2013 IL App (3d) 120956-U

Order filed December 19, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROGER HERTZBERG, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois, Appeal No. 3-12-0956 Circuit No. 12-CF-111 Honorable Charles H. Stengel, Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SUSAN HERTZBERG, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois, Appeal No. 3-12-0957 Circuit No. 12-CF-112 Honorable Charles H. Stengel, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendants' stipulated bench trial tantamount to a guilty plea was not a guilty plea for purposes of Supreme Court Rule 604(d). Therefore, defendants' failure to file a motion to withdraw the stipulation before filing a notice of appeal did not deprive appellate court of jurisdiction.
(2) The trial court did not err in denying defendants' motion to suppress. The police/citizen encounter was not a *Terry* stop and did not implicate defendants' fourth amendment rights.

¶ 2 Defendants, Roger and Susan Hertzberg, were arrested and charged with unlawful cannabis trafficking after an inquiry led to the discovery of raw cannabis in a rear compartment of their truck. The trial court denied their motion to quash the arrest and suppress the evidence and found them guilty of unlawful cannabis trafficking (720 ILCS 550/5.1(a) (West 2012)). On appeal, defendants argue that the trial court erred in denying their motion to suppress because the officer's request to search was made during an involuntary encounter and the search was conducted without reasonable, articulable suspicion that a crime was being committed. We affirm.

¶ 3 At the suppression hearing, Officer Clint Thulen testified that on June 7, 2012, he was on patrol as an Illinois State Police sergeant and driving an unmarked police car. Susan Hertzberg was driving a Toyota Tacoma truck eastbound on State Route 82 when she passed Thulen traveling in the opposite direction. Thulen radioed in the Nevada handicapped license plate number and asked dispatch to check the registration. The license came back registered to two different vehicles, neither one of which was the Tacoma. Thulen testified that he then turned around and looked for the truck and spotted it in a Wal-mart parking lot. He waited some distance away until he saw a person later identified as Susan, come out of the store and approach the vehicle. He pulled up along side the truck, parallel to it. Thulen

testified that he was not blocking the truck. As Thulen sat in his car and Susan sat in the truck, Thulen rolled down his passenger window and said "Hello" to her. Thulen testified that he did nothing more than say hello; he did not make any type of hand gesture.

¶ 4 Susan exited her vehicle and Officer Thulen informed her that he had run her plates and the Tacoma was not coming back registered to her or her husband. She told Thulen that it was her vehicle and that the handicapped plates had been on the truck for a year. She also told him that her husband was asleep in the truck because he had been driving all night. Thulen then continued to talk to Susan, asking her questions about her travel plans and destination. Susan informed Thulen that she and her husband lived with her child and grandchild, and sometimes they would get in the truck with no destination in mind to just get away. Officer Thulen testified that as this point, Susan exhibited more nervousness than usual. He then asked her about the cover on the back of the Tacoma. Susan told Thulen that her husband put the tonneau cover on to keep water out of the bed of the truck. She said that their luggage was in the truck bed. Thulen then asked Susan to open it for him. Thulen stated that Susan said her husband usually opened it and that she was not sure if she knew how. Thulen responded that if she had the key, he would be happy to help her.

¶ 5 Susan retrieved the keys to the tonneau and unlocked both locks that secured the cover. According to Thulen's testimony, Susan removed the latches, and then he helped her lift the cover up. Thulen testified that upon opening the back of the cover, he could smell the odor of raw cannabis. At that point, Susan's husband, Roger, emerged from the passenger side of the truck. Thulen placed them both under arrest.

¶ 6 Susan testified that when Officer Thulen pulled up next to her truck, he rolled down

the passenger side window and "waved," but she could not recall the specific gesture he made. She interpreted the gesture as wanting her to roll down her window so the officer could talk to her. Susan further testified that directly after the conversation about her registration, Thulen asked, "Do you mind if I look in your vehicle?" She replied, "Well, my husband is sleeping. I really don't want to disturb him, but let me see if I can get the keys." She testified that she did not feel free to disobey his request because "if a policeman asks you to do something, at my age you don't smart-mouth off to them." Susan got the keys, but was having difficultly with them. She testified that Thulen said, "Give me those keys," and grabbed the keys from her hand. He then pushed her out of the way and opened the cover himself.

¶ 7 The trial court also viewed the surveillance tape from the Wal-mart parking lot. The video depicts Thulen's patrol car stopping between the entrance to the store and the Tacoma. The patrol car is facing in the same direction as the truck and is parallel to it; the truck is not blocked by Thulen's car. Susan gets out of the truck and leans into the passenger side window of the patrol car. She stays in that position for several minutes, presumably conversing with Thulen. Thulen then emerges from the squad car, and Susan leads him to the back of the truck. She unlocks both ends of the tonneau cover starting with the rights side and then moving to the left. After removing the latches, she lifts up the left side of the cover and Thulen lifts up the right side. Thulen does not take the keys from Susan's hand, nor does he push her in any manner.

