

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2020 IL App (4th) 180031-U

NO. 4-18-0031

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

May 8, 2020

Carla Bender

4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Coles County
DARIEN D. SIMMONS,)	No. 16CF157
Defendant-Appellant.)	
)	Honorable
)	Brien J. O'Brien,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred by denying defendant’s motion to suppress where the totality of the circumstances established the police lacked reasonable suspicion of a parole violation to lawfully extend the traffic stop and the parole exception to the warrant requirement did not apply.

¶ 2 In April 2016, the State charged defendant, Darien D. Simmons, by information with one count of unlawful possession with the intent to deliver a controlled substance (720 ILCS 570/401(c)(1) (West Supp. 2015)). Defendant filed a motion to suppress, seeking to suppress the evidence that was discovered as a result of an alleged illegal search and seizure. In July 2017, the Coles County circuit court denied defendant’s motion to suppress. After an October 2017 trial, a jury found defendant guilty of the lesser-included offense of unlawful possession of a substance containing heroin (720 ILCS 570/402(c) (West 2016)). Defendant filed a motion for a judgment of an acquittal or, in the alternative, a motion for a new trial. At a

joint December 2017 hearing, the court denied defendant's posttrial motion and sentenced him to five years' imprisonment. Defendant filed a motion to reconsider his sentence, which the court denied in January 2018.

¶ 3 Defendant appeals, contending (1) the circuit court erred by denying his motion to suppress and (2) he was denied effective assistance of counsel because counsel failed to file a motion to suppress defendant's unlawfully obtained statements. We reverse in part and vacate in part.

¶ 4 I. BACKGROUND

¶ 5 The State's single charge alleged defendant knowingly possessed with the intent to deliver 1 gram or more but less than 15 grams of a substance containing heroin on April 17, 2016. The heroin was discovered after the police searched a vehicle in which defendant was a passenger. Defendant admitted the heroin belonged to him. In March 2017, defendant filed a motion to suppress, asserting no valid consent was given for the search and the vehicle could not be searched as a condition of defendant's mandatory supervised release (MSR) because it did not belong to defendant. MSR was formerly known as parole.

¶ 6 On June 21, 2017, the circuit court held a hearing on defendant's motion to suppress. Defendant presented the testimony of Detective Nicholas Clapp and a recording of the traffic stop. Detective Clapp testified he performed a traffic stop for speeding on a white Ford Focus traveling southbound on Route 130 in Coles County. Detective Clapp's directional radar had the car traveling 77 miles per hour on a road with a speed limit of 55 miles per hour. The driver of the car immediately pulled over, and Detective Clapp approached the car on the passenger's side. The driver of the car was a female, whom Detective Clapp later learned was Alexandra Hill. The only passenger in the car was a male, whom Detective Clapp later identified

as defendant. Detective Clapp spoke to both Hill and defendant through the front passenger window. Hill believed she was going 70 miles per hour. He verified Hill had valid car insurance and asked for the driver's license of both Hill and defendant. While speaking to Hill and defendant, Detective Clapp observed defendant's eyes were glassy and bloodshot. At that time, he did not smell an odor of cannabis. After receiving the two driver's licenses, Detective Clapp returned to his squad car. He ran both driver's licenses and discovered defendant was on parole. While running the driver's licenses, Detective Clapp requested a K9 unit, but one was not available. Since a K-9 unit was not available, Sergeant David Lewis offered to respond to the scene. Detective Clapp wrote Hill a warning for speeding.

¶ 7 When Detective Clapp returned to the car, he went to the driver's side window and asked Hill to exit the car. Detective Clapp and Hill went and stood in front of the squad car. Detective Clapp explained to Hill he was issuing her a warning and what that meant. By that time, Sergeant Lewis had arrived and stood by the front passenger side of Detective Clapp's squad car. Before Detective Clapp returned both driver's licenses to Hill, he asked if she had any bombs, weapons, or drugs or the like in the car. Hill answered in the negative and stated the car was hers. Detective Clapp then asked to search the car to confirm there was no contraband. Hill shrugged her shoulders and indicated she wanted to talk to defendant. Detective Clapp returned the driver's licenses to her and indicated the traffic stop was over. However, Detective Clapp further stated he wanted to talk to defendant about a search.

