

No. 1-09-2835

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 10899
)	
RICHARD MONTALOVO,)	Honorable
)	Larry G. Axelrood,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's findings on defendant's motion to suppress were not against the manifest weight of the evidence. Defense counsel was not ineffective for eliciting evidence of defendant's conviction, even though it was more than 10 years old, because defendant could not prove prejudice. This court affirmed the decision of the circuit court of Cook County.
- ¶ 2 Following a bench trial, defendant Richard Montalovo was found guilty of possession of a controlled substance and sentenced to two years' imprisonment. Defendant contends the trial court's denial of his motion to suppress was against the manifest weight of the evidence because the arresting officer's testimony was incredible. He further contends defense counsel was

constitutionally ineffective for eliciting evidence of defendant's forgery conviction on direct examination where that conviction was more than 10 years old. We affirm.

¶ 3 Defendant was arrested and then charged with the above-stated offense after police, while executing a search warrant, observed defendant's codefendant brother toss cocaine baggies aside and discovered cocaine in a shed behind the family residence. Prior to trial, defendant filed a motion to suppress his inculpatory statements regarding the cocaine. He alleged that Chicago police failed to advise him of his *Miranda* rights and induced his statements with promises of leniency.

¶ 4 At the motion-to-suppress hearing, defendant testified that on May 21, 2008, he parked his car on the corner and was walking home when police approached him in front of his residence, requested identification, served him with a warrant, and then stated he was under arrest for drug possession. Police took defendant's wallet, cell phone, jewelry, and money after a custodial search, and handcuffed him. Police did not inform defendant of his *Miranda* rights at any time. Defendant denied making inculpatory statements or possessing a key to the shed. Defendant stated that, in fact, no one ever asked any questions about the incident.

¶ 5 In response to defense counsel's query, defendant admitted a 1998¹ residential burglary conviction, but denied any convictions since his 2000 release from prison.

¶ 6 Officer Frano testified for the State that he and a team of police officers searched defendant's residence and shed pursuant to a search warrant. They recovered cocaine and articles of men's clothing. Officer Frano approached defendant in front of the residence, informed defendant that he was the subject of the search warrant, and placed him in custody for drug possession. On defendant's person, he found an identification card and silver key with "master"

¹ Defendant originally testified the year was 1997, but acknowledged on cross-examination that it was 1998.

inscribed thereon. The key fit the lock on the shed, which also bore the inscription, "master." Officer Frano then read defendant his *Miranda* rights from a Fraternal Order of Police (FOP) book. Defendant admitted that the narcotics and clothing discovered in the shed were his and stated that he did not "want to involve his family." Defendant stated that he lived in the basement, which was secured with surveillance equipment and fortified based on prior problems with police. Officer Frano memorialized defendant's statements in his police report.

¶ 7 On cross-examination, Officer Frano stated that he could not recall whether defendant had additional keys on his person at the time of arrest. Officer Frano further stated that he knew what *Miranda* rights were, but had never seen a written waiver form.

¶ 8 Following this testimony, the trial court denied defendant's motion to suppress. The court essentially found it was a credibility contest between defendant and Officer Frano. The court determined that Officer Frano had given defendant his *Miranda* rights from the FOP book "right on the street."

¶ 9 The case proceeded to trial, where Officer Frano testified as he had at the pretrial hearing. Officer Gonzalez testified that he was part of the team that executed the search warrant. After detaining the codefendant, Officer Gonzalez together with other officers proceeded to the shed. There, he observed a silver padlock on the door bearing the word, "Master." He corroborated that officers recovered from defendant a key to the shed and inside found men's clothing and cocaine.

¶ 10 The State rested, and defendant also testified as he had at the pretrial hearing that he lived on the second floor of the building and did not have access to the shed or possess the drugs found inside.

¶ 11 On direct examination, defense counsel inquired whether defendant had a forgery conviction from "nine or ten years ago," and defendant responded, "yes." He denied any

subsequent convictions. On cross-examination, defendant admitted that he had been convicted of residential burglary in 1998 with a six-year sentence. At that point, defense counsel objected, claiming the conviction was too old to be admitted into evidence, but the objection was overruled.

¶ 12 Defendant's sister-in-law, Theresa Carns Montalovo, testified on his behalf that she was present when police arrested defendant in front of his home. She testified that she did not hear police give defendant *Miranda* warnings and, further, that police presented her with items recovered from defendant, which included a "big key chain," jewelry, money, and defendant's wallet. Officer Frano later retrieved a small silver key from the key chain. She testified that defendant's older brother, who no longer lived in the building, was the only person with a key to the shed.

¶ 13 In rebuttal, the State presented the testimony of Joseph Fallon, an investigator for the State's Attorney's office. Fallon testified that he interviewed Theresa about a year after the offense. Theresa said she was not home at that time and did not have any knowledge in the matter.

¶ 14 Following argument, the trial court found defendant guilty of drug possession. Defendant hired a different attorney to represent him at sentencing. The parties presented evidence in aggravation and mitigation, and defendant made a statement to the court. Before imposing the sentence, the court noted defendant's extensive criminal background and stated it had reviewed his presentence investigation report. The court noted that many of defendant's convictions stemmed from the 1980s and early 1990s and that he had recently made "great strides." Despite defendant's extendable status, the court sentenced him to two years in prison. Defendant appealed.

