2023 IL App (4th) 220970-U

NO. 4-22-0970

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 17, 2023
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Tazewell County |
| RANDY JORDAN, | ) | No. 21CF406 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Christopher R. Doscotch, |
| | ) | Judge Presiding. |

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice DeArmond and Justice Doherty concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court did not err in denying defendant's motion to suppress evidence.

¶ 2 Defendant, Randy Jordan, who was convicted of unlawful possession of methamphetamine, appeals from the trial court's judgment denying his pretrial motion to suppress evidence. On appeal, defendant argues the court erred in denying his motion because the methamphetamine was discovered during an unreasonable seizure, as opposed to a consensual encounter with police, in violation of the fourth amendment (U.S. Const., amend. IV). We affirm.

¶ 3 I. BACKGROUND

¶ 4 In July 2021, a grand jury indicted defendant for unlawful possession of methamphetamine (720 ILCS 646/60(a) (West 2020)), alleging he knowingly possessed less than five grams of a substance containing methamphetamine.

¶ 5 In November 2021, defendant filed a motion to suppress evidence, arguing the methamphetamine located on his person was illegally seized during an "unduly prolonged" traffic stop. Defendant alleged that on July 15, 2021, Officer Corey Mitchell of the Pekin Police Department initiated a traffic stop of his vehicle on the basis it had an excessively loud exhaust system. After handing defendant several traffic citations, "Mitchell directed [him] to exit the truck; whereupon a search of the vehicle ensued." While Mitchell searched the truck, a second officer who had arrived to assist with the traffic stop, Officer Gregory Burris, "instructed" defendant to empty his pockets. Defendant produced a container of marijuana from one of his pockets. Once Mitchell had concluded the search of the vehicle, "he proceeded to search [defendant's] right pants pockets, which resulted in the seizure of purported methamphetamine residue from inside a glass smoking pipe."

¶ 6 Based on the allegations above, defendant argued in his motion to suppress evidence that the traffic stop was "unduly prolonged" where the officers lacked probable cause or a reasonable, articulable suspicion that would justify prolonging its duration. Defendant asserted that he "did not voluntarily consent to the search of his vehicle or person at the conclusion of the initial purpose of the stop." Defendant filed a memorandum in support of his motion to suppress evidence. In it, he framed the relevant issue as follows: "The officer's search of the truck and continued detention of [defendant] after issuing a written warning and petty traffic citations constituted an illegal search and seizure of his person and truck." As factual support for his claim that the searches of his vehicle and person were nonconsensual, defendant

highlighted how Mitchell positioned himself in a manner that prevented him from shutting his car door and Mitchell's repeated statements expressing his desire to have defendant exit the vehicle so he could conduct a search of it. Defendant maintained that after Mitchell repeatedly expressed his desire to search the vehicle, he "then acquiesce[d] to Mitchell's authority by stepping out of the truck." Defendant did not include any of his interactions with Burris as factual support for his suppression claim.

¶ 7 We note defendant also included a second issue in his memorandum, asserting the marijuana discovered on his person did not give the officers probable cause to search him further. At the suppression hearing, defense counsel dedicated a significant portion of his examination of the witnesses and argument to this issue. However, because defendant concedes on appeal that the marijuana did, in fact, give the officers probable cause to search him, we will not discuss this issue further.

¶ 8 The State filed a response to defendant's motion, arguing: (1) the initial traffic stop concluded when the officers returned defendant's paperwork and handed him the traffic citations, (2) the officers' actions following the conclusion of the traffic stop did not amount to a second seizure of defendant, and (3) defendant voluntarily consented to the search of his vehicle and person.

¶ 9 On June 21, 2022, the trial court conducted a hearing on defendant's motion to suppress evidence. At the outset of the hearing and upon stipulation of the parties, the court admitted Mitchell's and Burris's bodycam footage of the incident into evidence. Defendant called as witnesses Mitchell and Burris, and defendant testified on his own behalf. We will first discuss the video evidence.

