No. 125434

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate
	)	Court of Illinois, First
Plaintiff-Appellant,	)	District, No. 1-16-0640
	)	
	)	There on Appeal from the
v.	)	Circuit Court of Cook
	)	County, No. 14 CR 15846
	)	
CORDELL BASS,	)	The Honorable
	)	Neera Walsh,
Defendant-Appellee.	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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I. The Appellate Court Erred When It Decided a Constitutional Issue of First Impression that Defendant's Counsel Never Raised and the People Never Had an Opportunity to Address.

The People's opening brief explained that the appellate majority erred when it reversed defendant's conviction based on a theory that defendant never presented in any court — whether investigative alerts violate the Illinois Constitution's warrant clause — both because the majority acted as an advocate by raising and ruling on issues on defendant's behalf and because resolution of this issue was unnecessary to its resolution of the case. Peo. Br. 15-18.[1]

Defendant's contrary arguments are meritless. To begin, defendant offers no argument why the appellate majority could reach out to decide an issue that was unnecessary to its resolution of defendant's appeal. *See* Peo. Br. 17 (citing *People v. White*, 2011 IL 109689, ¶ 144) (reviewing court should not consider issue not essential to disposition of the case or where result will be unaffected regardless of how issue is decided). Although the People disagree with the appellate court's ruling, *see* Part III, *infra*, all three justices agreed that the passenger warrant check unlawfully extended the traffic stop. *Bass*, 2019 IL App (1st) 160640, ¶¶ 78, 114 & n.1. That holding resolved defendant's appeal, so the majority was wrong to reach the

[1] "Peo. Br. __," "Def. Br. __," and "R __," refer to the People's opening brief, defendant's appellee's brief, and the record on appeal, respectively.

unbriefed, unrelated question of whether investigative alerts violate the Illinois Constitution's warrant clause.

The majority was also wrong to reach the unbriefed issue for the independent reason that defendant never raised it. He did not raise the issue in the trial court, where he challenged only the scope and duration of the traffic stop that resulted in his arrest. And he concedes that, on appeal, he did not raise the argument embraced by the appellate majority: that the "supported by affidavit" language in the Illinois Constitution's warrant clause should be construed differently than the Fourth Amendment's "Oath or affirmation" language. Def. Br. 17 (conceding that opening brief "did not raise the 'affidavit' language"); *id.* (supplemental appellate brief argued that warrantless arrest violated Fourth Amendment and privacy clause of the Illinois Constitution); *see Bass*, 2019 IL App (1st) 160640, ¶ 39 (defendant's opening brief "cited the Illinois Constitution," but "did so without exposition on why the result might differ by applying its unique language and the precedent interpreting it."); *id.* ¶ 47 (defendant's supplemental brief argued that his warrantless arrest violated the privacy clause of Illinois Constitution).

Moreover, defendant concedes that "'a reviewing court should not normally search the record for unargued and unbriefed reasons to reverse a trial court judgment.'" Def. Br. 18 (quoting *People v. Givens*, 237 Ill. 2d 311, 323 (2010)). And this Court should reject defendant's proposed distinction

between unbriefed issues resting on common facts, which he argues may be considered, and unbriefed legal theories, which he concedes may not. Def. Br. 19. Beyond the fact that the unbriefed issue here plainly rests on a novel, unbriefed legal theory, *Givens* did not make that distinction, and its reasoning would not support it. *Givens* quoted *Greenlaw v. United States*, 554 U.S. 237 (2008), which explained that the rule rests on the "'principle of party presentation,'" in that "'we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" *Givens*, 237 Ill. 2d at 323 (quoting *Greenlaw*, 533 U.S. at 243). "'To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights.'" *Id.* (quoting *Greenlaw*, 533 U.S. at 243-44). But here, defendant is not a pro se litigant, and thus the appellate court should not have reached out to decide the issue on a theory that defendant never presented in any court.

