings.

¶38 Reversed in part, affirmed in part and remanded for further proceedings.