¶ 10 Mitchell's bodycam footage begins as he was positioning his squad car behind a pickup truck that was parked on a residential street. As Mitchell exited his vehicle and began walking toward the truck, a person, later identified as defendant, can be seen sitting in the driver's seat with the door open. Defendant's truck was parked in front of a detached garage and behind a second truck that was parked in front of a house. Defendant stated to Mitchell he did not live at the house but was there to work on the second truck. Mitchell asked defendant if there was a hole in his exhaust pipe, and defendant responded by saying it was the "exhaust manifold." Mitchell then asked defendant for his driver's license and proof of insurance. Defendant handed Mitchell a photocopy of his driver's license and indicated he could produce an electronic version of his insurance card on his phone, but he was unable to find his phone. As Mitchell was returning to his squad car to write a ticket, he asked defendant to "hang out here by the side of your truck; don't be going crazy reaching in for anything." After several minutes, defendant walked back to Mitchell's vehicle, and Mitchell informed him that he would be done in "just a sec [*sic*]."

¶ 11 Burris arrived on the scene to assist Mitchell with the traffic stop as Mitchell was finishing writing defendant several traffic citations. Mitchell informed Burris that he was going to ask defendant for consent to search his vehicle because defendant was acting "super nervous." As Mitchell walked up to defendant's truck after writing the citations, defendant was smoking a cigarette in the driver's seat with the door open and his left leg outside of the vehicle. Mitchell handed him a written warning for the loud exhaust and citations for failing to provide proof of insurance and for having an expired license plate.

¶ 12 Immediately after confirming defendant had no questions about the paperwork, Mitchell said to him, "Hey, I couldn't help but notice you're, like, extremely nervous and

shaking." Defendant stated he was not nervous but had been startled when Mitchell initially pulled up behind his truck. Mitchell then informed defendant that Pekin had a large methamphetamine and heroin problem. Defendant responded by saying he did not "mess with" either substance. Mitchell asked if defendant had "any needles or anything like that" in his vehicle. Defendant denied having any needles in the truck. Mitchell continued, "So you'd make me happy by just making sure I can search the vehicle, make sure there's no needles in here at all. I'm just looking for needles, heroin, that kind of stuff." Defendant said the only thing in his vehicle like a needle was his EpiPen, which he used for a bee allergy. Mitchell said the EpiPen was "fine" and then proceeded to tell defendant, "Yeah, if you just want to step back here with this, ah, officer here." Mitchell stepped away from the driver's-side door as he said this. Defendant asked, "And you're going to do what?" Mitchell replied, "I just wanna [*sic*] make sure there's no heroin, needles, like that in here." Defendant, said, "oh, yeah," and exited the vehicle and stood near the front left tire. As defendant was exiting the vehicle, Mitchell added, "That's what I'm—that's what I'm concerned by—right here, if you just wanna [*sic*], if you just wanna [*sic*] wanna step back here with this officer," while pointing at Burris, who was standing next to the bed of the truck on the driver's side.

¶ 13 Burris's bodycam footage shows that as Mitchell was having the exchange with defendant discussed above, Mitchell positioned himself near defendant, with his left elbow resting on the window ledge of the open door and his left foot placed on the running board. After defendant exited the vehicle and stood near the front left tire, Burris said, "Hey, [defendant], come on back over here." Defendant said, "Yeah," but did not move. Burris again said, "[Defendant], come, right over here," while pointing to the ground in front of where he was standing. Defendant complied with Burris's request and walked to the back of the truck. Burris

asked him, “Do you have anything in your pockets sharp, you mind if I check real quick?” Defendant responded, “Yeah, I do mind. I can empty them right here.” Defendant proceeded to empty his pants pockets and produced a container of marijuana that he set on the back of the truck. Burris told defendant that he was not concerned about the marijuana but advised him not to carry it on his person while driving. As Mitchell was still searching the vehicle, defendant said, “Hey, bud, I’ll save you some time. There is nothing in there. I’m not kidding you. I’m not trying to distract you or anything, but I don’t do that kind of shit. You can look at my arms, you can look at wherever you want to look.”