¶ 8 Detective Clapp then went to the front passenger window of Hill's car and attempted to get defendant to consent to a search of the car. Defendant did not want the car searched. Detective Clapp pointed out defendant's glassy eyes and indicated he knew defendant had smoked, and defendant replied there was no odor of cannabis in the car. Detective Clapp

then noted a faint odor of cannabis and stated he could get a K-9 unit to sniff the car if Hill and defendant did not consent to a search. Hill and defendant then consented to the search and exited the car. After exiting the car, defendant admitted he smoked cannabis and had three cannabis “roaches” in his pocket. Detective Clapp searched the entire car. In the trunk, he found a duffle bag which contained a small Baggie. The small Baggie had several smaller Baggies that contained a substance later found to be heroin. Defendant admitted the Baggie and the heroin were his.

¶ 9 After hearing the parties’ arguments, the circuit court took the matter under advisement. At a July 3, 2017, hearing, the court stated its reasons for denying defendant’s motion to suppress. The court first found defendant had standing to contest the search. It also concluded the evidence did not show a valid consent to search. However, the court found defendant’s parolee status and diminished expectations of privacy as a result of that status were “paramount.” The court found defendant’s glassy eyes and the odor of cannabis gave Detective Clapp reason to believe a parole violation had occurred. In doing so, the court did recognize Detective Clapp detected the odor of cannabis only after the traffic stop had concluded. Given the possible parole violation, Detective Clapp had the right to further investigate a possible parole violation by searching defendant’s person and property. The court noted the drugs found were under defendant’s control, even though the drugs were located in the trunk of the car.

¶ 10 In October 2017, the circuit court held defendant’s jury trial on the charge of unlawful possession of a controlled substance with the intent to deliver. In addition to the testimony of Detective Clapp and Sergeant Lewis, the State presented the testimony of Sergeant Jacob Latch, Officer Jeff Endsley, and Illinois State Police forensic scientist Joshua Stern. Defendant did not present any evidence. At the conclusion of the trial, the jury found defendant

guilty of the lesser-included offense of possession of a substance containing heroin. On appeal, the State does not point to any trial evidence in support of its argument the circuit court's denial of the motion to suppress should be affirmed. See *People v. Brooks*, 187 Ill. 2d 91, 127, 718 N.E.2d 88, 108 (1999) (explaining a reviewing court can rely on trial testimony to affirm the circuit court's denial of a motion to suppress but cannot rely on trial testimony to overturn the circuit court's ruling on the motion to suppress based on evidence that came out at trial). As such, we do not set forth the trial evidence in this case.

¶ 11 Defendant filed a motion for acquittal or, in the alternative, a motion for a new trial asserting, *inter alia*, the circuit court erred by denying his motion to suppress. At a joint December 15, 2017, hearing, the court first denied defendant's posttrial motion and then addressed sentencing. The parties agreed defendant was eligible for an extended-term sentence based on a prior conviction. The court sentenced defendant to five years' imprisonment for possession of a substance containing heroin. On December 27, 2017, defendant filed a motion to reconsider his sentence. On January 4, 2018, the court held a hearing on defendant's motion to reconsider sentence and denied it.

¶ 12 On January 10, 2018, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. July 1, 2017), which erroneously stated defendant was appealing a motion for reduction of sentence and supplemental motions to withdraw guilty plea and vacate sentence. On January 24, 2018, defendant filed a timely amended notice of appeal, listing his conviction, sentence, and denial of motion to reconsider sentence as the appealed judgments. See Ill. S. Ct. Rs. 606(d), 303(b)(5) (eff. July 1, 2017). Accordingly, this court has jurisdiction of defendant's appeal under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 13

II. ANALYSIS

¶ 14

A. Motion to Suppress

¶ 15 Defendant contends the circuit court erred by denying his motion to suppress because he was unlawfully seized when Detective Clapp continued to detain him after completing the traffic stop and the seizure was not justified by the parolee exception to the warrant requirement. The State contends defendant was lawfully seized and searched.

