2012 IL App (4th) 110198-U

Filed 5/10/12

NO. 4-11-0198

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Livingston County
JAMES MASON,	)	No. 10CF237
Defendant-Appellee.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Presiding Justice Turner and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held*: Because the trial court erred by concluding the traffic stop during which defendant was searched was unduly prolonged, rendering the search unconstitutional, we vacate the judgment granting defendant's motion to suppress and remand for the court to rule on the State's argument that defendant consented to be searched.

¶ 2 In September 2010, the State charged defendant, James Mason, with possession of a controlled substance, possession of drug paraphernalia, and possession of cannabis following a traffic stop of a vehicle in which defendant was a passenger. During the traffic stop, defendant had emptied his pockets, revealing contraband, when asked by an officer to do so. In November 2010, defendant filed a motion to suppress, alleging all evidence recovered during the traffic stop was obtained unconstitutionally and was subject to the exclusionary rule. In December 2010, following an evidentiary hearing, the trial court granted defendant's motion to suppress.

¶ 3 The State appeals, arguing the suppression order was erroneous because

defendant's emptying his pockets constituted his consent to a search of his person. Because we agree with the parties that the trial court's stated rationale for suppressing the evidence was erroneous, we vacate the court's judgment. We remand to allow the court to consider the State's argument that defendant consented to be searched.

¶ 4 I. BACKGROUND

¶ 5 On September 15, 2010, at around 5 or 6 p.m., defendant was riding in a vehicle driven by Anjela Coey. Fairbury police officer Jason Graves stopped Coey's vehicle when he observed obstructive objects hanging from Coey's rearview mirror and could not read the vehicle's temporary registration tag. Passing by, another Fairbury police officer, Evan Henkel, observed the traffic stop taking place and as a matter of routine stopped to provide reinforcement.

¶ 6 Officer Graves's check of Coey's driver's license revealed an irregularity that may have warranted a citation. Officer Henkel asked Coey to exit her vehicle and speak with the officers at Officer Graves's patrol car regarding the irregularity. Coey satisfactorily explained the irregularity. Officer Graves began writing a warning regarding the windshield obstructions. During this conversation, which according to Officer Henkel lasted "[p]robably less than a minute," the officers observed that Coey's eyes were glassy and her pupils were abnormally constricted, suggesting she was intoxicated. Officer Henkel asked Coey if she was under the influence of alcohol; she indicated she had been drinking the previous night. The officers requested her consent to a search of her vehicle and she agreed. Officer Henkel conducted the search alone while Officer Graves continued preparing the written warning.

¶ 7 When Officer Henkel approached Coey's vehicle for the search, defendant was seated in the passenger seat. Officer Henkel informed defendant he intended to conduct a vehicle

search and asked him to exit the vehicle. Defendant complied. Officer Henkel observed that, as with Coey, defendant's eyes were glassy and his pupils were constricted. Officer Henkel suspected defendant may have been under the influence of illicit drugs. As a precaution to ensure he had no weapons on his person, Officer Henkel requested that defendant empty his pockets. While the exact wording of the request is unknown, defendant later testified Officer Henkel asked, "Can you empty your pockets out?" Defendant complied. He emptied his right pocket, which contained some coins. When he reached into his left pocket, Officer Henkel observed that defendant "had a look as if he'd been defeated. Like his head lowered." Officer Henkel asked if defendant had drugs in his pocket. Defendant said he had been in prison and did not want to be returned to prison. Officer Henkel told defendant "he wouldn't be going to prison for a little bit of weed." Defendant then produced some suspected cannabis and a glass smoking pipe from his pocket. Officer Henkel arrested defendant, and a subsequent search of defendant's person revealed some unprescribed narcotic pills.

¶ 8 On September 16, 2010, the State charged defendant with (1) possession of a controlled substance (720 ILCS 570/402(c) (West 2008)), a Class 4 felony for which the State alleged defendant was eligible for an extended-term sentence (see 730 ILCS 5/5-8-2(a), 5-4.5-45(a), 5-5-3.2(b)(1) (West 2008)), (2) possession of drug paraphernalia (720 ILCS 600/3.5(a) (West 2008)), a Class A misdemeanor, and (3) possession of between 2.5 and 10 grams of cannabis (720 ILCS 550/4(b) (West 2008)), a Class B misdemeanor.

¶ 9 On November 5, 2010, defendant moved to suppress evidence, including any physical evidence obtained and any statements defendant made during the traffic stop. In part, defendant's motion alleged defendant was unconstitutionally detained and searched without his

consent and was questioned in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶ 10 On December 7, 2010, the trial court held a hearing on defendant's motion to suppress. Officers Graves and Henkel and defendant testified at the hearing, and the above facts were elicited in their testimony. In addition, Officer Henkel testified he believed at the time that defendant was free to leave or to decline the request to empty his pockets, whereas defendant testified he believed at the time that he was obligated to comply. The court granted the motion to suppress. It explicitly found that the officers' request of Coey's permission to search her vehicle impermissibly prolonged the traffic stop, tainting the ensuing procedures.