¶ 14 Once Mitchell completed his search of the vehicle, which failed to uncover any contraband, he approached defendant at the back of the truck and asked him whether the marijuana was the only thing he had in his pockets. Defendant said it was, and then Mitchell told him to spread his feet. Defendant responded, “I’m good. I’m good. I mean, really, I’m good. I’m done with the search.” Burris informed Mitchell that defendant “doesn’t want to be searched.” Mitchell confirmed with Burris that defendant had had marijuana in his pockets and then said, “Oh, well, that gives me probable cause to search the rest, see if there’s any other weed in there, in your pockets.” At that point in time, the officers physically restrained defendant and began searching his person. Defendant stated he did not consent to the search. Ultimately, Mitchell discovered a “bubble” pipe during the search and handed it to Burris. Burris confirmed that there was a small, but usable, amount of methamphetamine in the pipe. The officers then placed defendant under arrest.

¶ 15 Mitchell testified at the suppression hearing that his only reason for initiating the traffic stop was for a “loud or excessive muffler noise.” Mitchell admitted that he could not see defendant’s hands shaking in his bodycam footage but maintained that when he was “within a

foot or two of him," he could see that they were shaking. Mitchell testified he "had a feeling that [defendant] was either hiding something or he was—like I said, he was nervous and I wanted to ask for consent to search his vehicle." Mitchell conceded he was acting solely on a "hunch." Mitchell testified he never told defendant he was free to leave after handing him the traffic citations. Mitchell agreed that he never specifically asked defendant for consent to search his vehicle "by using those exact words." Mitchell testified he did not find any contraband in defendant's truck.

¶ 16 Burris testified that Mitchell was "standing at the driver's door" when he handed defendant the traffic citations. Burris agreed that Mitchell was "almost completely inside that door, so if [defendant] tried to close the door, it would obviously hit" Mitchell. In other words, Mitchell was "obstructing the door being closed at that point."

¶ 17 Defendant testified that Mitchell was standing in his "bubble" when he handed him the traffic citations and began discussing Pekin's drug problem. Defendant further testified he did not feel free to leave after Mitchell gave him the citations because Mitchell was "clearly in my door where I couldn't move actually. I mean, I was pretty much stuck right there." Defendant maintained he did not give Mitchell consent to search his vehicle but only stepped out of his vehicle "to get away from the situation" and because he believed Mitchell "was going to search it whether I said no or yes."

¶ 18 During argument, defense counsel framed the issues as follows:

> "MR. SNYDER [(DEFENSE COUNSEL)]: Really, there's two issues in this case, Judge. You have the first search of the cab of the truck and then you have the search of [defendant's] person. The reason that the first search is relevant even though no contraband was recovered is that if that search is improper, then

everything that follows is the fruit of the poisonous tree and would be improper as well because you would be unduly prolonging the detention we would argue of [defendant] at that point after or at the point in time when the traffic stop was supposed to have concluded."

Counsel went on to explain that the second issue was whether the discovery of marijuana provided the officers with probable cause to search defendant's person. After dedicating most of his argument to the issue of whether the marijuana gave the officers probable cause to search defendant's person, defense counsel stated the following in support of his argument that defendant did not voluntarily consent to the initial search of his vehicle:

"MR. SNYDER: As far as the first search goes, the search of the cab that led to the search of the person, I'm not waiving the argument that it was not consensual. I'd say that if you go on the totality of the circumstances and you look at the facts here, it's clear that we have two officers. They're fully uniformed. They're both armed. The physical position of Officer Mitchell in relation to [defendant] is he's very close. He's leaning in. His leg is actually on the side rail of his truck, and [defendant] could not actually close the door without committing some battery on the officer essentially. And the officer did not move away from the door until his second directive, repeated directive for [defendant] to exit the vehicle.

Now, acquiescence to authority and I think the Court is well aware of this, that's not enough for there to be consent. There's case law out the wazoo for that."

