2012 IL App (5th) 110250-U

NO. 5-11-0250

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Madison County.
	)	
v.	)	No. 10-CF-2264
	)	
THOMAS MOFFITT,	)	Honorable
	)	Charles V. Romani, Jr.,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Donovan and Justice Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: Court properly granted the defendant's motion to suppress contraband found in the trunk of a borrowed car he was driving where officer lacked reasonable articulable suspicion that driver's view was obscured by a standard-sized air freshener hanging from the rear view mirror.

¶ 2 The trial court granted the defendant's motion to suppress cannabis found in the trunk of the car he was driving, finding that the arresting officer impermissibly extended a traffic stop premised on an air freshener hanging from the rear view mirror materially obstructing the driver's view. The State appeals pursuant to Illinois Supreme Court Rule 604(a) (eff. July 1, 2006), arguing that (1) the stop was justified at its inception and (2) information obtained during the stop gave the officer reasonable suspicion to detain the defendant long enough for a drug-sniffing dog to arrive at the scene. We affirm.

¶ 3 The defendant, Thomas Moffitt, was driving on Interstate 70 when Illinois State Police Officer Beau Marlow pulled him over. Officer Marlow explained that he had stopped

the defendant because an air freshener hanging from the rear view mirror obstructed his view of the road. It took approximately 14 minutes for Trooper Marlow to run warrant checks on the defendant's and a passenger's licenses and issue a written warning. After issuing the warning, Officer Marlow asked for permission to search the vehicle. The defendant declined. Officer Marlow then told him that he would be detained until a canine officer could bring a drug-sniffing dog to conduct a free-air sniff of the vehicle. The dog arrived and alerted on the trunk of the vehicle. A search led to the discovery of a suitcase and duffel bag containing cannabis. The defendant was charged with unlawful cannabis trafficking (720 ILCS 550/5.1(a) (West 2010)).

¶ 4 The defendant filed a motion to suppress the cannabis evidence. At a hearing on the motion, Officer Marlow testified that he was in his squad car positioned in the median of Interstate 70 when he saw the defendant driving toward him. The closest the vehicle got to Officer Marlow was approximately 30 feet. As the vehicle approached, Officer Marlow noticed that the defendant was driving slower than the posted speed limit. He also noticed what appeared to be a yellow air freshener in the shape of a Christmas tree dangling from the rear view mirror. He testified that the air freshener was "very visible" to him. He decided to stop the defendant's vehicle and issue a written warning for having a materially obstructed view. See 625 ILCS 5/12-503(c) (West 2010).

¶ 5 Once he had made the stop, Officer Marlow noticed that there were two air fresheners hanging from the rear view mirror. They were clipped together by a small clip so that they were completely aligned. Officer Marlow acknowledged that the two air fresheners took up no more room than a single air freshener would. He estimated the size of the air fresheners to be 5 inches by 3½ inches at the widest portion. We note, however, that the air fresheners themselves were never entered into evidence and Officer Marlow did not actually measure them.

¶ 6 Officer Marlow testified that he asked both the defendant and a passenger for their driver's licenses. He stated that it was his usual practice to run warrant checks and criminal histories on all occupants of a vehicle that he stopped. He testified that he told the defendant the reason for the stop and informed him that he intended to issue a written warning. He then asked the defendant to accompany him to his squad car, which the defendant did.

¶ 7 Officer Marlow further testified that the vehicle was not registered to the defendant. He asked the defendant how he knew the owner of the car. Officer Marlow testified that the defendant told him that he knew the registered owner only as Tommy and explained that he knew Tommy's father better than he knew Tommy himself. Officer Marlow also testified that he asked the defendant about his travel plans. The defendant told him he was driving the vehicle from Arizona to Ohio as a favor to Tommy because Tommy had to fly back to Ohio from Arizona due to a family emergency and the defendant wanted to take a vacation anyway. Marlow stated that when he asked the defendant how he and his traveling companion intended to get back to Arizona, the defendant stated that they had purchased tickets for a flight back.

¶ 8 Officer Marlow also questioned the passenger about their travel plans when he returned her license to her. At this point, the defendant was sitting in the passenger seat of Officer Marlow's squad car, while the passenger remained seated in the passenger seat of the car the defendant was driving. Marlow testified that the passenger's statements about their travel plans were mostly consistent with the defendant's, although she gave fewer details. He testified, however, that there was one key difference. While the defendant told him that they had purchased plane tickets, the passenger told him that they might be getting a ride back to Arizona with friends.