¶ 16

1. *Standard of Review*

¶ 17 In reviewing a circuit court's ruling on a motion to suppress evidence, this court applies a two-part standard of review. *People v. Timmsen*, 2016 IL 118181, ¶ 11, 50 N.E.3d 1092. First, we uphold the circuit court's factual findings unless they are against the manifest weight of the evidence. *Timmsen*, 2016 IL 118181, ¶ 11. Second, this court reviews *de novo* the circuit court's ultimate legal conclusion regarding whether suppression is warranted. *Timmsen*, 2016 IL 118181, ¶ 11.

¶ 18

With a motion to suppress, the defendant bears the burden of proof. *People v. Cregan*, 2014 IL 113600, ¶ 23, 10 N.E.3d 1196. If the defendant makes a *prima facie* showing the State obtained the evidence from an illegal search or seizure, the burden shifts to the State to provide evidence to counter the defendant's *prima facie* case. *Cregan*, 2014 IL 113600, ¶ 23. However, the ultimate burden of proof remains with the defendant. *Cregan*, 2014 IL 113600, ¶ 23.

¶ 19

2. *Seizure*

¶ 20

Both the fourth amendment to the United States Constitution (U.S. Const., amend. IV), which applies to the states under the fourteenth amendment (U.S. Const., amend. XIV), and article I, section 6, of the Illinois Constitution (Ill. Const. 1970, art. I, § 6) protect people against

unreasonable searches and seizures. *Timmsen*, 2016 IL 118181, ¶ 9. Reasonableness is an objective standard which is determined by examining the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

¶ 21 As with the driver of a vehicle, a passenger of a vehicle is seized within the meaning of the fourth amendment when a police officer makes a traffic stop. *Brendlin v. California*, 551 U.S. 249, 251 (2007). A police officer’s decision to stop a vehicle is reasonable where the officer has probable cause to believe a traffic violation occurred. *Whren v. United States*, 517 U.S. 806, 810 (1996). Nevertheless, a seizure that was lawful at its inception can violate the fourth amendment “if its manner of execution unreasonably infringes interests protected by the Constitution.” *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). In the context of a traffic stop, “[a] seizure justified only by a police-observed traffic violation, therefore, ‘become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission’ of issuing a ticket for the violation.” *Rodriguez v. United States*, 575 U.S. 348, 350-51 (2015) (quoting *Caballes*, 543 U.S. at 407). “Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.” *Rodriguez*, 575 U.S. at 354. Moreover, with regards to duration, our supreme court has stated a “seizure remains lawful only ‘so long as [unrelated] inquiries do not measurably extend the duration of the stop.’ ” *Rodriguez*, 575 U.S. at 355 (quoting *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)). In other words, a police officer may conduct certain unrelated checks during an otherwise lawful traffic stop, but the officer “may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.” *Rodriguez*, 575 U.S. at 355.

¶ 22 Defendant argues the police officer’s continued questioning of Hill and request to speak to defendant and search the car unreasonably extended the stop beyond its initial purpose

of issuing a warning to Hill for speeding. The State contends the scope of the stop changed based on reasonable suspicion defendant had committed a parole violation. The State also refers to the parole exception to the warrant requirement. In reply, defendant contends the evidence of defendant's glassy and bloodshot eyes was insufficient to establish reasonable suspicion of a parole violation based on the use of cannabis. As to the parole exception, defendant contends (1) it does not justify prolonging a traffic stop in the absence of reasonable suspicion; (2) even if it did justify prolonging the traffic stop, the exception does not apply because Detective Clapp prolonged the stop by talking with Hill who was not on parole; and (3) the State failed to prove defendant was on parole.

¶ 23 Here, the parties agree the initial traffic stop was lawful. When Detective Clapp first approached the car, he observed defendant had glassy and bloodshot eyes. While checking Hill's and defendant's names, he learned defendant was on parole. The parties do not dispute those facts were known to Detective Clapp during the traffic stop, and the circuit court found the detection of an odor of cannabis happened after the conclusion of the traffic stop. We agree with defendant those facts alone do not establish reasonable articulable suspicion defendant had violated his parole by using cannabis. Glassy and bloodshot eyes are also indicative of a person being under the influence of alcohol. See, e.g., *People v. Meo*, 2018 IL App (2d) 170135, ¶ 29, 102 N.E.3d 751 (noting the defendant's glassy and bloodshot eyes, the odor of alcohol on the defendant's breath, and other factors would cause a reasonably cautious person to believe the defendant was impaired). Moreover, as defendant notes, glassy and bloodshot eyes may be related to other conditions as well, such as tiredness, emotional distress, and seasonal allergies. Thus, the mere existence of glassy and bloodshot eyes alone is an insufficient indication of cannabis use. Accordingly, we find Detective Clapp did not have reasonable suspicion