Givens also defeats defendant's argument that the court could properly consider the unbriefed issue under Rule 366(a)(5). *Givens* quoted with approval *People v. Rodriquez*, 336 Ill. App. 3d 1 (1st Dist. 2002), which stressed that while a reviewing court has the power to raise unbriefed issues pursuant to Rule 366(a)(5), it "'must refrain from doing so when it would have the effect of transforming [the] court's role from that of jurist to advocate.'" *Givens*, 237 Ill. 2d at 324 (quoting *Rodriguez*, 336 Ill. App. 3d at

14). Here, as in *Givens*, "the appellate court stepped over the line from neutral jurist to that of an advocate for defendant to raise and rule on issues that were neither controlled by clear precedent nor dictated by an interest in a just result." *Id*. at 325. If anything, this Court's clear precedent — holding that the search and seizure provisions of the two constitutions "should be construed alike," *see* Peo. Br. 18, and that public, warrantless arrests are permissible so long as they are supported by probable cause, *see* Peo. Br. 22-23 — dictated the opposite conclusion.

Finally, defendant's gripe that the amicus brief provides insufficient information about investigative alerts, for example, about how often investigative alert audits are performed, "who performs them, what standards are employed, or what the results of a typical audit might be," Def. Br. 34, is not merely irrelevant; it underscores the People's point that the appellate court erred when it reached out to decide an issue that was not raised in the circuit court, where a sufficient record could have been developed, or briefed by the parties.

Accordingly, this Court should vacate the portion of the appellate court's judgment that holds that investigative alerts violate the warrant clause of the Illinois Constitution. *Givens*, 237 Ill. 2d at 330 (appellate court's analysis "must be vacated" where court reversed defendant's conviction based on "a theory never raised by defendant or addressed by the parties in their appellate briefs"); *Bass*, 2019 IL App (1st) 160640, ¶¶ 38-71.

II. Investigative Alerts Do Not Violate the Illinois Constitution's Warrant Clause.

As explained in the People's opening brief, the appellate majority's conclusion that "article I, section 6 [of the Illinois Constitution] provides greater protections than the fourth amendment," *Bass*, 2019 IL App (1st) 160640, ¶ 43, is incorrect, Peo. Br. 18-24, so if the Court does not vacate the appellate court's judgment, it should reverse it outright. It is firmly established that the Illinois Constitution's "supported by affidavit" language and the Fourth Amendment's "Oath or affirmation" language are "virtually synonymous," and that the search and seizure provisions of the two constitutions "should be construed alike." *Caballes*, 221 Ill. 2d at 291; *People v. Tisler*, 103 Ill. 2d 226, 241 (1984) ("the warrant clause with its probable-cause requirement, and the guarantee against unreasonable search and seizure . . . remains nearly the same as that of the fourth amendment"); *id.* at 242 (Illinois Constitution of 1970 "does no more than specifically provide for fourth amendment protection with regard to eavesdropping and invasion of privacy"); *People v. Holmes*, 2017 IL 120407, ¶ 25 (when construing Illinois Constitution, Illinois courts "follow decisions of the United States Supreme Court regarding searches and seizures."); *People v. Manzo*, 2018 IL 122761, ¶ 28 (search and seizure provision in article I, section 6, of the Illinois Constitution is to be interpreted in lockstep with the Fourth Amendment); *People v. Fitzpatrick*, 2013 IL 113449, ¶ 15 (explaining that this Court has conducted the limited lockstep analysis for purposes of article I, section 6 of

the Illinois Constitution and determined that "the framers intended for it to have the same scope as the fourth amendment"). Given this established precedent, defendant's argument that the text or history of article I, section 6 demonstrate the framers' intent that it be construed differently than the Fourth Amendment is plainly wrong. *See* Def. Br. 24-32.

In any event, both the "affidavit" and "Oath or affirmation" language merely govern the mechanism by which a warrant may be obtained, i.e., whether a warrant application must be supported by an "affidavit," or instead by an "Oath or affirmation"; it does not provide that arrests may be made only with a warrant and has no bearing on the question presented here: whether a defendant may be arrested *without* a warrant so long as the police have probable cause. Thus, even if, defendant asserts, the framers of the state constitution ascribed different meaning to the "supported by affidavit" language than to the Fourth Amendment's "Oath or affirmation" requirement, that difference would have no bearing on this case, and his reliance on *Lippman v. People*, 175 Ill. 101 (1898), *People v. Elias*, 316 Ill. 376 (1925), and *People v. Clark*, 280 Ill. 160 (1917), which addressed the validity of search and arrest warrants, is misplaced.