¶ 9 Officer Marlow testified that he found no outstanding warrants on either the defendant or the passenger, but that the defendant had a history of previous drug violations. He stated

that there were multiple violations, but he could not recall how many or whether it was an "extensive" history. Officer Marlow then issued the defendant a written warning and asked the defendant to sign it. Marlow estimated that this process took 14 minutes.

¶ 10 After the defendant signed the warning, Officer Marlow requested permission to search the car. The defendant told him no, he would prefer to be on his way. Officer Marlow testified that he then told the defendant that he would be detained until a canine officer could bring a drug-sniffing dog to the scene to sniff the vehicle. He told the defendant that this could take up to an hour. Officer Marlow testified that he immediately called to request the canine unit. While waiting for the canine unit to arrive, Marlow repeatedly asked the defendant for permission to search the vehicle. Asked to explain why he did so, Officer Marlow testified, "I was under the impression by his mannerisms he–he looked as if he had a look of defeat on his face and his body postures and everything he looked unsure of his decision to deny my consent to search the vehicle." Officer Marlow further admitted that the defendant asked to call his attorney two or three times while they were waiting and that he would not allow the defendant to do so.

¶ 11 Upon questioning by defense counsel, Officer Marlow admitted that he told the defendant that he was being stopped because the air fresheners obstructed his view; he did not tell the defendant that they were a material obstruction. See 625 ILCS 5/12-503(c) (West 2010). Counsel asked if Officer Marlow generally stops drivers for displaying a handicapped parking placard from their rear view mirrors. Marlow replied that he does not always do so but that he frequently does.

¶ 12 Defense counsel also asked Officer Marlow to explain how the video camera mounted on the windshield of his squad car works. Marlow explained that the camera automatically starts recording when he activates the flashing lights on his squad car. The camera, which is mounted on the windshield adjacent to the rear view mirror, records both the passenger

seat of the squad car and the view out the windshield of the squad car. He further explained that he has the ability to mute the audio recording so that the camera records only the video with no audio. Portions of the recording of Officer Marlow's stop of the defendant had no audio. However, Marlow could not recall whether he had muted the recording at any time during the stop.

¶ 13 During cross-examination by the State, Officer Marlow testified that he knew that the defendant was traveling from Arizona, which he knew was "one of the largest spots in the United States for drug intake from Mexico." Asked whether anything aroused his suspicion during the stop, Officer Marlow stated that he found it unusual that the registered owner of the vehicle asked the defendant to drive the car to Ohio for him when the defendant knew him only by his first name. He also noted that the defendant had prior drug violations and that the scent from the air fresheners was unusually strong, something that drug traffickers often do to mask the scent of the drugs they are carrying.

¶ 14 Officer Marlow also testified that both the defendant and the passenger appeared to be nervous. He stated that it was very unusual for passengers to appear nervous during routine traffic stops. According to Marlow, the defendant appeared to be far more nervous than most motorists are during a routine traffic stop. He gave several examples of what he considered to be nervous behavior. He noted that the defendant left his turn signal on after pulling the car onto the shoulder of the road, which, according to Marlow, is often a sign of "tunnel vision." He also testified that the defendant's lip trembled as Officer Marlow approached the car and that his hands trembled as he handed Officer Marlow his driver's licence. In addition, Officer Marlow testified that the defendant appeared to have labored breathing and a pulsating carotid artery. He further noted that the defendant took his sunglasses on and off, rubbed his forehead, and licked his lips.

¶ 15 The court admitted into evidence photographs of the air fresheners taken by Officer

Marlow and an investigator employed by the public defender's office. The court also admitted into evidence a compact disc containing the video recording of the traffic stop. The photographs show that the two air fresheners are clipped together so that they completely overlap. When viewed from the front or back, only one air freshener is visible. A photograph taken from outside the vehicle looking in through the windshield shows that the air fresheners take up a small portion of the windshield. The video recording shows that, contrary to Officer Marlow's testimony, the defendant appears to be remarkably calm throughout the stop. He became nervous only after Officer Marlow informed him that he would be detained until a drug-sniffing dog could be brought to the scene. The recording also shows that Officer Marlow issued the written warning 14 minutes into the stop and that the entire stop lasted 50 minutes.

¶ 16 At the end of the hearing, the trial judge took the matter under advisement so that he could view the video recording before ruling. Subsequently, the court entered a written order in which it found that the traffic stop was "unduly prolonged" and granted the defendant's motion to suppress. The State filed a certificate of impairment, and this appeal followed. See Ill. S. Ct. R. 604(a) (eff. July 1, 2006).