¶ 11 On January 7, 2011, the State filed its motion to reconsider. At a January 31, 2011, hearing, the trial court denied the motion. On March 2, 2011, the State filed its notice of appeal, citing Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2006) as the authorization for this interlocutory appeal.

¶ 12 II. ANALYSIS

¶ 13 On appeal, the State argues, and defendant concedes, that the trial court's stated justification for granting defendant's motion to suppress was erroneous. Now the State contends the officers permissibly sought and received defendant's consent to be searched under noncoercive circumstances while he was constitutionally detained pursuant to the traffic stop. We agree with the parties that the court's reasoning was erroneous. We remand to allow the trial court to rule on the State's consent-search argument and make necessary factual findings.

¶ 14 A. Jurisdiction

¶ 15 Initially, we address defendant's argument that we lack jurisdiction. Specifically, defendant argues the trial court—and, in turn, this court—lost jurisdiction in this case because

the State's motion to reconsider the suppression order was untimely. The State claims the court was revested with jurisdiction when defendant challenged the merits of the State's motion without objecting to it on timeliness grounds. We agree with the State.

¶ 16 Rule 604(a)(1) allows the State to appeal a trial court's judgment suppressing evidence. Ordinarily, to preserve jurisdiction in either the appellate or the trial court, the State must file a notice of appeal or a motion to reconsider no later than 30 days after such an order. *People v. Holmes*, 235 Ill. 2d 59, 72, 919 N.E.2d 318, 327 (2009). However, under the "narrow terms" of the revestment doctrine, "litigants may revest a court which has general jurisdiction over the matter with both personal and subject matter jurisdiction over the particular cause after the 30-day period following final judgment during which post-judgment motions must ordinarily be filed." *People v. Kaeding*, 98 Ill. 2d 237, 240, 456 N.E.2d 11, 14 (1983). For this rule to apply, "the parties must actively participate without objection in proceedings which are inconsistent with the merits of the prior judgment." *Id.* at 241, 456 N.E.2d at 14. "If a trial court is revested with jurisdiction, then a notice of appeal filed within 30 days after a ruling on the untimely postjudgment motion vests the appellate court with jurisdiction." *People v. Lindmark*, 381 Ill. App. 3d 638, 652, 887 N.E.2d 606, 618 (2008).

¶ 17 Here, the trial court entered its judgment granting defendant's motion to suppress on December 7, 2010. The State's motion to reconsider was not filed until January 7, 2011—31 days after the court's order and 1 day past the jurisdictional deadline. Nevertheless, the parties revested the court with jurisdiction when defendant appeared at the hearing on the State's motion to reconsider and contested its merits without objecting to its untimeliness. The court's order denying the motion to reconsider was entered on January 31, 2011. The State's notice of appeal

was filed 30 days later, on March 2, 2011. Because the notice of appeal was filed within 30 days of the court's decision on the motion to reconsider, we obtained jurisdiction of this appeal under the revestment doctrine and we may proceed to consider its merits.

¶ 18 B. Statement of Factual Findings and Standard of Review

¶ 19 According to section 114-12(e) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-12(e) (West 2008)), a trial court's order granting or denying a motion to suppress "shall state the findings of facts and conclusions of law upon which the order or judgment is based." "This requirement serves the salutary purpose of enlightening the appellate court as to the evidence and reasoning relied upon below and thereby facilitates review." *People v. Hinton*, 249 Ill. App. 3d 713, 718, 619 N.E.2d 198, 202 (1993).

¶ 20 On appeal from a trial court's judgment on a motion to suppress evidence, we generally apply a two-part standard of review. *People v. Oliver*, 236 Ill. 2d 448, 454, 925 N.E.2d 1107, 1110 (2010). "The trial court's factual findings are entitled to great deference, and we will reverse them only if they are against the manifest weight of the evidence." *Id.* "The trial court's ultimate legal ruling on whether suppression is warranted, however, is reviewed *de novo*." *Id.*

¶ 21 C. The Trial Court's Ruling

¶ 22 In this case, the State argues and defendant concedes that the trial court's asserted rationale for granting defendant's motion to suppress was erroneous. The court expressly found that Coey's consent to the search of her vehicle was unconstitutionally obtained because the request for consent prolonged the otherwise valid traffic stop, tainting Officer Henkel's ensuing interaction with defendant. See *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (stating a stop

becomes unlawful when it is prolonged beyond the time reasonably required to complete the purpose of the stop). The court relied on *People v. Al Burei*, 404 Ill. App. 3d 558, 566, 937 N.E.2d 297, 304 (2010), where the First District Appellate Court held the search of the defendant's vehicle during a traffic stop was impermissible because officers delayed issuing traffic citations while questioning him without grounds for suspicion before they obtained his consent for the search.

¶ 23 This case is distinguishable from *Al Burei*. Here, Officer Graves was writing a warning ticket while he and Officer Henkel questioned Coey and sought her permission for a vehicle search. The traffic stop necessarily continued as Officer Graves wrote the ticket, and nothing suggests the questioning unreasonably prolonged that process. We agree with the parties the court's finding that the detention of Coey and defendant had become unconstitutional when Coey consented to the search of her vehicle is unsupported.