¶ 8 Following the witnesses' testimony, the trial court denied defendants' motion. The trial court found that the encounter between Thulen and Susan was consensual and that in

response to Thulen's request, Susan voluntarily consented to the search of the truck bed.

¶ 9 At the beginning of the stipulated bench trial, the trial court accepted defendants' jury waivers and both defense attorneys stipulated to the sufficiency of the evidence to convict. The following discussion took place:

"THE COURT: Now it's my understanding that we are having, today, a stipulation and that this stipulation is to the sufficiency of the evidence to convict.

Is that correct, Mr. Dalton?

MR. DALTON [Attorney for Susan]: It is, sir.

THE COURT: And is that correct, Mr. Carmen?

MR. CARMEN [Attorney for Roger]: Yes, Your Honor."

A few moments later, the trial court again stated:

"THE COURT: Now, this stipulation that your attorneys are entering into is effectively tantamount to a plea of guilty.

Do you understand that so far, Susan?

SUSAN HERTZBERG: Yes.

THE COURT: And Roger?

ROGER HERTZBERG: Yes, Your Honor.

THE COURT: Susan[,] do you understand that a stipulation to all the evidence against you is... is effectively a stipulation to the evidence against you and that correspondingly that the Court would be... it would be a finding of guilt? Do you understand that?

SUSAN HERTZBERG: (Moving head up and down.) Yes, sir.

THE COURT: Ok. So this... Mr. Dalton, again, this is your stipulation there is sufficient evidence to prove the defendant guilty beyond a reasonable doubt?

MR. DALTON: That's correct, sir.

THE COURT: And is this the same stipulation that you're entering into, Mr. Carmen?

MR. CARMEN: As to Count I, yes, Your Honor.

THE COURT: As to Count I.

MR. DALTON: Count I.

MR. CARMEN: I assume Counts II and III will be dismissed.

MR. KERR (Assistant State's Attorney): The lesser-includeds [sic], yes."

¶ 10 The court then thoroughly admonished defendants pursuant to Supreme Court Rule 402 (eff. July 1, 1997):

"So basically what we're doing here is that this is a stipulation that is tantamount to a plea of guilty. It has the same effect as a plea of guilty, except it preserves your right to appeal."

Both defendants indicated that they understood.

¶ 11 Following admonishments, defense attorney Carmen informed the trial court that both Susan and Roger would stipulate that on the date and time set forth in the complaint, they were in knowing possession of more than 5,000 grams of a substance containing cannabis, and they would stipulate that they brought the cannabis from another state into Illinois. The prosecutor then added that the substance in the bed of the truck was found to be cannabis and that defendants were transporting the cannabis from Las Vegas, Nevada, to Pittsburgh, Pennsylvania.

¶ 12 The trial court asked defendants if they agreed with the stipulation, and defendants

stated that they did. The trial court found that the stipulation was knowing and voluntary and concluded that there was sufficient evidence to find defendants guilty beyond a reasonable doubt of unlawful cannabis trafficking. It then sentenced defendants according to the terms of the negotiated stipulation to 12 years in prison, with three years mandatory supervised release.

¶ 13 After the trial court sentenced defendants, the court read the following admonishments:

"You have the right to appeal the judgment of conviction only if notice of appeal is filed in the trial court within 30 days of today's date. That if you desire to challenge any part of the sentence or sentencing hearing, you must file, prior to an appeal, a motion to reconsider the sentence, or any challenge to the sentencing hearing, within 30 days of today's date. This motion must be in writing, and it must set forth all the issues or claims of error about the sentence or the sentencing hearing. If you cannot afford it, a copy of the transcript of the trial and sentencing hearing will be provided for you. If you cannot afford an attorney, one will be appointed to assist you in the appeal and the motion to reconsider the sentence. That if the notice of appeal or motion to reconsider is not filed within 30 days of today, you will lose the right to appeal and challenge your sentence. If the motion to reconsider the sentence is denied and if you still desire to appeal, you must request the clerk to file a notice of appeal within 30 days of the date that the motion to reconsider was denied. That any issue or claim of error about the sentence imposed or any part the sentencing hearing you fail to raise in the written motion will not be considered by the appellate court."

Both defendants indicated that they understood the court's directions.

¶ 14 Within 30 days of the judgment, both defendants filed a notice of appeal, challenging the court's suppression ruling. Defendants did not file a motion to withdraw the stipulation or reconsider the sentences prior to filing their notices of appeal.