¶ 17 A motion to suppress evidence presents mixed questions of fact and law. *People v. Grove*, 341 Ill. App. 3d 466, 469, 792 N.E.2d 819, 821 (2003). On appeal, we review the trial court's findings of fact to determine if they are against the manifest weight of the evidence. However, we review the court's ultimate determination *de novo*. *People v. Garvin*, 349 Ill. App. 3d 845, 850, 812 N.E.2d 773, 778 (2004).

¶ 18 The State argues that the stop was valid at its inception and that facts that became known to the officer during the course of the stop gave rise to probable cause to detain the defendant long enough to bring a drug-sniffing dog to the scene. We note that the trial court did not specifically make any findings with regard to the validity of the stop at its inception,

choosing to focus instead on the issue of whether Officer Marlow had probable cause to extend the stop. However, this court may affirm the trial court's ruling on any basis that appears in the record, even if it was not the basis relied upon by the trial court. *People v. Dinelli*, 217 Ill. 2d 387, 403, 841 N.E.2d 968, 978 (2005). Because we find that the stop was not valid, we need not consider whether Officer Marlow was justified in extending the stop until the drug-sniffing dog could be brought to the scene.

¶ 19 A routine traffic stop such as the one that occurred in this case constitutes a seizure within the meaning of the fourth amendment. Thus, such stops are subject to the requirement of reasonableness. *People v. Cole*, 369 Ill. App. 3d 960, 965, 874 N.E.2d 81, 86 (2007). Traffic stops are analyzed under the framework of *Terry v. Ohio*, 392 U.S. 1 (1968), which involves a two-part inquiry: (1) the stop must be valid at its inception, and (2) the scope of the stop must be reasonably related to the circumstances that justified the stop. *Cole*, 369 Ill. App. 3d at 965-66, 874 N.E.2d at 86.

¶ 20 A routine traffic stop is justified at its inception if the officer can point to specific, articulable facts supporting his suspicion that the defendant has committed a traffic violation. *Cole*, 369 Ill. App. 3d at 966, 874 N.E.2d at 87 (citing *People v. Rozela*, 345 Ill. App. 3d 217, 225, 802 N.E.2d 372, 379 (2003)). Here, the defendant was stopped because of an air freshener hanging from the rear view mirror and obstructing his view of the roadway. The relevant statute does not prohibit any and all obstructions; rather, it prohibits any *material* obstruction of a driver's view. 625 ILCS 5/12-503(c) (West 2010). We also note that what is at issue is not whether the officer correctly determines that the object constitutes a material obstruction but whether the officer reasonably believes it to be so at the time he initiates the stop. See *People v. Jackson*, 335 Ill. App. 3d 313, 316, 780 N.E.2d 826, 829 (2002).

¶ 21 In support of its contention that the traffic stop was valid at its inception, the State first argues that the instant case is similar to two other cases in which Illinois courts have found

multiple air fresheners to constitute "material obstructions" sufficient to justify a stop. *Jackson*, 335 Ill. App. 3d at 314, 780 N.E.2d at 827, involved two air fresheners hanging from the defendant's rear view mirror, while *People v. McQuown*, 407 Ill. App. 3d 1138, 1140, 943 N.E.2d 1242, 1244 (2011), involved three. In both cases, the appeals courts found that the stops were justified. We note that neither case turned on the fact that there were multiple air fresheners involved. We also find both cases distinguishable from the case before us.

¶ 22 In *Jackson*, the arresting officer specifically testified to seeing what appeared to him to be a " 'large obstruction' " through the windshield of the defendant's vehicle prior to making the traffic stop at issue. *Jackson*, 335 Ill. App. 3d at 314, 780 N.E.2d at 827. The trial court expressly found this testimony to be credible. *Jackson*, 335 Ill. App. 3d at 315, 780 N.E.2d at 828. The court, however, found that the air fresheners did not constitute a material obstruction, and the State appealed. The Second District held that, once the trial court found the officer's testimony credible, it could not simply determine on its own that the air fresheners did not constitute a material obstruction. *Jackson*, 335 Ill. App. 3d at 316, 780 N.E.2d at 828-29.