Defendant's reliance on *People v. McGurn*, 341 Ill. 632 (1930), *see* Def. Br. 29-30, is similarly unavailing. Indeed, that case *supports* the People's argument that long-standing Illinois precedent permits public, warrantless arrests supported by probable cause. Peo. Br. 22-23. In *McGurn*, this Court

explained that "[i]t is the rule in this state where a criminal offense has, in fact, been committed, that an officer has a right to arrest without a warrant where he has reasonable ground for believing that the person to be arrested is implicated in the crime." 341 Ill. at 636. The arrest in *McGurn* was invalidated not because it ran afoul of Illinois's warrant clause, but because the police lacked probable cause: "[t]here was nothing about the attending circumstances which would lead a reasonable and prudent man to believe that plaintiff in error was, in fact, committing any crime or which would justify the officer in making the arrest." *Id.* at 637-38.

And unlike *McGurn*, in which the "only attempt to justify this illegal arrest is the statement of [the arresting officer] that he was acting under orders of his superior officer," *id.* at 638, defendant here was not arrested at the mere direction of a superior officer. The investigative alert included factual detail that provided sufficient probable cause for defendant's arrest, as he conceded below, *Bass*, 2019 IL App (1st) 160640, ¶ 37, and does not dispute before this Court.

Nor does anything in our state history or tradition suggest that the framers intended article I, section 6 be construed differently than the Fourth Amendment. To the contrary, and as defendant acknowledges, the People's opening brief established that for more than a century, this Court has held that police officers may make warrantless arrests in public where there is probable cause to believe that the arrested individual committed a crime. *See*

Def. Br. 30. Numerous cases, decided both before and after adoption of the 1970 Constitution, establish the falsity of the appellate majority's conclusion that some yet-to-be-identified Illinois tradition requires that a warrant issue before a public arrest may be made. Peo. Br. 22-23. Defendant's argument that those cases "generally involved . . . exigency," Def. Br. 30, overlooks that the relevant question is whether the police had probable cause to arrest, and the "fact that the police may have had time to obtain an arrest warrant is immaterial" to answering that question. *People v. Denwiddie*, 50 Ill. App. 3d 184, 190 (3d Dist. 1977) (citing *United States v. Watson*, 423 U.S. 411, 423-24 (1976)). Defendant's argument that where those cases did not involve exigency they involved "a crime committed, if not in the arresting officer's immediate presence, at least in the course of the arresting officer's investigation," Def. Br. 30, similarly misses the mark. As the Supreme Court explained nearly a century ago, "the usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony." *Carroll v. United States*, 267 U.S. 132, 156 (1925). This reflected the common-law rule that a peace officer was permitted to make a felony arrest without a warrant *whether or not it was committed in his presence* if there was reasonable ground for making the arrest. *Watson*, 423 U.S. at 418.

Because the framers of the 1970 Constitution did not intend to change the warrant requirement of the 1870 Constitution, which allowed officers to

make warrantless arrests in public when supported by probable cause, or depart from the search and seizure provision's lockstep with the Fourth Amendment, which similarly allows such warrantless arrests, defendant has no viable challenge to his arrest on the basis of an investigative alert with probable cause.

Accordingly, if this Court does not vacate that portion of the appellate majority's decision invalidating investigative alerts, it should overrule it. Notably, since the filing of the People's opening brief, the Fifth Division has joined the Second and Fourth Divisions of the First District and declined to follow *Bass*. *See People v. Simmons*, 2020 IL App (1st) 170650, ¶ 64 (following *People v. Braswell*, 2019 IL App (1st) 172810, ¶ 39, which noted that *Bass*'s reasoning is flawed because "arrests must be based on probable cause, not warrants").