¶ 19 On July 1, 2022, the trial court entered a written order denying defendant's motion to suppress evidence. The court made the following findings: (1) the initial traffic stop was lawful; (2) the traffic stop concluded when Mitchell handed defendant the citations, at which point defendant was free to leave; (3) Mitchell "immediately requested permission to search the vehicle" after handing defendant the citations; (4) "defendant voluntarily remained and engaged in discussion with" Mitchell after receiving the citations; (5) defendant could not close the driver's-side door without "striking" Mitchell; (6) Mitchell was calm in demeanor and tone, did not "promote he was armed," and did not raise his voice; (7) Mitchell was not blocking the truck doorway when defendant "voluntarily consented to the search of the truck"; (8) defendant did not consent to Burris's request to search him, which "demonstrated his recognition of the ability to say no to the officer's request"; (9) defendant voluntarily removed marijuana from his pocket, which gave the officers probable cause to conduct a further search of his person; and (10) "neither officer's tone nor demeanor indicated or suggested *** defendant had no choice but consent to the search." Ultimately, the court concluded:

> "The totality of the evidence does not support Defendant's claim of acquiescence as opposed to voluntary consent. A reasonable person would believe he *** was free to leave or decline the officer's request. In fact, *** Defendant exercised that freedom later when he declined both Officers' request to search his person."

¶ 20 At a status hearing the following week, defense counsel informed the trial court that the parties expected defendant's trial to "be a stipulated bench trial to preserve his motion to suppress for appeal purposes."

¶ 21 On August 26, 2022, the trial court conducted defendant's stipulated bench trial. The State informed the court that in exchange for defendant's agreement to stipulate to the

evidence, it would recommend a sentence of first offender probation if the court were to find him guilty. After hearing the stipulated evidence and the arguments of the parties, the court found defendant guilty beyond a reasonable doubt and continued the proceedings for sentencing.

¶ 22 On September 6, 2022, defendant filed a motion for a new trial, arguing, in relevant part, the trial court erred in denying his motion to suppress evidence. On October 31, 2022, the court denied defendant's motion and sentenced him to 24 months' probation.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant argues the trial court erred in denying his motion to suppress evidence. While acknowledging he was initially seized pursuant to a lawful traffic stop, defendant contends that following the conclusion of the traffic stop, the officers "effected a second seizure by ordering him out of his truck and restraining his freedom of movement during a purportedly consensual search of the vehicle." Defendant claims he was "seized when he was ordered out of the truck [by Mitchell], or at the very latest, when his freedom of movement was curtailed as he was ordered [by Burris] to stand at the back of the truck." Defendant further notes that, "critically, when he tried to exercise his freedom of movement by standing back away from the truck, and to exercise his right to decline to cooperate by staying in that position, Burris *did* raise his voice," thereby exerting control over him. (Emphasis in original.). According to defendant, "Because that second seizure was illegal, and because the methamphetamine was the fruit of that illegality, the trial court erred in denying [his] motion to suppress evidence."

¶ 26 A. The Motion to Suppress Evidence

¶ 27 Defendant argues the trial court erred in denying his motion to suppress evidence because the methamphetamine discovered on his person was the fruit of an unreasonable seizure

in violation of the fourth amendment. According to defendant, after the traffic stop had concluded, "the officers involved effected a second seizure by ordering him out of his truck and restraining his freedom of movement during a purportedly consensual search of the vehicle." Specifically, defendant asserts that he "was seized when he was ordered out of the truck [by Mitchell], or at the very latest, when his freedom of movement was curtailed as he was ordered [by Burris] to stand at the back of the truck." As discussed below, we will not address whether Burris's statements to defendant shortly after he exited his truck amounted to a seizure of defendant for fourth amendment purposes.