¶ 23 In *McQuown*, the appeals court likewise found the initial stop to be valid. *McQuown*, 407 Ill. App. 3d at 1144, 943 N.E.2d at 1247. The court did not offer any rationale for this finding, instead focusing its discussion on the duration of the stop. *McQuown*, 407 Ill. App. 3d at 1144, 943 N.E.2d at 1248. There, however, the officer specifically testified that he made the stop after noticing multiple objects suspended from the rear view mirror. *McQuown*, 407 Ill. App. 3d at 1140, 943 N.E.2d at 1244. As in *Jackson*, the trial court expressly found the officer's testimony to be credible. *McQuown*, 407 Ill. App. 3d at 1142, 943 N.E.2d at 1246.

¶ 24 Here, by contrast, the air fresheners were clipped together so that they overlapped

completely and took up no more space than a single air freshener. Officer Marlow testified that he did not notice that there were two air fresheners clipped together until he approached the vehicle on foot after making the stop. Moreover, a photograph entered into evidence shows the view through the windshield, and it is not apparent in the photograph that there were multiple air fresheners. In that photograph, the clipped-together air fresheners do not appear to be a material obstruction, and Officer Marlow offered no testimony at the hearing to explain why he believed otherwise when he first saw them through the windshield from a distance of 30 feet. See *People v. Mott*, 389 Ill. App. 3d 539, 544, 906 N.E.2d 159, 164-65 (2009) (noting that the officer "failed to articulate any specific facts giving rise to an inference [that the] defendant's view was obstructed").

¶ 25 We acknowledge that Officer Marlow did testify that in one of the photographs taken from inside the vehicle, another trooper stood in front of the vehicle and was completely obscured by the air freshener. When asked whether he had used a zoom lens to take the photograph, Officer Marlow replied that he did not know the focal length of the lens used to take the picture. However, the air freshener appears larger than in real life. Most importantly, Officer Marlow did not testify to any facts that would explain why he thought the air fresheners materially obstructed the defendant's view before he made the stop. See *Jackson*, 335 Ill. App. 3d at 316, 780 N.E.2d at 829 (explaining that the relevant inquiry is whether facts known to the arresting officer when he initiates the stop would give a reasonable officer support for the stop).

¶ 26 We also acknowledge that Officer Marlow testified that when he made the stop, he felt that he had observed a material obstruction of the defendant's view. However, he never testified to any specific facts that would support this conclusion. We also emphasize that the video recording shows that at the time he made the stop, Officer Marlow informed the defendant that he was being stopped because he was not allowed to have anything hanging

from the rear view mirror. This stands in stark contrast to the specific testimony of the officers in *Jackson* and *McQuown*.

¶ 27 There is one other significant distinction between this case and both *Jackson* and *McQuown*. As previously noted, both of those cases involved testimony from officers that the trial courts explicitly found to be credible. Here, the court made no express findings regarding Officer Marlow's testimony. We also note that the video recording affirmatively contradicted much of Officer Marlow's testimony about the defendant's demeanor during the stop, which makes it quite likely that the court treated the rest of his testimony with suspicion as well. In sum, we find no support for the State's position in *Jackson* or *McQuown*.

¶ 28 The State next argues that the instant case is distinguishable from all three cases relied upon by the defendant at trial. This is so, the State contends, because each of those cases involved an officer's mistake of law as to the meaning of "material obstruction," and all three cases involved smaller objects than the air fresheners at issue here. We find neither distinction persuasive.

¶ 29 In *People v. Cole*, as here, the officer told the defendant during the stop that he was being stopped because it was illegal to have anything hanging from the rear view mirror. *Cole*, 369 Ill. App. 3d at 962, 874 N.E.2d at 84. Unlike here, however, when asked at a suppression hearing to clarify his understanding of the law, the officer there testified that " 'anything hanging *** or suspended between the driver and the front windshield' " constituted a material obstruction. *Cole*, 369 Ill. App. 3d at 961, 874 N.E.2d at 83. The appellate court found that a traffic stop based on an officer's mistake of law is not reasonable and is therefore generally unconstitutional. *Cole*, 369 Ill. App. 3d at 967, 874 N.E.2d at 88. However, the court went on to note that such a stop may still be reasonable–and therefore valid–if facts known to the officer at the time of the stop would be sufficient to give a reasonable officer a reasonable suspicion that the defendant was "violating the law as

written." *Cole*, 369 Ill. App. 3d at 968, 874 N.E.2d at 88.