Nor is there any merit to defendant's contention that his arrest violated the Fourth Amendment. Def. Br. 39-42. As defendant himself recognizes, *Watson* held that "the Fourth Amendment did not prohibit a warrantless arrest provided that the arresting officer had probable cause to believe that the suspect was guilty of a felony." Def. Br. 40 (citing *Watson*, 423 U.S. at 416-17). Thus, as the appellate majority recognized below, because defendant did not dispute that the police had probable cause for his arrest, that arrest did not violate the Fourth Amendment. *Bass*, 2019 IL App (1st) 160640, ¶ 37. Defendant's policy argument that in light of modern

technology and policing practices an arresting officer is unlikely to be familiar with the suspect or circumstances of the offense, Def. Br. 40-41, in no way alters the effect of this established, binding precedent, which is fatal to defendant's Fourth Amendment argument. *People v. LeFlore*, 2015 IL 116799, ¶ 33 ("There is no question that decisions of the United States Supreme Court interpreting fourth amendment law are binding precedent for Illinois police officers and Illinois courts[.]"). In any event, defendant's policy argument is defeated by the facts of his own case, in which the investigative alert contained detailed information about defendant's identity and offense. R J18-19. Nor may this Court adopt defendant's proposed "more correct interpretation of the Fourth Amendment," Def. Br. 42. *See Oregon v. Haas*, 420 U.S. 714, 719 (1975) ("a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them").

Because public arrests supported by probable cause are permissible under both the state and federal constitutions, defendant's complaint that an arrest based on an investigative alert with probable cause "cuts the judiciary out of the process," Def. Br. 32, is irrelevant. As even the majority below recognized, police always have an incentive to obtain a warrant because "when the officer acts under the cover of a warrant, the evidence the officer discovers may still be admitted even if a court eventually invalidates the warrant for lack of probable cause." *Bass*, 2019 IL App (1st) 160640, ¶ 69.

Defendant's argument that "[n]either the State nor the City, has articulated a bona fide reason for why investigative alerts should be preferred over warrants," Def. Br. 38, is a straw man: the People have never argued that investigative alerts are preferable to warrants. And even if they had, it would not change the fact that defendant's public, warrantless arrest, which he concedes was supported by probable cause, comported with both the state and federal constitutions.

Moreover, even if the appellate majority was correct that warrantless arrests violate the Illinois Constitution (and it was not), defendant's post-arrest statement should not be excluded. The exclusionary rule is extraordinarily strong medicine. Its application has been limited to instances where its remedial objectives will be most effectively served. *Arizona v. Evans*, 514 U.S. 1, 11 (1995). In other words, it applies only where its deterrent benefits outweigh its substantial social costs. *See United States v. Leon*, 468 U.S. 897, 907 (1984); *United States v. Janis*, 428 U.S. 433, 453-54 (1976). That is not the case where, as here, officers had no reason to believe their conduct ran afoul of the constitution. At the time of defendant's arrest, and for more than a century before that, binding appellate precedent held that public, warrantless arrests were lawful so long as they were supported by probable cause. *See LeFlore*, 2015 IL 116799, ¶ 31 (declining to apply exclusionary rule where (1) officer could rely on "binding appellate precedent" permitting his conduct, and (2) "police conduct in relying on the legal

landscape that existed at the time was objectively reasonable and a reasonable officer had no reason to suspect that his conduct was wrongful under the circumstances"). And as explained in the People's opening brief, Officers Carrero and Serrano could reasonably rely on the investigative alert drafted by Detective Davis. Peo. Br. 26 (citing, *e.g.*, *People v. McGee*, 2015 IL App (1st) 130367, ¶ 49) (When an arrest is "predicated on information received in an official police communication by a commanding officer," "the State must demonstrate that the circumstances known to other, non-arresting officers, whose report or directions were relied upon by the officer in making the arrest, were sufficient to establish probable cause to arrest the defendant."); *Taylor v. City of Chicago*, No. 13 CV 4597, 2020 WL 92003, at *4 (N.D. Ill. Jan. 8, 2020) ("initial officer's probable-cause determination is . . . imputed to other CPD officers aware of the alert"; collective knowledge doctrine "also applies to police bulletins," and "investigative alert system functions as a police bulletin broadcast within a jurisdiction"). Because officers such as Carrero and Serrano would have had no reason to suspect that their conduct might later be ruled unlawful, *see Bass*, 2019 IL App (1st) 160640, ¶ 71 (recognizing that the "officers here undoubtedly acted consistently with the established policy at the time"), the good-faith exception applies, and defendant's post-arrest statement should not be excluded, *see LeFlore*, 2015 IL 11670, ¶ 22.

