2012 IL App (4th) 110014-U

Filed 6/26/12

NO. 4-11-0014

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EUGENE E. BOF, Defendant-Appellant.	)	Appeal from Circuit Court of Livingston County No. 09CF154 Honorable Jennifer H. Bauknecht, Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: An unlawful traffic stop based on an officer's mistake of law is not objectively reasonable and all evidence obtained as a result of the unlawful traffic stop must be suppressed.

¶ 2 Following a September 2010 bench trial, the trial court convicted defendant, Eugene E. Bof, of (1) aggravated driving under the combined influence of alcohol and other drug (cocaine) (count I), (2) aggravated driving under the influence of alcohol (count II), (3) unlawful possession of controlled substance (cocaine) (count III), and (4) obstructing justice (count IV). At the November 2010 sentencing hearing, the trial court merged count II into count I and sentenced defendant to concurrent prison terms of eight years on count I, two years on count III, and two years on count IV. The court also imposed a $500 public-defender assessment.

¶ 3 Defendant appeals, arguing the following: (1) his motion to suppress evidence

should have been granted because Illinois law does not require a person to signal when exiting a private parking lot and, thus, the traffic stop was objectively unreasonable; (2) his convictions for driving under the influence must be reversed because the State failed to prove beyond a reasonable doubt that defendant was under the influence of alcohol, or both alcohol and cocaine; and (3) the $500 public-defender fee was imposed without notice or hearing and must be vacated. Because we agree with defendant's first contention, we reverse the trial court's ruling denying the motion to suppress, and we vacate defendant's conviction.

¶ 4 I. BACKGROUND

¶ 5 In June 2009, the State charged defendant with (1) aggravated driving under the combined influence of alcohol and other drug (cocaine) (count I) (625 ILCS 5/11-501(d)(1)(A) (West 2008)), (2) aggravated driving under the influence of alcohol (count II) (625 ILCS 5/11-501(d)(1)(A) (West 2008)), (3) unlawful possession of controlled substance (cocaine) (count III) (720 ILCS 570/402(c) (West 2008)), and (4) obstructing justice (count IV) (720 ILCS 5/31-4(a) (West 2008)). These charges stemmed from a traffic stop in which defendant was issued a citation for failure to signal when required pursuant to section 11-804 of the Illinois Vehicle Code. 625 ILCS 5/11-804 (West 2008).

¶ 6 A. Motion To Suppress Evidence

¶ 7 In September 2009, defense counsel filed a motion to suppress evidence, asserting defendant was unlawfully stopped, detained, and arrested and, thus, all evidence obtained as the result of the illegal stop must be suppressed pursuant to section 114-12 of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/114-12 (West 2008)). Specifically, the motion asserted that when defendant was stopped, he was not engaged in any "apparent

criminal activity"; "[a] warrantless arrest made without probable cause is illegal"; and, had it not been for the unlawful detention, officers would not have recovered the evidence or made the observations that led to the charges against defendant.

¶ 8 During the October 2009 hearing on defendant's motion to suppress, Officer Casey Kohlmeier testified that on June 5, 2009, he was watching a car (a silver Sebring) that was parked in the parking lot of Scotty's Place, a tavern in Pontiac, Illinois. Kohlmeier stated he had been watching the car for four continuous hours when he observed defendant exit the tavern and enter the driver's seat of the car. The following testimony ensued on direct examination by defense counsel:

"Q. Why were you watching that vehicle?

A. I had intelligence that [defendant] was driving the vehicle and also that there could possibly be illegal drug activity inside the vehicle.

Q. So you wanted to watch the vehicle and see who, in fact, drove it?

A. That's correct.

Q. Was it your intention then to search the vehicle?

A. Ultimately, yes.

Q. Did you have a search warrant at any time concerning [defendant]?

A. No, sir.

Q. Did you have an arrest warrant at any time for [defen-

dant]?

A. No, sir.

* * *

Q. So as far as you could tell [when defendant exited the tavern], there wasn't anything improper about him getting into the vehicle and driving in terms of registration or invalid license or suspended or anything like that?

A. No, sir.

* * *

Q. Now you stopped [defendant] for which reason?

A. For not using a turn signal.

* * *

Q. You issued a traffic citation, sir, based upon the reason for the stop. Would that be correct?

A. Yes."

Defense counsel then showed Kohlmeier defendant's exhibit No. 1, a copy of the traffic ticket issued to defendant. Kohlmeier agreed it was the traffic ticket he issued defendant. The following testimony ensued.