¶ 28 This court applies a two-part standard of review when reviewing the trial court's ruling on a motion to suppress evidence. *People v. Grant*, 2013 IL 112734, ¶ 12. We afford great deference to the trial court's findings of fact and will not reverse those findings unless they are against the manifest weight of the evidence. *Id.* However, we review *de novo* the ultimate question of whether the evidence should have been suppressed. *Id.*

¶ 29 The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Similarly, article I, section 6, of the Illinois Constitution of 1970 provides that "[t]he people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means." Ill. Const. 1970, art. 1, § 6. "It is settled, however, that not every encounter between a police officer and a private citizen involves a seizure or restraint of liberty that implicates the fourth amendment." *People v. Almond*, 2015 IL 113817, ¶ 56. For instance, "a consensual encounter between a citizen and an officer does not violate the fourth amendment because it does not

involve coercion or a detention." *Id.* "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." (Internal quotation marks omitted.) *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980).

¶ 30 "As the United States Supreme Court has recognized when considering whether a challenged incident was a consensual encounter, a person is seized within the meaning of the fourth amendment 'only when, by means of physical force or a show of authority, his freedom of movement is restrained.' " *Almond*, 2015 IL 113817, ¶ 57 (quoting *Mendenhall*, 446 U.S. at 553). The Supreme Court in *Mendenhall* elaborated on what constitutes a seizure for fourth amendment purposes:

> "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. [Citations.] In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Mendenhall*, 446 U.S. at 554.

"The *Mendenhall* factors are not designed to be exhaustive, however, and coercive behavior similar to those factors may also constitute a seizure. [Citation.] Nonetheless, we have

recognized that the absence of any *Mendenhall* factors is highly instructive on the issue of whether a seizure has occurred." (Internal quotation marks omitted.) *People v. Oliver*, 236 Ill. 2d 448, 456-57 (2010).

¶ 31 Here, we find none of the *Mendenhall* factors were present during the relevant encounter. Mitchell and Burris were the only two officers present. See *People v. Cosby*, 231 Ill. 2d 262, 278 (2008) ("[T]he presence of only two officers, without more, is not a factor that would indicate a seizure occurred."). Neither officer displayed a weapon during the encounter. *Mendenhall*, 446 U.S. at 554. The only physical touching of defendant occurred after the officers had learned defendant had marijuana on his person, thereby giving them probable cause to search him. *Id.* The trial court found neither Mitchell's "tone nor demeanor indicated or suggested *** defendant had no choice but [to] consent to the search." *Id.* We cannot say this finding was against the manifest weight of the evidence, and we conclude none of the *Mendenhall* factors were present during defendant's encounter with the officers. See *Almond*, 2015 IL 113817, ¶ 57 ("While these factors are not designed to be exhaustive, this court has recognized that the absence of any *Mendenhall* factors is highly instructive on the issue of whether a seizure has occurred." (Internal quotation marks omitted.)).

¶ 32 In his reply brief, defendant concedes "that the encounter does not fit neatly into the *Mendenhall* framework" but nonetheless stresses "he was still objectively not free to leave." In support of this contention, defendant asserts that the facts in this case "present as compelling a case for suppression, if not more so," than the facts in *People v. Brownlee*, 186 Ill. 2d 501 (1999), a case in which our supreme court found the defendant had been seized for fourth amendment purposes following the conclusion of a lawful traffic stop.

¶ 33 In *Brownlee*, the defendant was a passenger in a vehicle stopped by two police officers for a traffic violation. *Id.* at 505-06. After obtaining the identities of the driver and the three passengers and determining no outstanding warrants existed, the officers decided not to issue a traffic citation, but they agreed to ask the driver for consent to search the vehicle. *Id.* at 506. When the officers returned to the vehicle, they positioned themselves on either side of it. *Id.* One of the officers handed the driver his driver's license and insurance card and said that no citations would be issued. *Id.* The officer did not inform the driver he was free to leave but rather "paused a couple of minutes" without saying anything. (Internal quotation marks omitted.) *Id.* During this period of silence, the officers remained standing on either side of the vehicle. *Id.* Following the extended pause, one of the officers asked the driver if he could search the vehicle. *Id.* The driver asked whether he had a choice, to which the officer "replied that the driver did have a choice and he was 'asking' if he could search the vehicle." *Id.* "The driver stepped out of the car and said, 'Okay, you can search.' " *Id.* The officers found marijuana and an open beer bottle in the vehicle and arrested its occupants. *Id.* at 507. During a search of the defendant's person incident to her arrest, the officers found cocaine. *Id.* The defendant filed a motion to suppress the cocaine, arguing that the consent given to search the vehicle was the product of an unlawful detention. *Id.* at 507-08. The trial court granted the motion, the appellate court reversed the trial court's judgment and remanded, and the defendant filed a petition for leave to appeal with the supreme court. *Id.* at 509-10.

