

No. 1-10-1937

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 14205
	)	
WENDELL NORWOOD,	)	Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE QUINN delivered the judgment of the court.  
Justices Cunningham and Connors concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The State's evidence established actual physical delivery of heroin to a third party. But defendant's conviction for delivery of heroin was reversed and the cause remanded for a new trial where the trial court abused its discretion in barring the defense from cross-examining the surveillance officer concerning the exact location of his surveillance post where the officer claimed that from that location he was able to see all four sides of the building and its front and back porches, where the heroin was hidden under one of those porches.
- ¶ 2 Defendant Wendell Norwood appeals from his bench trial conviction for delivery of a controlled substance (heroin) and his eight-year prison term. Defendant contends that the State failed to prove that defendant delivered the heroin and that the trial court violated defendant's

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sixth amendment right to confrontation (U.S. Const., amend. VI) by barring the defense from cross-examining a police officer concerning the exact location from which he conducted surveillance of defendant.

¶ 3 The State's evidence established the following. On June 30, 2009, at approximately 1:20 p.m., Chicago police officer Albert Wyorba was conducting drug surveillance in the vicinity of 4900 West Walton Street in Chicago. Three enforcement officers were assisting him: Officers Heydan and Frigo and Sergeant Rentner. Officer Wyorba observed two black men standing on the corner. They were subsequently identified as Angelo Bernard and O'Neal. According to Officer Wyorba, Bernard had been yelling "blows, blows" to passing vehicles. In Officer Wyorba's experience this was a means of soliciting heroin sales. A gold Nissan drove up and was flagged down by Bernard. Defendant pulled up on a red bicycle, got off the bicycle, and approached the passenger side of the Nissan where he spoke to the driver, who was the only person in the car. Defendant then accepted United States currency from the driver and handed over an unknown object which he took from his waistband. Officer Wyorba saw this transaction from 40 to 50 feet away and had an unobstructed view of Bernard, defendant and the vehicle. The Nissan then drove west on Walton and south on Lavergne Avenue, where it was stopped by the enforcement officers.

¶ 4 At this time, Officer Wyorba saw defendant ride over to Bernard and O'Neal and converse briefly with O'Neal, who then walked west and stood in front of an abandoned building. Defendant went north into the gangway of an abandoned building. Shortly thereafter, defendant emerged from the gangway and gave O'Neal a golf-ball size object. O'Neal took the object to the back of a building at 4917 Walton and placed it under a porch. Officer Wyorba again radioed his enforcement officers to direct them to these three individuals. Defendant rode his bicycle northbound on Lamon Avenue, out of Officer Wyorba's sight. But Officers Heydan and Frigo

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got out of their vehicle and detained Bernard and O'Neal. Officer Wyorba went to the porch under which he had seen O'Neal place an object. There he recovered a golf-ball size object containing one bag with 16 red tape strips which Officer Wyorba believed contained heroin. He recognized this as the same object earlier handled by O'Neal. He then identified O'Neal as the person who accepted that object from defendant, and Bernard as the individual who had been yelling "blows, blows" and flagging down passers by. Officer Frigo brought defendant back to the squad car, where Officer Wyorba positively identified him.

¶ 5 A custodial search of defendant back at the police station revealed \$30 on his person. At the station Officer Wyorba handed over the golf-ball size object to Sergeant Rentner, who inventoried it.

¶ 6 Officer Wyorba testified that during the entire time of the surveillance he remained in radio contact with his enforcement officers, and described all three men to them. The length of the surveillance was approximately 40 minutes. After he saw O'Neal place the golf-ball size object under the porch, he did not see anyone else approach that area. When he subsequently looked under the porch the only object he found was the golf-ball size object.

¶ 7 On cross-examination the defense began to question Officer Wyorba about the location from which he conducted his surveillance. When the State objected, the court indicated that it would be the State's burden to move to bar a description of this location and otherwise that information could be brought out. The State indicated that it was moving to bar that information and the defense asked for a *Knight* hearing. *People v. Knight*, 323 Ill. App. 3d 1117 (2001). The court instead examined the officer. In response to the court's questioning, Officer Wyorba testified that he was not in somebody's personal residence, nor was he standing on the public street. He was elevated in a residential building or structure but had not obtained the permission of the owner or occupants to be there. He had previously used the same location for drug

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surveillance up to 20 times and intended to use the location in the future. It was the only place from which the entire block could be seen. The area was a high crime area and was the location of narcotics transactions and gang violence, because there was an ongoing "war" between two street gangs, the Conservative Vice Lords and the Four Corner Hustlers. A young man had been killed in the area the summer before. The surveillance area was controlled by the Conservative Vice Lords and Officer Wyorba testified that he feared that knowledge of the surveillance location would permit this gang to attempt to harm him when he was working from that location. Based upon this information the court ruled that the surveillance location would be barred from disclosure. The defense objected to this limitation, noting that Officer Wyorba was the only witness claiming to have seen defendant "during the alleged contact."