"Q. And what is it that you charged [defendant] with on that ticket?

A. The initial traffic citation was for failure to signal as required.

Q. Would it be correct that [defendant] was leaving Scotty's Place? It's a private area. It's not a public area?

A. Correct.

Q. He's leaving a private drive and entering onto the road in front of Scotty's Place which is a public drive?

A. He was merging onto the roadway from a private drive while crossing oncoming lanes. Yes."

¶ 9 On cross-examination, the State asked, "Coming out of a parking lot such as this one, in terms of safe practice, good practice, particularly at night, what would the reasonably safe approach be in terms of signalling, pausing, those kinds of things." Defense counsel objected, arguing the issue was whether defendant violated the law, not what the officer's opinion regarding safe driving was. The following arguments followed:

"[STATE]: *** There are several legitimate justifications for this stop. Whether there is a technical or a non-technical violation of the traffic law is one thing. That would be a probable cause thing. But there is also [*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)], and you've got a vehicle sitting in front of a tavern for four hours. The guy comes out; and if in exiting the driver makes a maneuver that is not for one even reasonably experienced in operating a motor vehicle that would be, if you will, the norm and reasonable safe way to make that exit, that is certainly a basis for a *Terry* stop by a police officer.

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[DEFENSE COUNSEL]: Your Honor, we can't reconstruct the facts. The officer did not say he stopped him for a *Terry* stop. He said he stopped him because he did not comply with this statute, and he wrote him a ticket for this statute. He did not say that he stopped him for any other reason, or I didn't think he was driving safely. It was late at night. He'd been in the bar. That was not the officer's direct testimony.

So I believe any other statements or arguments on the point are simply not based upon the facts as stated by the officer. And that's irrelevant as to could there be 50 other reasons for the stop? Sure. Maybe there are. But that's not why the officer stopped him.

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[STATE]: Judge, the subjective is what's not relevant. What's relevant is what are [*sic*] objectively reasonable because we are talking about what is reasonable in a constitutional setting. What a reasonable person, a reasonable person in the officer's shoes would do. Is it reasonable for an individual to be stopped if he engages in, if you will, conduct, a pattern, however you want to describe it, that adds up to [']wait a minute, this is not real safe['] and [defendant] just left the tavern after four hours? It's what's reasonable.

> [DEFENSE COUNSEL]: Your Honor, that's simply not the facts though. He went there and waited four hours to find this individual. This is not waiting to see if we've been in the bar and we're going to have a *Terry* stop on him.
>
> He specifically went with the intention of finding this individual in hopes of searching the car. The basis for this stop then based upon his prior information hoping there might be something in the car was the ticket that he wrote and which he's testified to and which is on the video that he did not properly signal."

The court overruled the objection, stating it needed "to take into consideration everything that was out there for the stop."

¶ 10 In response to the State's question of what Officer Kohlmeier felt was safe, Kohlmeier responded "My opinion is if someone is going to be making a left with all the conditions in mind and crossing a lane of oncoming traffic, I would say my opinion is that yes, you would need to use your turn signal due to safety reasons." Kohlmeier further testified on cross-examination that the location where the parking lot meets the road can be a potentially dangerous area because the intersection is somewhat tricky and sits grade level with the street. Kohlmeier did not witness defendant stop or pause before entering the roadway.

¶ 11 On redirect, Officer Kohlmeier agreed with defense counsel that "[i]t [was] a result of [the traffic] stop that [Kohlmeier] then arrested [defendant] based upon a search of the vehicle and other information that led to the charges for the DUI and obstructing justice and having possession of cocaine." Kohlmeier also agreed that no traffic was on the street as

defendant exited the parking lot at approximately 11 p.m.

¶ 12 For clarity, the trial court asked Officer Kohlmeier, "So you're saying the basis for the stop [was defendant] not signalling coming out of Scotty's parking lot?" Kohlmeier responded affirmatively.

¶ 13 In argument, the State acknowledged that, depending on how one interprets section 11-804 of the Illinois Vehicle Code, defendant may not have been statutorily required to use his signal when he left the parking lot of the tavern. However, the State argued it is "common sense to anyone who drives *** that you're going to signal your intentions." In addition to not signaling, the State argued that because defendant was at the tavern for at least four hours and did not pause when he was exiting the parking lot in his vehicle, it was reasonable to conclude that defendant was driving impaired and the stop was reasonable under *Terry*.