¶ 34 Before the supreme court, the defendant argued "that the [trial] court was correct in concluding that, after the initial purpose for the traffic stop was concluded, the officers' continued detention of the car and its occupants violated her constitutional rights and thereby invalidated the subsequent consent to search the car and her arrest." *Id.* at 516. The supreme

court agreed with the defendant. *Id.* at 520-21. The supreme court found that the traffic stop had concluded when one of the officers returned the driver's paperwork to him and explained that no citations would be issued. *Id.* at 520. After the conclusion of the traffic stop, "[t]he officers apparently did not move from their stations at the car's doors during [a] two-minute time period, but rather stood there, saying nothing." *Id.* According to the supreme court, "the officers' actions constituted a show of authority such that a reasonable person would conclude that he or she was not free to leave." *Id.* "A reasonable person in this driver's situation would likely conclude that, if he or she drove away, then the two officers would soon be in hot pursuit." *Id.* As further support for its conclusion, the *Brownlee* court noted that by asking whether he had a choice in the matter of consenting to a search of the vehicle, "not only did the driver believe that he was not free to drive away at that point, he was uncertain whether he was required to submit to [the officer's] request to search his car." *Id.* "Although the test for whether a reasonable person would have felt free to leave is an objective one, this driver's subjective reaction to the two officers' show of authority bolsters our conclusion on this matter." *Id.* Thus, in light of the officer's show of authority and the driver's belief he was not free to leave, the supreme court concluded that a reasonable person would not have felt free to leave and, as a result, "the driver and his passengers, including the defendant, were subjected to a seizure." *Id.* at 520-21.

¶ 35 Two important facts in *Brownlee* distinguish it from this case: (1) the officers' actions constituted a show of authority and (2) the driver of the vehicle believed he was not free to leave. *Id.* at 520. The officers in *Brownlee*, after the traffic stop had concluded, positioned themselves on either side of the vehicle and stood silently for approximately two minutes, which the supreme court found amounted to a show of authority. *Id.* Here, no such show of authority occurred during defendant's encounter with Mitchell. Instead, as the trial court found, "Mitchell

immediately requested permission to search the vehicle" after handing defendant the traffic citations, as opposed to standing in silence for an extended period of time. Moreover, unlike the driver in *Brownlee*, who believed he was not free to leave, defendant here demonstrated on multiple occasions that he *did*, in fact, believe he was free to refuse the officers' requests to search him. *Id.* For example, he sought clarification from Mitchell about the scope of his search before stepping out of the vehicle, refused to give Burris consent to search his person but instead voluntarily produced marijuana from his pocket, and refused to give Mitchell consent to search his person after he had completed the search of his vehicle. Given that Mitchell's actions did not constitute a show of authority, coupled with defendant's belief he was free to refuse the officers' requests, we find defendant's reliance on *Brownlee* misplaced. Accordingly, we conclude the trial court did not err in rejecting defendant's arguments and denying his motion to suppress evidence.

¶ 36 B. Forfeiture

¶ 37 Defendant also claims that Burris unreasonably seized him by ordering him, in a raised voice, to stand next to him while Mitchell searched the vehicle. The State argues defendant has forfeited the argument because he failed to present it to the trial court. The State concedes defendant preserved his claim that his consent to search the vehicle was invalid where he had been unlawfully seized by Mitchell at the time but asks this court to find he has forfeited the additional claim that his interactions with Burris amounted to an alternative basis to find an unlawful seizure had occurred prior to defendant producing the marijuana from his pants pocket.