¶ 15 I. Jurisdiction on Appeal

¶ 16 The State initially argues that we lack jurisdiction to consider defendants' appeal because their stipulated bench trial was tantamount to a guilty plea and defendants failed to a file motion to withdraw their pleas before filing their notices of appeal pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006).

¶ 17 The question of whether a defendant's stipulated bench trial is tantamount to a guilty plea is a question of law subject to *de novo* review. *People v. Horton*, 143 Ill. 2d 11 (1991) A guilty plea forfeits all nonjurisdictional defenses or defects. *Id.* at 22. On the other hand, a stipulated bench trial allows a defendant to avoid the forfeiture rule as to an issue the defendant seeks to raise on appeal, while still allowing the defendant to enjoy the advantages of a guilty plea. *People v. Thompson*, 404 Ill. App. 3d 265 (2010).

¶ 18 Courts recognize two types of stipulated bench trials: one in which the defendant stipulates to the evidence but does not stipulate to his or her guilt; and the other where the defendant stipulates to the sufficiency of the State's evidence. See *Horton*, 143 Ill. 2d at 21-22 (noting that the second type is essentially a private agreement between the parties that the defendant is guilty). Either form allows the parties to enjoy the "benefits and conveniences" of a guilty plea without requiring the defendant to forfeit issues such as those raised in a motion to quash and suppress evidence. *Id*. at 22.

¶ 19 A stipulated bench trial is tantamount to a guilty plea if (1) the State presents its

entire case by way of stipulation and the defendant fails to preserve a defense, or (2) the defendant concedes, by way of stipulation, that the evidence is sufficient to support a guilty verdict. *People v. Clendenin*, 238 Ill. 2d 302 (2010); see also *Horton*, 143 Ill. 2d at 21 (where counsel stipulates that the facts as presented by the State are sufficient for a finding of guilty beyond a reasonable doubt, a stipulated bench trial is tantamount to a guilty plea). If a stipulated bench trial is tantamount to a guilty plea, Illinois Supreme Court Rule 402 (eff. July 1, 1997) admonishments must be given to the defendant. *People v. Smith*, 59 Ill. 2d 236 (1974). As Rule 402 specifically provides, "[i]n hearings on pleas of guilty, or in any case in which the defense offers to stipulate that the evidence is sufficient to convict" the defendant must be admonished as to the nature of the charge, the minimum and maximum sentence, the right to plead not guilty, and the consequences of a guilty plea. Ill. S. Ct. R. 402 (eff. July 1, 1997).

¶ 20 Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) is entitled "Appeal by Defendant from a Judgment Entered Upon a Plea of Guilty." It mandates that before a defendant can appeal from a guilty plea, he must file a motion in the trial court to withdraw his guilty plea and vacate the judgment within 30 days of the date sentence is imposed. Any issue not raised in the motion to withdraw the plea is deemed forfeited. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). Compliance with Rule 604(d) is a condition precedent to an appeal; if defendant fails to meet this requirement, the appellate court must dismiss the appeal. *People v. Flowers*, 208 Ill. 2d 291 (2003).

¶ 21 In this case, defense counsels stated that there was sufficient evidence to convict defendants, and they agreed that there was sufficient evidence to prove defendants guilty

beyond a reasonable doubt. Thus, under *Horton* and its progeny, defense counsels' actions were tantamount to a guilty plea on behalf of defendants, and Supreme Court Rule 402 admonishments were required.

¶ 22 However, that is not the question before us. The trial court properly admonished defendants as to the dangers of a stipulated bench trial tantamount to a guilty plea. Defendants were made aware of the stipulation's effect and were afforded the protections set forth by Rule 402. See *Smith*, 59 Ill. 2d at 242-43. The question we must determine is whether categorizing the proceeding as a stipulated bench trial "tantamount to a guilty plea" for purposes of Rule 402 renders defendants' trial a "guilty plea" under Supreme Court Rule 604(d). We conclude that it does not.

¶ 23 Supreme Court Rule 402 admonishes the defendant that by stipulating to the sufficiency of the evidence to convict in a guilty plea, he or she is forfeiting all nonjurisdictional defenses. Therefore, if a defendant states that he agrees that the evidence is sufficient to prove him guilty beyond a reasonable doubt during a stipulated bench trial, he should be properly instructed according to Rule 402. That reasoning is bolstered by the inclusion of a stipulation of guilt in the express language of the rule. However, a stipulated bench trial tantamount to a guilty plea is still a stipulated bench trial. It allows a defendant to avoid the forfeiture rule as to an issue that he or she seeks to preserve for appeal but take advantage of the benefits of a guilty plea. See *Horton*, 143 Ill. 2d at 22. Thus, while it may be similar to a guilty plea, it is not actually a guilty plea subject to Rule 604(d).