¶ 30 Similarly, in *People v. Johnson*, the defendant testified that the officer told him that it was illegal to have anything hanging from his rear view mirror, and the trial court found this testimony to be credible. *People v. Johnson*, 384 Ill. App. 3d 409, 414, 893 N.E.2d 275, 280 (2008). *People v. Mott* likewise involved a mistake of law by the arresting officer. There, the officer mistakenly believed that any object wider than the size of a fingernail was a material obstruction. *Mott*, 389 Ill. App. 3d at 543, 906 N.E.2d at 163. Both courts recognized, however, that the stops would nevertheless be valid if the State could show that it would be reasonable for an officer correctly interpreting the law to conclude that objects involved constituted material obstructions. *Mott*, 389 Ill. App. 3d at 543-44, 906 N.E.2d at 164; *Johnson*, 384 Ill. App. 3d at 412, 893 N.E.2d at 278.

¶ 31 Here, as we have already discussed, Officer Marlow told the defendant that he was stopping him because any object hanging from the rear view mirror could obstruct his view and was not legal, although he also testified, conclusory, that he believed he saw a material obstruction. He indicated that he understood that the statute prohibits only material obstructions in response to a leading question by the State's Attorney during cross-examination. Even assuming that this testimony makes the instant case distinguishable from *Cole*, *Johnson*, and *Mott*, we reiterate that each of those cases recognized that a stop premised on an officer's mistake of law will still be upheld if the facts known to the officer at the time he made the stop would otherwise support the stop. As such, any distinction is meaningless.

¶ 32 In addition, the State argues that these three cases are all factually distinguishable from this case because each involved a smaller air freshener or other object. *Mott* involved a leaf-shaped air freshener that was 3 inches long and 2¾ inches wide at its widest point. *Mott*, 389 Ill. App. 3d at 541, 906 N.E.2d at 162. *Johnson* involved an air freshener in the

shape of two cherries, which was two inches across. *Johnson*, 384 Ill. App. 3d at 411, 893 N.E.2d at 277. *Cole* involved a string of beads that were approximately one-quarter inch in diameter. *Cole*, 369 Ill. App. 3d at 963, 874 N.E.2d at 85.

¶ 33 Here, Officer Marlow estimated the air freshener to be 5 inches tall and measure 3½ inches at its widest point. However, he did not testify that he measured it precisely, and the air freshener was not entered into evidence. Assuming it was slightly larger than the air fresheners involved in *Johnson* and *Mott* and acknowledging that it was larger than the beads at issue in *Cole*, we are not convinced that this difference is enough to require us to reach a different conclusion. As the Fourth District observed in *Mott*, "Size alone does not determine whether an object materially obstructs the driver's view." *Mott*, 389 Ill. App. 3d at 546, 906 N.E.2d at 166. Another relevant factor is where the object is in relation to the driver's sight line, taking into account distance, perspective, and binocular vision. *Mott*, 389 Ill. App. 3d at 543, 906 N.E.2d at 163.

¶ 34 Finally, the State contends that the defendant made a judicially binding admission when he admitted to Officer Marlow that the air fresheners obstructed his view of the roadway. See *People v. Burns*, 99 Ill. App. 3d 42, 45, 424 N.E.2d 1298, 1301 (1981) (explaining that "an admission is any statement *** by a defendant which, when considered with other facts in evidence, permits an inference of guilt"). We reject this contention. Officer Marlow told the defendant that he had stopped the vehicle because it was unlawful to have any objects suspended from the rear view mirror. He explained to the defendant that Department of Transportation studies had shown that "it obstructs your vision of the roadway." The defendant responded, "Yeah, it does." As we have explained, only a *material* obstruction of a driver's view is prohibited by statute. Nothing in this conversation can be interpreted as an admission that the air fresheners materially obstructed the defendant's view. Thus, we find no support for the State's contention.

¶ 35 Finally, we note that we are not holding that a single air freshener can never constitute a material obstruction or give an officer reasonable suspicion to justify a traffic stop. As the Fourth District recognized in *Mott*, any object suspended from a rear view mirror could constitute a material obstruction "in the proper situation." *Mott*, 389 Ill. App. 3d at 546, 906 N.E.2d at 166. We merely hold that under the facts and circumstances presented here, Officer Marlow did not have a reasonable suspicion that the air fresheners materially obstructed the defendant's view. As such, the stop was not valid at its inception, and the court properly suppressed the evidence found as a result.

¶ 36 We conclude that the court properly granted the defendant's motion to suppress. Thus, we affirm its order.

¶ 37 Affirmed.