Defendant's argument that the good-faith exception should not apply because his "arrest resulted from the Chicago Police Department's sustained and systematic efforts to avoid pre-arrest judicial scrutiny of probable causes [*sic*] determinations in an inexcusable end-run around both the Illinois and United States Constitution's pellucidly stated arrest warrant requirement," Def. Br. 46, is also a straw man. Neither the state nor the federal constitution requires a warrant, so long as the arrest is made in public and supported by probable cause. Defendant has conceded that his public arrest was supported by probable cause, so the police committed no misconduct at all, much less a "systematic and egregious effort to circumvent the protections afforded to citizens by both the United States and Illinois constitutions." Def. Br. 45. Even if this Court were to change that long-standing law here, defendant's statement should not be excluded. *LeFlore*, 2015 IL 116799, ¶ 22 (application of exclusionary rule limited to "unusual" case where it can achieve its "sole objective" of deterring future Fourth Amendment violations).

III. The Appellate Court Wrongly Concluded that the Police Unreasonably Extended the Duration of the Lawful Traffic Stop by Requesting Passenger Identification and Running Name Checks.

Finally, the appellate court erred in concluding that the name checks measurably extended the duration of the concededly lawful traffic stop.[2] The "tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission,' to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (quoting *Caballes*, 543 U.S. at 407); *see also People v. Harris*, 228 Ill. 2d 222, 247 (2008) (quoting *Caballes*, 543 U.S. at 408) ("warrant check on the occupants of a lawfully stopped vehicle does not violate fourth amendment rights, so long as the duration of the stop is not unnecessarily prolonged for the purpose of conducting the check and the stop is 'otherwise executed in a reasonable manner.'"). Accordingly, as part of the "mission" of the traffic stop, the police were permitted to request the driver's license and run a name check on the driver. *See People v. Cummings*, 2016 IL 115769, ¶ 8 (determining whether there are outstanding warrants against driver is ordinary inquiry incident to traffic stop). And because Carrero ran the passenger name check simultaneously, it did not "measurably extend the duration of the stop." *Arizona v. Johnson*, 555 U.S. 323, 334 (2009). Thus,

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[2] Defendant neither disputes that he forfeited this issue by failing to raise it in his post-trial motion, nor argues that the People forfeited its forfeiture argument. *See* Peo. Br. 28. Accordingly, this Court should enforce his forfeiture.

the appellate court erred in holding that the name check impermissibly extended the duration of the stop, and this Court should reverse that portion of the appellate court's judgment.

Defendant's argument that "the stop took the amount of time needed to complete the mission plus the time it took to run at least three additional name checks," Def. Br. 13, is unsupported by the record. The record establishes only that Carrero ran name checks on the driver and defendant. Specifically, the record shows Carrero ran a name check on "some of the individuals" in the vehicle, R J17, and he named specifically the driver, R J12, and defendant, R J18. Serrano testified that there were "other passengers in the rear of the minivan," R J24, but neither officer testified that Carrero ran a name check on the other passengers. Based on Carrero's testimony that he "conducted a LEADS check" on the driver, R J12, one can reasonably infer that Carrero's "name check" of defendant was also a "LEADS check." And because that single additional name check on defendant likely "took just seconds," *see Hadnott v. City of Chicago*, No. 07 C 06754, 2015 WL 13598320, at *3 (N.D. Ill. May 22, 2015) (evidence established that police database checks "took just seconds…to produce results"), it cannot be said to have *measurably* extended the traffic stop. Therefore, this Court should reverse that portion of the appellate court's judgment.

CONCLUSION

This Court should vacate or reverse that portion of the appellate court's judgment holding that defendant's arrest violated the Illinois Constitution and reverse the appellate court's judgment holding that the traffic stop did not comport with the Fourth Amendment.

January 5, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance, and the proof of service, is 16 pages.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 5, 2021, the foregoing Reply Brief of Plaintiff-Appellant, People of the State of Illinois, was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy via e-mail to the e-mail addresses listed below:

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