¶ 24 Our conclusion is supported by the supreme court's decision in *People v. Wilk*, 124 Ill. 2d 93 (1988). In that case, the court noted that the purpose of Rule 604(d) is to give the

trial court the opportunity to hear the allegations of improper conduct that took place outside the record. The trial court's decision should be made on the record and then considered on review. *Id*. at 104. In the case of a stipulated bench trial tantamount to a guilty plea, the issue for appeal has been preserved and the factual basis upon which the defendant relies is on the record for us to review. Thus, a motion to withdraw and a hearing before the trial court are not necessary.

¶ 25 In this case, defendants proceeded to a stipulated bench trial to preserve the motion to suppress issue while still receiving the benefits of their negotiated sentences. Their trial was conducted as a stipulated bench trial tantamount to a guilty plea. They did not enter a guilty plea. Therefore, compliance with Rule 604(d) is not a condition precedent to defendants' appeal. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006) (rule only specifies guilty pleas).

¶ 26 II. Motion to Suppress

¶ 27 Defendants argue that the search of the truck bed was unlawful because they were detained without reasonable, articulable suspicion and the request to search was made during an involuntary encounter.

¶ 28 There are three tiers of lawful police/citizen encounters: (1) arrests supported by probable cause; (2) investigatory detentions, based on a reasonable, articulable suspicion of criminal activity; and (3) consensual encounters, involving no coercion or detention, that do not implicate fourth amendment interests. *People v. Roa*, 398 Ill. App. 3d 158 (2010). A police officer does not violate the fourth amendment merely by approaching a person in public to ask questions if the person is willing to listen. *People v. Robinson*, 368 Ill. App.

3d 963 (2006); *People v. Luedemann*, 222 Ill. 2d 542 (2006) (police officers may approach citizens and ask potentially incriminating questions). By contrast, a person is seized within the meaning of the fourth amendment when by means of physical force or a show of authority the person's freedom of movement is restrained. *People v. Cosby*, 231 Ill. 2d 262 (2008). Some factors that might lead to a seizure would be (1) the threatening presence of several police officers, (2) the display of a weapon by an officer, (3) some physical touching of the citizen, or (4) the use of language or tone of voice indicating that compliance with the officer's request was required. *United States v. Mendenhall*, 446 U.S. 544 (1980). Other factors indicative of a seizure of a parked car may include (1) boxing the car in, (2) approaching the car from all sides, (3) pointing a gun at the citizen, or (3) the use of flashing lights to show authority. *Luedemann*, 222 Ill. 2d at 557.

¶ 29 Here, none of the above factors were present. Susan's vehicle was parked at the time Officer Thulen approached the vehicle, and he did not use flashing lights. Thulen did not block the Tacoma in the parking spot; he was the only officer on the scene; he never raised his voice in a threatening manner; and he did not use his weapon as a show of force. Susan's testimony that she felt coerced because she had been taught to obey police officers is based on her subjective view, not the objective perception of a reasonable person in her position. See *Luedemann*, 222 Ill. 2d at 565. An objective evaluation of Thulen's conduct in this case demonstrates that his actions were consistent with a third tier police/citizen encounter. The encounter was not a *Terry* stop and did not implicate fourth amendment rights.

¶ 30 Even if we find that the encounter was a *Terry* stop, the trial court appropriately concluded that Susan consented to the search. Consent to search eliminates the need for

probable cause or a warrant under the fourth amendment. See *People v. Starnes*, 374 Ill. App. 3d 329 (2007). Consent is valid if it is voluntary, which is a question of fact to be determined from the totality of the circumstances. *People v. Sanchez*, 292 Ill. App. 3d 763 (1997). A review court will not substitute its judgment for that of the trier of fact regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn. *People v. Deleon*, 227 Ill. 2d 322 (2008).

¶ 31 The record indicates that when asked by Officer Thulen, Susan agreed to open the cover of the truck bed and used the keys to unlock both latches on the tonneau. The trial court heard the testimony from both witnesses. We are not in a better position to assess their credibility. The court also reviewed the surveillance tape from the Wal-mart parking lot. In light of the evidence presented at the motion to suppress hearing, the trial court's finding that Susan voluntarily consented to the search of the vehicle was not against the manifest weight of the evidence.

¶ 32 CONCLUSION

¶ 33 The judgment of the circuit court of Henry County is affirmed.

¶ 34 Nos. 3-12-0956 & 3-12-0957, Affirmed.