¶ 8 The defense was permitted to question Officer Wyorba about details other than the exact location of the surveillance point. Officer Wyorba testified that he was in an elevated outside area. When he began his surveillance, defendant was on his bicycle about 200 feet away. O'Neal and Bernard were up to 50 feet away from defendant. Officer Wyorba's vantage point for seeing the gold Nissan was from the front and the driver's side. When defendant rode up to the passenger's side he could see defendant's profile as defendant spoke to the driver, but he could not hear what was being said. Defendant then accepted folded paper money from the driver and gave the driver an object which he took from his waistband. Officer Wyorba could not see what the object was. When O'Neal subsequently went to 4917 Walton, the officer could see the front and back porches of that building from his location. In fact, he testified that he could see all four sides of this three-story building. The porch where O'Neal placed the golf-ball size object was about 10 feet away from Officer Wyorba. During the three to five minutes it took Officer Wyorba to climb down from his surveillance location he could not see the porch where O'Neal

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had placed the golf-ball size object so he could not have seen anyone else approach the porch during that time.

¶ 9 Although Officer Wyorba testified that he had radioed descriptions of the men to his enforcement officers, at trial he could not recall what they had been wearing. He described defendant as a skinny black male with a short hairstyle and approximately six feet tall. He also testified that he had encountered defendant in the past.

¶ 10 Sergeant Robert Rentner testified that when he stopped the gold Nissan he recovered from a coffee cup in the central console two pieces of tin foil wrapped in red tape, containing what he believed to be heroin. He kept those items in his control until he got back to the police station. At the station Officer Wyorba gave him a clear plastic bag which contained 16 similar red taped strips with tin foil inside, also containing a white powder which he believed to be heroin. This object was round and about two inches in diameter. Sergeant Rentner inventoried these 16 strips under one number, and the 2 strips recovered from the gold Nissan under another number. He then placed these objects in a narcotics safe. Sergeant Rentner testified on cross-examination that he and the other enforcement officers could not see the 4900 block of West Walton from their location.

¶ 11 Officer Terry Frigo testified that he was also one of the enforcement officers working with Officer Wyorba that day. During the course of the investigation, Officer Wyorba radioed him descriptions of the possible drug sellers, including the defendant's nickname, Fat Wendell. Officer Frigo testified that he already knew defendant. He subsequently arrested defendant and transported him back to Officer Wyorba's location, where Officer Wyorba identified defendant. Officer Frigo testified that he did not observe any of the transactions that day, and he did not see defendant until he arrested him on North Lamon.

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¶ 12 The parties proceeded by stipulation as to the chain of custody of the narcotics recovered that day. Specifically, as to the 16 items recovered from under the porch it was stipulated that a police crime lab chemist tested the contents of five of those items and found that they contained 1.1 grams of heroin. The total estimated weight of all 16 items was 3.6 grams. It was also stipulated that the same chemist would testify that the two items recovered from the gold Nissan contained a residue of heroin.

¶ 13 When the State rested, the court granted the defense motion for directed findings of not guilty as to counts one and two, which required proof that the deliveries of the drugs occurred within 1,000 feet of a school. After final arguments the court found defendant guilty of count three, delivery of one or more grams but less than fifteen grams of a substance containing heroin, the amount found in the golf-ball size object containing the 16 tin foil packets. The court found defendant not guilty on count four, which was delivery of less than one gram of heroin, the amount found in the Nissan. Defendant was subsequently sentenced to eight years in prison. This appeal ensued.

¶ 14 Defendant's first contention is that his act of handing the ball of heroin to O'Neal did not constitute actual delivery because defendant retained joint possession of the heroin, presumably to sell it. But the statutory definition of delivery of a controlled substance for this crime is the "actual, constructive or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 ILCS 570/401(c)(1) (West 2008). It is clear from Officer Wyorba's testimony that he saw defendant actually transfer possession of the ball of heroin to O'Neal, who then hid it under the porch of a building. No consideration was required for this transfer to constitute delivery. More important, the existence of an agency relationship between defendant and O'Neal would not have defeated the fact of the actual transfer. Thus even if defendant and O'Neal were engaged in a joint activity of selling this

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heroin, the fact remained that defendant actually transferred possession of the heroin to O'Neal in order to facilitate such an activity. Under the statutory definition, this sufficed to establish delivery. For these reasons we find no merit to defendant's contention.

