No. 1-09-0836

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

THIRD DIVISION
March 9, 2011

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.	)	08 CR 569 (03)
	)	
JESUS TOSCANO,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Steele concurred in the judgment.

O R D E R

Held: We hold that the trial court did not misapprehend the burden of proof that applied to Toscano's affirmative defense of entrapment. We also hold that Toscano's constitutional right to confrontation was not violated and that the trial court did not violate Supreme Court Rule 412 or abuse its discretion when it refused to order the State to provide the defendant with Rios's address. We further hold that Toscano received effective assistance of counsel. Therefore, we affirm Toscano's conviction.

Following a bench trial, Jesus Toscano, the defendant, was convicted of possession of a

controlled substance and sentenced to 10 years in prison. On appeal, Toscano contends that: (1) the trial court misunderstood the burden of proof related to his affirmative defense of entrapment; (2) the trial court erred when it refused to order the State to disclose the address of the informant; and (3) he received ineffective assistance of counsel when defense counsel filed but failed to seek a ruling on his motion to suppress statements. We find that Toscano is not entitled to a new trial and affirm his conviction.

BACKGROUND

The Suppression Hearing

The court held a hearing on two motions presented by Toscano: (1) a motion to quash arrest and suppress statements, and (2) a motion to suppress statements for failure to read Toscano his *Miranda* rights. At the hearing, Toscano testified that on December 5, 2007, at approximately 4:00 p.m., he was walking near 1251 West 18th Street, in Chicago, when two police officers pulled up to him and placed him under arrest. He testified that the police officers did not read him his *Miranda* rights and that he did not waive those rights. The officers took Toscano to a novelty store located at 1251 West 18th Street and made him kneel down on the ground.

Sergeant Noel Sanchez, a Chicago police officer, testified that he was working with an informant, Fidel Garay Rios, on December 5, 2007. He saw Rios meet with Toscano earlier that day and Rios informed Sergeant Sanchez that Toscano would be involved in a narcotics transaction. Sergeant Sanchez began following Toscano and saw him meet with another individual, Alberto Albarran, at 53rd and Kedzie. He observed Albarran get into the passenger seat of Toscano's car. Toscano took Albarran to his car, a burgundy GMC, and then Toscano and Albarran followed each

other to 58th and Rockwell. In the 5700 block of Rockwell, Toscano backed his car into a garage, got out of the car and got back in. Sergeant Sanchez then observed them follow each other to a novelty store on West 18th Street.

Sergeant Sanchez testified that at approximately 4:20 p.m., he drove to the novelty store and observed Toscano arrive in a Toyota 4 Runner. Toscano walked into the store, walked out of the store and went back to his car, and then walked back into the store. Sergeant Sanchez got out of his vehicle and walked past the store where he observed Toscano and Albarran inside and saw Toscano place a box into a bag. He observed Toscano leave the store with nothing in his hands, get into a van and proceed west onto 18th Street. A few blocks later, Toscano got out of the van and started walking back towards the store. He then observed another individual, Manuel Quezada, leave the store with what he believed to be the same bag he observed Toscano placing in a box inside the store. Sergeant Sanchez got out of his car, approached Quezada, and Quezada dropped the bag in the street and said it was not his bag. Sergeant Sanchez looked in the bag and observed four rectangular bricks that he believed to be cocaine. Sergeant Sanchez seized the plastic bag with the bricks and instructed Officers Sherman Jefferson and Bob Dempsky to arrest Toscano and everyone in the store.

Sergeant Sanchez testified that Rios called him after he left the store. Rios told Sergeant Sanchez that when he went into the store, he was allowed to observe a kilo of cocaine and cut it open.

At the conclusion of Toscano and Sergeant Sanchez's testimony, Toscano's motion to quash his arrest and suppress evidence was denied by the trial court. Defense counsel reminded the court

that the motion to suppress statements had not been ruled on. Defense counsel also requested that the State produce the address of the informant, Rios, or that the State produce Rios to be interviewed by the defense prior to trial in order to support Toscano's entrapment defense. The court denied Toscano's request for the informant's address, but directed the Assistant State's Attorney to see if Rios was willing to talk with Toscano's attorneys and, if not, Rios was to provide an affidavit.