¶ 38 Defendant contends he preserved the issue because even though his "argument on appeal expands on the argument below, the two arguments are not wholly distinct." He notes that in the motion to suppress evidence, he alleged Mitchell directed him to exit the vehicle without a

warrant or voluntary consent and, in the accompanying memorandum, he alleged that he acquiesced to Mitchell's authority. According to defendant, "[t]he judgment being appealed addressed the issue as it has been raised in the opening brief, that is, the trial court went through the same analysis it would have gone through had counsel's argument mirrored the opening brief precisely."

¶ 39 "Generally, a reviewing court will not consider a claim of an illegal search and seizure unless it was first presented to the trial court." *People v. Bui*, 381 Ill. App. 3d 397, 405 (2008); see *People v. Jaynes*, 2014 IL App (5th) 120048, ¶ 38 ("[A] defendant's argument is forfeited on appeal if it was not raised in the trial court." (Internal quotation marks omitted.)). "An issue raised by a litigant on appeal does not have to be identical to the objection raised at trial, and we will not find that a claim has been forfeited when it is clear that the trial court had the opportunity to review the same essential claim." *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009).

¶ 40 Here, we agree with the State that defendant has forfeited his argument that Burris seized him because he failed to present it to the trial court. *Bui*, 381 Ill. App. 3d at 405. In his motion to suppress evidence, defendant asserted the traffic stop was "unduly prolonged" and he "did not voluntarily consent to the search of his vehicle or person at the conclusion of the initial purpose of the stop." In the memorandum in support of his motion, defendant identified the only two arguments he was presenting to the court: (1) "The officer's search of the truck and continued detention of [him] after issuing a written warning and petty traffic citations constituted an illegal search and seizure of his person and truck" and (2) the marijuana he produced from his pocket did not give the officers probable cause to search his person "following the fruitless search of the vehicle." During the hearing on the suppression motion, defense counsel again

clearly articulated the two arguments he was raising: "Really, there's two issues in this case, Judge. You have the first search of the cab of the truck and then you have the search of [defendant's] person." Counsel spent the majority of his argument on the second issue—*i.e.*, whether the marijuana gave the officers probable cause to search defendant's person.

¶ 41 Now, on appeal, in addition to renewing his argument that Mitchell had seized him at the time he gave consent to search the vehicle, defendant is attempting to raise a new and wholly distinct argument that, if he was not seized by Mitchell, then he was subsequently seized by Burris when Burris ordered him to stand at the back of the truck and asked him to search his pockets in a "descending" tone. This new claim that Burris effected a seizure does not merely expand on the argument defendant presented to the trial court. Instead, it is a distinct claim based on facts unrelated to the issue of whether the search of defendant's vehicle was consensual. Burris's act of ordering defendant to stand next to him had no bearing on whether defendant's consent to search the vehicle was valid, as that act occurred after defendant had already exited the vehicle and therefore cannot be considered a mere expansion of the argument raised below. In other words, the question of whether Mitchell effected a seizure requires an analysis of facts completely independent of those that would need to be analyzed to determine whether Burris subsequently effected a distinct seizure. Defendant cannot now argue on appeal that the court erred in failing to grant the motion to suppress on the basis Burris had unlawfully seized him prior to producing the marijuana when the court was never given the opportunity to review this claim.

¶ 42 We further note that had the argument been made to the trial court, the court would have examined Burris's interaction with defendant, such as his statements to defendant and his tone of voice, and made findings of fact which, on review, would be subject to the highly

deferential manifest weight of the evidence standard of review. If we were to address the Burris argument now, we would essentially be conducting a *de novo* review, placing defendant in a more advantageous position on appeal as a consequence of his having failed to raise the issue in the first instance. Accordingly, we agree with the State that defendant is not raising the same "essential claim" and find he has forfeited the argument that Burris effected an unreasonable seizure for fourth amendment purposes by ordering him to stand at the back of the truck and asking to search his pockets in a "descending" tone. *Lovejoy*, 235 Ill. 2d at 148.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the trial court's judgment.

¶ 45 Affirmed.