¶ 24 D. The State's Consent Argument

¶ 25 The State now claims that the search of defendant's person was constitutional because he consented to it. The fourth amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons[ ] *** against unreasonable searches and seizures." U.S. Const., amend. IV. Article I, section 6, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, §6) contains similar protections, which our supreme court has construed "in a manner that is consistent with the [United States] Supreme Court's fourth amendment jurisprudence." *Fink v. Ryan*, 174 Ill. 2d 302, 314, 673 N.E.2d 281, 288 (1996).

¶ 26 A preliminary consideration in our analysis is whether a search occurred at all. We conclude one did. A search occurs when "an expectation of privacy that society is prepared

to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); see also Black's Law Dictionary 1377 (8th ed. 2004) (defining a "search" as "[a]n examination of a person's body, property, or other area that the person would reasonably be expected to consider as private, conducted by a law-enforcement officer for the purpose of finding evidence of a crime"). The law recognizes the contents of a person's pockets as undisputably private—even when a person is reasonably believed to be armed, an officer, in general, may not reach into that person's pockets unless a pat-down search reveals a likely weapon. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). Here, Officer Henkel asked to see the private contents of defendant's pockets. Thus, when defendant emptied his pockets at Officer Henkel's behest toward revealing whether he possessed a concealed weapon or other illicit object, a search occurred. That search is subject to the fourth amendment's reasonableness requirement.

¶ 27 A defendant's voluntary consent to be searched is a recognized substitute for a warrant issued upon probable cause, which is ordinarily required of a reasonable search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Where the State claims a search is supported by the defendant's consent, the State has the burden of showing the consent was voluntarily given. *Id.* at 222. Voluntariness is a question of fact to be determined from the totality of the circumstances. *People v. Anthony*, 198 Ill. 2d 194, 202, 761 N.E.2d 1188, 1192 (2001). The voluntariness requirement ensures that consent is received, not extracted "by explicit or implicit means, by implied threat or covert force." *Schneckloth*, 412 U.S. at 228. Thus, a court considering the validity of a consent search must take account of "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Id.* at 229.

¶ 28 The underlying question of whether consent is given is muddled when the purported consent is not express or is made by nonverbal conduct. See *Anthony*, 198 Ill. 2d at 202, 761 N.E.2d at 1192 (acknowledging "that there is little authority as to what constitutes consent in the absence of an express verbal statement" (internal quotation marks omitted)). In general, while a person "may convey consent to search by nonverbal conduct," a defendant's "mere acquiescence to apparent authority is not necessarily consent" (internal quotation marks omitted). *Id.* at 202, 761 N.E.2d at 1192-93. "In the case of nonverbal conduct, where dueling inferences so easily arise from a single ambiguous gesture, the defendant's intention to surrender this valuable constitutional right should be unmistakably clear." *Id.* at 203, 761 N.E.2d at 1193.

¶ 29 In *Anthony*, for example, that "single ambiguous gesture" was the defendant's nervously " 'assum[ing] the position' " after officers requested his consent to be searched. *Id.* The supreme court rejected the State's argument that "the defendant intended to consent, not acquiesce." *Id.* It stated, "An equally valid inference *** is that he submitted and surrendered to what he viewed as the intimidating presence of an armed and uniformed police officer who had just asked a series of subtly and increasingly accusatory questions." *Id.* The court affirmed the trial court's suppression of the cocaine uncovered in the course of the search because, in light of the ambiguity of the defendant's gesture, "the State failed to establish that the defendant voluntarily consented to a search of his person." *Id.* at 203-04, 761 N.E.2d at 1193; see also *People v. Raibley*, 338 Ill. App. 3d 692, 701-02, 788 N.E.2d 1221, 1230-31 (2003) (holding the defendant, who was suspected of having child pornography, did not manifest his consent to a search when he shrugged in response to an officer's request to view a videotape in his possession). But *cf. People v. Terry*, 379 Ill. App. 3d 288, 297-98, 883 N.E.2d 716, 724 (2008)

(Fourth District holding the defendant voluntarily consented to be searched where he responded to an initial request by assuming a search position and responded to subsequent requests for clarification of his apparent consent with statements such as, "You have a job to do," and, "[H]ere[,] let me help you out," and by removing items from his coat that would have interfered with a search (internal quotation marks omitted)).

¶ 30 Defendant asks that we affirm based on the evidence on record. See *Kruse v. Kuntz*, 288 Ill. App. 3d 431, 434, 683 N.E.2d 1185, 1187 (1996) (stating the appellate court may affirm the trial court's judgment for any basis appearing in the record regardless of whether the appellee raised it or the trial court relied on it below). Without the trial court's salutary findings, we decline to do so. Here, since the court based its ruling on erroneous findings and conclusions, the court did not proceed to consider the State's consent argument. The court did not have occasion to address factual questions pertaining to that argument—particularly, whether defendant voluntarily consented to be searched or acquiesced to Officer Henkel's apparent authority to search him. Because these findings are necessary to a ruling on the merits of defendant's motion to suppress, we conclude remand is appropriate.

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, we vacate the trial court's judgment and remand for further proceedings on defendant's motion to suppress.

¶ 33 Vacated and remanded.