¶ 15 Defendant first challenges the denial of his motion to suppress inculpatory statements. He contends the trial court's ruling was against the manifest weight of the evidence because Officer Frano's testimony was incredible. Defendant, for example, argues it was unlikely he would have confessed to Officer Frano or admitted that the basement apartment was fortified given defendant's prior criminal history and, further, that Officer Frano's testimony tracked the fortification offense statutory language "too perfectly to believe he gave it." Defendant adds that Officer Frano's account of the search appeared "tailored to proving guilt" because defendant likely would have been carrying other keys if he had just parked his car and was prepared to enter his home. Defendant also argues it "defies common sense" that Officer Frano did not know of a written *Miranda* waiver form and evidence showed defendant in fact did not live in the basement. With Officer Frano's incredible testimony, defendant contends his conviction rested largely on inculpatory statements made without *Miranda* warnings and therefore it must be reversed.

¶ 16 The State, initially, responds that defendant forfeited review of this issue by failing to file a posttrial objection. Defendant acknowledges that deficiency, but contends the alleged error was presented to the court following the motion-to-suppress hearing and this was sufficient for preservation purposes.

¶ 17 The supreme court has made clear that to preserve an alleged error for review, a defendant must raise a timely objection both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Therefore, when a defendant fails to also challenge the denial of his motion to suppress in a posttrial motion, any claimed error relating to the motion to suppress is forfeited. *People v. Cosby*, 231 Ill. 2d 262, 271-73 (2008).

¶ 18 Defendant nevertheless argues that the plain error rule applies in this case. Indeed, courts may review an unpreserved issue for plain error where the evidence is closely balanced or where

the claimed error affects a substantial right. *Cosby*, 231 Ill. 2d at 272. However, the first step in plain-error review is to determine whether any error occurred. *Id.* at 273. We agree with the State that there was no error here.

¶ 19 When determining whether a trial court has properly ruled on a motion to suppress, findings of fact and credibility determinations made by the trial court are accorded great deference and will be reversed only if they are against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). We review *de novo*, however, the ultimate question posed by the legal challenge to the trial court's ruling on a suppression motion. *Id.*

¶ 20 In this case, Officer Frano testified that he gave defendant *Miranda* warnings, and defendant made admissions regarding the drugs found in the shed. Defendant testified that he was not given *Miranda* warnings and did not make any statements. Credibility of the witnesses was the determinative factor in this case. The trial court, which is in the best position to assess the credibility and demeanor of the witnesses, heard many of the same arguments defendant now makes and resolved the conflicts in evidence against defendant. See *People v. Anderson*, 407 Ill. App. 3d 662, 667-68 (2011). We have examined all of defendant's arguments in support of his contention that Officer Frano was not believable. They do not persuade us that a basis exists for disturbing the trial court's credibility determinations. Therefore, the findings are not against the manifest weight of the evidence.

¶ 21 Defendant next contends trial counsel was constitutionally ineffective when counsel elicited evidence of defendant's forgery conviction on direct examination. Defendant argues the conviction was more than 10 years old and, under *People v. Montgomery*, 47 Ill. 2d 510 (1971), therefore inadmissible as evidence to impeach defendant's credibility at trial. See *People v. Naylor*, 229 Ill. 2d 584, 597 (2008).

¶ 22 Claims of ineffective assistance of counsel are examined under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that a defendant prove his attorney's performance was both objectively unreasonable and prejudicial. *People v. Harris*, 206 Ill. 2d 293, 303 (2002). If this court determines that a defendant did not suffer prejudice, we need not determine whether counsel's performance was constitutionally deficient. *Id.* at 304.

¶ 23 Here, counsel's decision to elicit evidence of defendant's prior conviction was apparently in anticipation of the State's cross-examination. Even if this decision was unreasonable, for reasons stated below, we conclude defendant has suffered no prejudice. As stated, defendant testified at the hearing on his motion to suppress that he was not given *Miranda* warnings, he made no inculpatory statements, and he did not have a key to the shed. The court found defendant's testimony incredible. The only new evidence at trial that defendant offered to contradict the court's findings was the testimony of Theresa. Theresa's testimony that defendant was not given *Miranda* warnings and carried many keys was significantly impeached by her statement that she essentially could not hear what the officers were saying and also by the State's rebuttal witness who testified that Theresa previously had stated she was not present at defendant's arrest. Defendant, then, once determined incredible remained incredible. Given the trial court's credibility determination at the pretrial hearing and defendant's lack of contradictory trial evidence, we cannot say there is a reasonable probability the outcome of trial would have been different even absent defense counsel's alleged error. We note, moreover, that at the motion-to-suppress hearing, the trial court was already made aware of defendant's residential burglary conviction, which defendant concedes was admissible under *Montgomery*, and that he had a criminal background. Furthermore, this was a bench trial, and as such, we must presume that the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion. See *Naylor*, 229 Ill. 2d at 603; *People v. Posedel*, 214 Ill. App. 3d 170,

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178 (1991). Defendant has not identified any evidence in the record to overcome that presumption. Based on the foregoing, defendant's claim must fail.

¶ 24 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.