¶ 14 Defense counsel argued that defendant did not violate the Illinois Vehicle Code and, as such, Officer Kohlmeier lacked probable cause to initiate a traffic stop of defendant's car. Counsel also proffered that the fact defendant's car remained at the tavern for at least four hours is not enough to support a *Terry* stop and, further, counsel argued Kohlmeier did not testify he stopped defendant for any reason other than his failure to signal as he exited the parking lot. Last, defense counsel pointed out that there was no traffic when defendant left the tavern and no testimony by Kohlmeier that defendant's driving indicated he was impaired.

¶ 15 The trial court declared "the law is whether or not there was reasonable articulable suspicion to stop the vehicle" and, thus, whether defendant's failure to signal violated the Illinois Vehicle Code was not the only factor to consider. Rather, the court explained it must "look at the totality of the circumstances and whether or not there is reasonable articulable suspicion to stop

the vehicle." The court denied defendant's motion to suppress, finding the following factors, when combined, provided sufficient suspicion to stop the vehicle: (1) defendant was at the tavern for four hours; (2) defendant failed to slow down as he left the parking lot; (3) defendant failed to use his turn signal; and (4) Kohlmeier had " 'intelligence about what the [d]efendant had *** been doing.' " The court acknowledged it did not know what the "intelligence" Kohlmeier had was, but it noted Kohlmeier was engaged in a proactive unit. Additionally, the court stated, "I think I know that intersection [near Scotty's]; and I would agree it's a, it's a pretty dangerous area. I mean, pulling out of Scotty's right there is."

¶ 16 In November 2009, defense counsel filed a motion to reconsider denial of defendant's motion to suppress evidence and a brief in support of its motion to reconsider. In the brief, counsel cited *People v. Cole*, 369 Ill. App. 3d 960, 966, 874 N.E.2d 81, 87 (2007), arguing defendant had not committed a traffic violation and "a traffic stop based on a mistake of law is generally unconstitutional, even if the mistake is reasonable and made in good faith." Counsel also argued the trial court erred in relying on defendant's presence at the bar for four hours as a basis to support the stop. Following a hearing, the court denied defendant's motion to reconsider, reiterating that when all the factors mentioned above were combined, the officer had reasonable articulable suspicion to support the stop.

¶ 17 B. Bench Trial and Posttrial Motion

¶ 18 Following a September 2010 bench trial, defendant was found guilty of all charges. Defense counsel filed a motion for a new trial, which the trial court denied. At sentencing, the trial court merged count II into count I and sentenced defendant to consecutive prison terms of eight years on count I, two years on count III, and two years on count IV. The

court also imposed a $500 public-defender assessment. Defense counsel immediately filed a motion to reconsider sentence, which the trial court denied following a hearing.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues the following: (1) his motion to suppress evidence should have been granted because Illinois law does not require a person to signal when exiting a private parking lot and, thus, the traffic stop was objectively unreasonable; (2) his convictions for driving under the influence must be reversed because the State failed to prove beyond a reasonable doubt that defendant was under the influence of alcohol, or both alcohol and cocaine; and (3) the $500 public-defender fee was imposed without notice or hearing and must be vacated.

¶ 22 A. Suppression of Evidence

¶ 23 1. *Standard of Review*

¶ 24 When examining a trial court's decision regarding a motion to suppress, this court "give[s] great deference to the trial court's factual findings, *** [but reviews] *de novo* the trial court's ultimate legal ruling as to whether suppression is warranted." *People v. Luedemann*, 222 Ill. 2d 530, 542, 857 N.E.2d 187, 195 (2006). We are free to undertake our own assessment of the facts and draw our own conclusions; however, we will only overturn a trial court's factual findings when they are against the manifest weight of the evidence. *People v. Pitman*, 211 Ill. 2d 502, 512, 813 N.E.2d 93, 100-01 (2004).

¶ 25 2. *Propriety of the Traffic Stop*

¶ 26 Under the fourth amendment, all citizens have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const.,

amend. IV. "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' " under the fourth amendment. *Whren v. United States*, 517 U.S. 806, 809-10, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89, 95 (1996). Thus, traffic stops are governed by the reasonableness requirement set forth in *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880. *People v. Close*, 238 Ill. 2d 497, 505, 939 N.E.2d 463, 467 (2010).