defendant committed a parole violation based on cannabis use and could not extend the stop on that basis. Thus, we disagree with the State's contention the scope of the stop changed when Detective Clapp discovered defendant was on parole.

¶ 24 The State also argues Detective Clapp did not measurably extend the stop because the time that lapsed from when he tried to obtain consent to search the car and when he detected an odor of cannabis was less than two minutes. However, in *Rodriguez*, 575 U.S. at 357, the Supreme Court rejected the argument “an officer may ‘incremental[ly]’ prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances.” In doing so, the Court noted the reasonableness of a seizure depends on what the police actually do. *Rodriguez*, 575 U.S. at 357. Thus, the Supreme Court emphasized the critical question is not whether the dog sniff or other unrelated action occurs before or after the officer issues a ticket but whether conducting the drug sniff or other unrelated action adds time to the stop. *Rodriguez*, 575 U.S. at 357. Here, Detective Clapp's seeking consent to search from Hill and then seeking consent to search from defendant added time to the stop. We also note Detective Clapp expressly stated the traffic stop was over but continued to pursue consent to search the vehicle. Accordingly, we disagree with the State's suggestion Detective Clapp's seeking consent to search before discovering the odor of cannabis did not measurably extend the stop.

¶ 25 As to the applicability of the parole exception to the warrant requirement, we note one of the conditions of parole in Illinois is the person on parole “consent to a search of his or her person, property, or residence under his or her control.” 730 ILCS 5/3-3-7(a)(10) (West 2014). The condition allows law enforcement to ask the person to consent to search the

aforementioned things with or without reasonable suspicion. *People v. Moss*, 217 Ill. 2d 511, 528, 842 N.E.2d 699, 710 (2005). The State cites the Illinois Supreme Court's decision in *Moss*, 217 Ill. 2d at 528, 842 N.E.2d at 710, where it found the search of the defendant's truck during a traffic stop was proper based on the defendant being on MSR. There, the defendant was the owner and driver of the truck and gave consent to search. *Moss*, 217 Ill. 2d at 528, 842 N.E.2d at 710. In this case, Hill was the driver of the car, and she told Detective Clapp the car was hers. No evidence was presented Hill was on parole at the time of the stop. Moreover, when Detective Clapp was talking with defendant, Detective Clapp referred to searching Hill's car, not defendant's person or property in the car. When Detective Clapp ultimately searched the car, he searched the entire car and did not limit his search to defendant's property. The State cites no authority holding law enforcement can search an entire car in which the person on parole is the passenger and not the driver, and we are unaware of any authority. Here, even if a traffic stop can lawfully be extended beyond the scope of the stop to conduct a search pursuant to the parole exception, the evidence presented at the motion to suppress hearing did not show Detective Clapp sought to conduct (and did conduct) a search pursuant to the parole exception. Thus, we find the parole exception is not applicable in this case.

¶ 26 Accordingly, we find Detective Clapp unlawfully prolonged the traffic stop to search Hill's vehicle in violation of defendant's constitutional rights. Thus, the circuit court erred by denying defendant's motion to suppress, and we vacate defendant's conviction and sentence for possession of a substance containing heroin. See *People v. Heather*, 351 Ill. App. 3d 1052, 1059, 815 N.E.2d 1, 7 (2004).

¶ 27 B. Ineffective Assistance of Counsel

¶ 28 Defendant also raises a claim of ineffective assistance of trial counsel. However,

since we have reversed his conviction and sentence, we do not address this issue.

¶ 29

III. CONCLUSION

¶ 30 For the reasons stated, we reverse the Coles County circuit court's denial of defendant's motion to suppress and vacate defendant's conviction and sentence.

¶ 31 Reversed in part and vacated in part.