The Trial

At the trial, Lou Gade, a special agent with the Drug Enforcement Administration ("DEA"), testified that he and his team members met with Rios, and formulated a plan for the informant to meet with Toscano to purchase cocaine. On December 5, Agent Gade testified that he observed Rios go to a restaurant at 3211 West 59th Street at about 1:30 p.m. About 15 minutes later, Agent Gade observed a blue mini-van arrive at the restaurant driven by an unidentified Hispanic male. Toscano was a passenger in the mini-van. Toscano and the driver went into the restaurant and talked to Rios for approximately 15 minutes. After Rios left the restaurant, Agent Gade followed Toscano to 53rd and St. Louis where Toscano exited the van and got into a Toyota 4 Runner. Then Toscano took a circuitous route to a gas station on 53rd and Kedzie and met with Albarran after.

Agent Gade testified that Albarran got into the Toyota with Toscano, and they traveled for a short distance and Albarran got out of the Toyota and got into a GMC. The men drove to 58th and Rockwell, Albarran parked his car, got back into Toscano's car and Toscano drove in a "round about way" until they arrived at a garage at 5736 South Rockwell, which was later determined to be Albarran's residence. Agent Gade observed Toscano and Albarran come out the garage about five minutes later. They got into Toscano's car and Toscano drove Albarran back to his GMC. At

approximately 4:30 p.m., Agent Gade observed Toscano and Albarran arrive at the store on West 18th Street and go inside. Toscano was in the store for a couple of minutes, and he came out of the store and went to the rear of his vehicle. Agent Gade observed Toscano remove a large shoe box from the rear of his vehicle, and he attempted to conceal it under his coat, before he went back into the store.

Agent Gade testified that he then observed Rios go in and come out of the store. Toscano exited the store a few seconds later. Neither of them were carrying the shoebox. Finally, Rios and Toscano got into Rios's van, they began talking, Rios drove two or three blocks, stopped, and Toscano exited the van and began walking back to the store.

Rios testified that he has been an undercover informant for the DEA for 20 years, worked on approximately 100 cases, and had received approximately $190,000 in compensation during the 20 year time period. He met Toscano originally at a restaurant near 63rd and Kedzie, a couple of months prior to Toscano's arrest on December 5, 2007. He met and had drinks with a person named Martin and talked about a drug deal. After Martin refused to do the deal, Toscano volunteered, and they exchanged numbers. After Rios met with Toscano the first time, Toscano would call Rios most of the time.

Rios testified that he met with Toscano another time at a restaurant. He testified that he never told Toscano about opening a restaurant, never asked Toscano to set him up with a man named Carlos Cruz, never tried to convince Toscano to do the deal, and never offered Toscano $300 to go through with the transaction.

Rios testified that on December 5, 2007, at about 1:30 p.m., he met with Toscano and another

person at a restaurant at 59th and Kedzie regarding the cocaine transaction. Toscano asked Rios if he had the money ready and Rios told Toscano that he needed 10 to 15 kilos. Toscano told Rios that he was going to leave to make sure the cocaine was ready.

Rios testified that after he left the restaurant, he called Sergeant Sanchez to describe Toscano and the other person and to let Sergeant Sanchez know that Toscano was ready to do the transaction. Rios testified that when he arrived at the store on West 18th Street at approximately 4:20 p.m, he parked his car across the street and went inside. There were four men inside, including Toscano. One of the men pointed to a plastic bag in a bowl which Rios identified as cocaine because of the strong acid-like smell. Rios left the store and called Sergeant Sanchez to tell him what he saw and to describe the people he saw inside the store. Rios testified that Toscano left the store after him. When Rios got into his vehicle, Toscano jumped in on the passenger side and said he was going with Rios to get the money for the cocaine. Sergeant Sanchez called Rios while Toscano was in the van and told Rios to get rid of Toscano.

Sergeant Sanchez's trial testimony was consistent with his pre-trial testimony during the hearing on Toscano's motions. Sergeant Sanchez testified that he and the other officers secured the store and, after Officer Banayos read Toscano his *Miranda* rights, Toscano told Officer Banayos there was more cocaine in his vehicle. Sergeant Sanchez and the other officers secured the vehicles driven by the gentlemen in the store, obtained a search warrant, and discovered cocaine in the Toyota driven by Toscano.