¶ 27 "A *Terry* analysis requires a dual inquiry: '(1) whether the officer's action was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' " *Cole*, 369 Ill. App. 3d at 965-66, 874 N.E.2d at 86 (quoting *People v. Hall*, 351 Ill. App. 3d 501, 503, 814 N.E.2d 1011, 1015 (2004)). "[E]vidence obtained during [a] stop may not be relied upon to show that [the stop] was justified at its inception." *People v. Haywood*, 407 Ill. App. 3d 540, 545, 944 N.E.2d 846, 853 (2011). "Reasonable suspicion exists where an officer possesses specific, articulable facts that, when combined with rational inferences derived from those facts, give rise to a belief the driver is committing a traffic violation." *People v. Mott*, 389 Ill. App. 3d 539, 544, 906 N.E.2d 159, 164 (2009). "In judging the police officer's conduct, we apply an objective standard: 'would the facts available to the officer at the moment of the seizure *** "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' " *Close*, 238 Ill. 2d at 505, 939 N.E.2d at 467 (quoting *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880).

¶ 28 On a motion to suppress evidence, the defendant bears the burden of proof and must persuade the court the seizure was unlawful. *People v. Mott*, 389 Ill. App. 3d 539, 542, 906 N.E.2d 159, 163 (2009). Once the defendant has made out a *prima facie* case for unlawful search

or seizure, the State then has the burden of introducing evidence to show the search or seizure was justified. *Id*.

¶ 29 a. Mistake of Law

¶ 30 Defendant argues that because section 11-804 of the Illinois Vehicle Code (625 ILCS 5/11-804 (West 2008)) does not require the use of a turn signal when exiting a private parking lot, the traffic stop was objectively unreasonable and, thus, the trial court erred in denying his motion to suppress the evidence. Specifically, defendant asserts that Officer Kohlmeier's mistake of law cannot justify the stop of defendant's car from its inception. The State concedes that defendant was not required to use his turn signal when exiting the private drive. We agree and accept the State's concession.

¶ 31 Traffic stops based on a mistake of law are generally unconstitutional, even where the mistake is reasonable and made in good faith. *Cole*, 369 Ill. App. 3d at 966, 874 N.E.2d at 87. In *Cole*, we stated as follows:

> "To satisfy the reasonableness requirement of the fourth amendment, a police officer conducting a search or seizure under an exception to the warrant requirement need not always be correct but must always be reasonable. [Citation.] For this reason, traffic stops based on an officer's objectively reasonable mistake of fact rarely violate the fourth amendment. [Citations.] However, a police officer who mistakenly believes a violation occurred when the acts in question are not prohibited by law is not acting reasonably. [Citations]." *Id*. at 967-68, 874 N.E.2d 81, 88.

See *United States v. McDonald*, 453 F.3d 958, 961 (7th Cir. 2006); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) (explaining the "failure to understand the law by the very person charged with enforcing it is *not* objectively reasonable" (Emphasis in original.)).

¶ 32 In this case, Officer Kohlmeier initiated the traffic stop because defendant failed to use his turn signal when he exited the private parking lot. Defendant was cited for failure to signal when required pursuant to section 11-804 of the Illinois Vehicle Code, which provides as follows:

> "When signal required. (a) No person may turn a vehicle at an intersection unless the vehicle is in the proper position upon the roadway as required in Section 11-801 or *turn a vehicle to enter a private road or driveway*, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety." (Emphasis added.) 625 ILCS 5/11-804 (West 2008).

¶ 33 "The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature, and that inquiry appropriately begins with the language of the statute." *People v. Woodard*, 175 Ill. 2d 435, 443, 677 N.E.2d 935, 939 (1997). "The best indicator of the legislature's intent is the language of the statute, which must be accorded its plain and ordinary meaning. [Citation.] Where the language of the statute is clear and unambiguous, this court will apply the statute as written without resort to aid of statutory construction." *People v. Tidwell*, 236 Ill. 2d 150, 157, 923 N.E.2d 728, 732 (2010).

¶ 34 In this case, the statute is clear: it requires a person to use their turn signal when

entering a private road or driveway from a roadway, but it contains no such requirement upon exiting a private road or driveway onto a roadway. See 625 ILCS 5/11-804 (West 2008). Thus, no traffic violation is committed when a person pulls out of a private driveway onto a roadway without using his or her turn signal.