¶ 15 Defendant also contends that by barring him from cross-examining Officer Wyorba concerning his exact surveillance location, the trial court infringed upon his right to confrontation under the sixth amendment. *People v. Knight*, 323 Ill. App. 3d 1117, 1127-28 (2001) In *Knight* this court held that there exists at trial a qualified privilege for the State against the disclosure of a surveillance location. *Knight*, 323 Ill. App. 3d at 1127-28. We held that when the State invokes this privilege, the proper procedure is for the trial court to hold an *in camera* hearing, outside the presence of the defendant and his counsel, at which the State would reveal the surveillance location to the court so that it could determine whether defendant had a right to elicit this information. *Knight*, 323 Ill. App. 3d at 1127. At this initial stage it would be the State's obligation to show that such disclosure would harm the interests of the public. *Knight*, 323 Ill. App. 3d at 1127. The court would then weigh that potential harm against the interests of the defendant in disclosure. *Knight*, 323 Ill. App. 3d at 1128. Strongly weighing in favor of disclosure would be the situation, like that in *Knight*, where the case against the defendant turned almost exclusively on the surveillance officer's testimony. *Knight*, 323 Ill. App. 3d at 1128. Also weighing in favor of disclosure in *Knight* was the fact that there was testimony from a minister that defendant was in the area to assist her in unloading a van and testimony that a person wearing a jacket similar to that worn by the defendant was selling drugs in the vicinity at that time. *Knight*, 323 Ill. App. 3d at 1120-21. Thus there were reasons to question the testimony of the surveillance officer and the accuracy of his testimony. Based upon all of this information the court held that the defendant's conviction should be reversed and the cause remanded for a new trial in accord with the guidelines it had established. *Knight*, 323 Ill. App.

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3d at 1128; see *People v. Price*, 404 Ill. App. 3d 324, 332 (2010) (a defendant can overcome the privilege by showing that disclosure would be helpful to the defense or is necessary to a fair determination of the case).

¶ 16 In this case, the defense requested a *Knight* hearing but instead the court conducted its own examination of Officer Wyorba in open court, eliciting from him testimony that he had often used this surveillance location in the past and planned to use it in the future, and that his life could be endangered by rival warring gangs if the location were disclosed and he again attempted to use that location. But what was also brought out at trial were serious questions about what Officer Wyorba claimed he could see from the surveillance location. He testified that he could not only see the front and back porches of the three-story building where the ball of heroin was hidden by O'Neal, but that he could see all four sides of the building from his location. Like *Knight*, the State's case here depended entirely upon the testimony of one officer, Wyorba, who was the only officer to witness the delivery of the ball of heroin from defendant to O'Neal and O'Neal's subsequent actions in hiding the ball under a porch.

¶ 17 This case is unlike *People v. Quinn*, 332 Ill. App. 3d 40 (2002), cited by the State, in which the surveillance officer testified to four narcotics transactions which he observed the defendant engage in, using binoculars from a distance of 75 to 100 feet. The officer was able to radio to his fellow officers a detailed description of the defendant including the clothing he was wearing. The *Quinn* court found no abuse of discretion in the trial court's upholding of the surveillance privilege. *Quinn*, 332 Ill. App. 3d at 45. But *Quinn* did not involve the extraordinary claims attributed to the surveillance officer which we have in this case, concerning his ability to see all four sides of a building and its front and back porches from one surveillance location.

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¶ 18 Disclosure of Officer Wyorba's surveillance location was critical to the ability of the defense to properly cross-examine him. The State's case depended upon the credibility of Officer Wyorba and his ability to see what he claimed he could see from his surveillance site. It therefore did not suffice, as the State contends, for the trial court to allow the defense to question Officer Wyorba about other aspects of his surveillance, such as various distances from the activities at issue and his ability or inability to hear conversations. The defense was entitled to test, via cross-examination, Officer Wyorba's claims about what areas he could see from his single surveillance site. For these reasons, we hold that defendant's right of confrontation was infringed by the trial court's failure to rule that the qualified privilege against disclosure of the surveillance site had been overcome and we reverse defendant's conviction and remand for a new trial. In doing so we note that there is no double jeopardy problem presented because the evidence, viewed in the light most favorable to the State, would be sufficient to convict. *Price*, 404 Ill. App. 3d at 335.

¶ 19 Reversed and remanded.