The parties stipulated that Officer Banayos would testify that he read Toscano his *Miranda* rights, and that after Toscano was *Mirandized*, he told Officer Banayos that five kilos of cocaine

were in his Toyota. The parties also stipulated to the testimony of Officer Chris Wilson, and Gail Gutierrez and Daniel Bryant, the forensic chemists, but their testimony is not relevant to the issues in this appeal.

Assistant State's Attorney (ASA) Jeanne Wrenn testified that she was assigned to the Special Narcotics Unit on December 5, 2007, and at 3:00 a.m. on the morning of December 6, 2007, she met with Toscano. Agent Gade and Officer Gomez were present during the meeting. ASA Wrenn testified that she read Toscano his *Miranda* rights, that Toscano stated that he understood his rights, and that Toscano stated that he had not been threatened or promised anything.

ASA Wrenn then read Toscano's statement into evidence. Toscano stated that he had known Cruz for four to five years and that he met someone at Cruz's store who supplied cocaine and they exchanged numbers. One week later, Toscano was at a restaurant with his friend Jose and Jose told Toscano that he knew someone who wanted to buy cocaine. A few weeks later, Jose and Toscano met with Rios, who introduced himself as "Cowboy." Rios informed them that he needed nine kilos of cocaine and Toscano told Rios that it would cost $21,800 for each kilo, and they exchanged numbers.

According to Toscano's statement, a few days later, Toscano contacted Albarran to set up the transaction. On December 5, Rios and Toscano met at a restaurant on 3211 West 59th Street. After they left the restaurant, Toscano met with Albarran at 53rd and Kedzie, drove Albarran to his truck and they followed each other to 57th and Rockwell. Albarran parked his car, got into Toscano's car, they drove to a nearby alley, pulled into a garage and moved the cocaine from a car in the garage to Toscano's car. Toscano drove Albarran back to his car and proceeded to the novelty store on

West 18th Street. Toscano removed the box from his car, went into the store, placed the box on the counter and walked out of the store. He then contacted Rios. When Rios arrived, Toscano and Rios went into the store, Rios sampled a portion of the cocaine and left the store with Toscano so that they could go get the money for the cocaine. After driving a few blocks, Rios dropped Toscano off and as he was walking back to the store, he was detained by the police.

After ASA Wrenn took Toscano's statement, Toscano read a paragraph back and signed the statement. Finally, Toscano never told ASA Wrenn that he was kicked by the police, never mentioned any conversations with Norma Cruz, never told her that he tried to cancel the deal with Rios, and never told her that he was doing the deal to get a management position at a restaurant.

Toscano testified at trial that in the early fall of 2007, he had a conversation with Martin at his cousin's birthday party. Martin told him that he had a friend from Indianapolis who was opening a restaurant in Chicago. Martin did not mention anything to him about selling cocaine. Toscano testified that in mid-November of 2007, he ran into Martin again at a bar. Martin talked about the restaurant, but did not mention anything about drugs. A few days later, Toscano was having lunch with his boss at 49th and Kedzie when Martin contacted Toscano to tell him that Rios was in Chicago and Toscano invited Martin to bring Rios to the restaurant. Toscano testified that Rios, who introduced himself as Juan, also known as "Cowboy," told Toscano that he wanted his help opening his restaurant and they exchanged numbers. There was no discussion about cocaine.

Toscano testified that a few days later, he called Rios regarding the restaurant and Rios told Toscano to meet him at a restaurant on 58th and Kedzie. When Toscano arrived, Rios told Toscano to come to his car, and they talked about preparing Mexican food. Then Rios asked Toscano if he

knew a guy named Carlos (Cruz), a drug dealer, and asked Toscano if he could talk to Cruz about supplying him with drugs. Toscano told Rios that although he had known Cruz for five years, he did not know Cruz in that way. Rios told Toscano that he would tell him how to approach Cruz, that there was a lot of money to be made, and that he had nothing to be afraid of. Toscano told Rios that he was not interested in doing the transaction and Rios asked Toscano to think about it.

Toscano testified that a few days later, he called Rios regarding the restaurant. Rios asked Toscano if he had spoken to Cruz and Toscano said no. Rios sounded a little irritated and told Toscano that he would be missing the opportunity of a lifetime and that it involved a lot of money. A few minutes later, Rios called Toscano back, begged him not to hang up, and asked Toscano to talk to Cruz.