¶ 35 b. Review After Mistake of Law

¶ 36 While the State concedes defendant was not required to use his turn signal when exiting the private lot, it argues the stop was justified based on the totality of the circumstances known to Officer Kohlmeier. We disagree.

¶ 37 The State cites *People v. Mott*, 389 Ill. App. 3d 539, 906 N.E.2d 159 (2009), for the proposition that an otherwise improper traffic stop based on a mistake of law may nonetheless be found reasonable and constitutional if the facts known to the officer raised a reasonable suspicion that the defendant was violating the law as written. However, the facts known to the officer must give rise to a reasonable suspicion that a driver is engaged in criminal activity. *Mott*, 389 Ill. App. 3d at 544, 906 N.E.2d at 164. In *Mott*, the officer pulled the defendant over because he believed any object hanging from the rearview mirror, larger than a fingernail, constituted a "material obstruction" under section 12-503(c) of the Illinois Vehicle Code. *Id*. at 543, 906 N.E.2d at 163. We held the defendant met his burden of making a *prima facie* showing that the search subsequent to the traffic stop was unlawful based on the officer's mistake of fact, and the State failed to meet its burden of then showing the facts known to the officer provided reasonable suspicion the air freshener constituted a material obstruction. *Id*. at 544, 906 N.E.2d at 164.

¶ 38 In this case, at the suppression hearing, Officer Kohlmeier testified the sole basis

for the stop was defendant's failure to signal. On cross-examination, Kohlmeier admitted he stopped defendant for not using his turn signal. Further, the trial court specifically asked Kohlmeier, "So you're saying the basis for the stop [was defendant] not signalling coming out of Scotty's parking lot?" Kohlmeier responded affirmatively. The State points to additional factors which it argues gave rise to reasonable suspicion that criminal activity was taking place, including (1) defendant's presence at the tavern for four hours, (2) defendant's failure to slow down upon exiting the parking lot onto what could be considered a "dangerous intersection," (3) defendant's failure to use his turn signal, and (4) Kohlmeier's "intelligence" that defendant may be involved in illegal drug activity. However, the State cites no authority—nor are we aware of any—that makes it a crime to (1) be an a tavern for four hours or (2) fail to slow your vehicle prior to exiting a parking lot. Further, we have already determined the statute does not require that a driver use his or her turn signal upon exiting a private parking lot onto a roadway. Additionally, although Kohlmeier may have had some "intelligence" defendant may have been involved in illegal drug activity, such intelligence does not give rise to a reasonable suspicion that defendant was committing a statutory offense. The State did not met its burden of showing these other factors gave rise to a reasonable suspicion that defendant was engaged in criminal activity.

¶ 39 Because section 11-804 of the Illinois Vehicle Code clearly does not require a person to signal when exiting a private parking lot onto a roadway, and because our officers are tasked with knowing the laws they are charged with enforcing, defendant's actions of exiting the private parking lot onto a roadway without signaling could not have raised a reasonable suspicion that he was violating the law as written. Neither could any other factor cited by the State give

rise to a reasonable suspicion that defendant was engaged in criminal activity. Therefore, Officer Kohlmeier was not acting reasonably and his actions were not justified at their inception.

¶ 40 c. Exclusionary Rule and Application

¶ 41 "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 346 (1987) (citing *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961)). "[T]he 'prime purpose' of the exclusionary rule 'is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.' " *Krull*, 480 U.S. at 347 (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974)). "[A] motion to suppress necessarily invokes the exclusionary rule because the motion seeks to suppress evidence that would otherwise be admissible but is not because of police misconduct." *People v. Burney*, 2011 IL App (4th) 100343, ¶ 59, 963 N.E.2d 430, 444.

¶ 42 In this case, Officer Kohlmeier—who admitted his intentions were to search the vehicle—initiated a traffic stop for a crime that does not exist. Thus, the traffic stop was unlawful and all evidence obtained as a result of the stop should have been suppressed. As a result, we reverse the trial court's ruling on the motion to suppress and vacate defendant's conviction.

¶ 43 Because we vacate defendant's conviction, we need not address the other arguments raised by defendant on appeal.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we reverse the trial court's ruling denying the motion to suppress, and we vacate defendant's conviction.

¶ 46 Vacated.