After his conversation with Rios, Toscano met with Cruz at his store on West 18th Street. He told Cruz he was going to work at his friend, Rios's restaurant. Toscano also told Cruz that Rios needed drugs, and that he had done transactions with Rios in the past. Toscano testified that he had never done a drug transaction with Cruz before. A few days later, Toscano called Rios and told him that Cruz was interested in the transaction. The following Sunday, Toscano had a conversation with Cruz at the flea market and informed him that Rios needed 10 kilos of cocaine. Cruz told Toscano that it would cost $21,800 for each kilo.

After a phone call on December 5 with Norma Cruz, Cruz's wife, Toscano felt very nervous and called Rios to tell him that he was not going to take part in the transaction. Rios told Toscano to come and talk with him at a restaurant on 59th and Kedzie. While at the restaurant, Rios told Toscano that there were a lot of people involved in the transaction, that he only wanted to gain

Cruz's trust, and that Toscano would receive $5,000 at the end of the day. At the conclusion of the meeting, Rios also gave Toscano $300.

Toscano testified that after he left the restaurant, he spoke with Albarran, and Albarran told Toscano to meet him at 53rd and Kedzie at a gas station. When they met at the gas station, Toscano followed Albarran to a garage. While inside the garage, Albarran handed Toscano a toolbox and a plastic bag and Toscano put it in his trunk. Albarran told Toscano that if everything was successful, he would receive $3,000 and told Toscano to go to Cruz's store. Toscano testified that when he arrived at the store, Albarran called him and told him to bring the box inside but leave the plastic bag in the car. Toscano went inside, placed the box on the counter, walked outside the store and called Rios.

Toscano testified that when Rios arrived, they went into the store together. A man, Quezada, told Rios to go to a room in the back of the store. Rios came out several minutes later and said he was going to get the money but Cruz told Toscano to follow Rios. Toscano followed Rios to his car and sat in the passenger seat. While in Rios's car, Toscano saw Rios making several phones calls and he asked Rios what was going on. Rios told him "this is the end of the road." Toscano asked Rios to let him out the vehicle and as Toscano was walking back towards the store, he was placed in handcuffs. Toscano testified that while he was in the police car, a police officer kicked him in his back.

After Toscano arrived at the police station, he met with ASA Wrenn. Toscano testified that ASA Wrenn knew everything that happened prior to writing the statement and that he provided her with information that was not put in the statement, including information about the informant, Rios.

According to Toscano, when he was arrested, he had $210 on his person, which was the remainder of the $300 he received from Rios, after he paid for breakfast and purchased gas earlier in the day. Finally, Toscano testified that ASA Wrenn never read the statement to him out loud.

After hearing all of the trial testimony, the court considered the evidence and found that Toscano had not shown that he was entrapped and that the State had met its burden of proof. The trial court also found that the affirmative defense of entrapment was not clear enough to show that Toscano did not have a predisposition at all to involve himself in the drug transaction and get involved with an experienced informant. The trial court found Toscano guilty of the possession of a controlled substance and sentenced him to 10 years in prison. Finally, Toscano's oral motion for reconsideration was denied and he filed the instant appeal.

ANALYSIS

I. Entrapment

First, Toscano argues that he is entitled to a new trial because the trial court misunderstood the burden of proof related to his affirmative defense of entrapment. The State argues that Toscano has forfeited this argument by failing to object during the trial and by failing to include the objection in a posttrial motion. We find that the defendant *both* failed to object at trial and failed to include the error in a written posttrial motion, therefore, he forfeits appellate review of the issue. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010), citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, Toscano asks this court to review the issue under the "plain error" doctrine.

The plain error doctrine allows reviewing courts to consider unpreserved errors when (1) a clear and obvious error occurs and the evidence is so closely balanced that the error alone threatened

to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) a clear or obvious error occurs and the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); Ill. S. Ct. R. 2d 615(a)(eff. Aug. 7, 1999). The first step in plain-error analysis is to determine whether an error has, in fact, occurred. *Sargent*, 239 Ill. 2d 189. However, without an error, there can be no plain error. *People v. Wade*, 131 Ill. 2d 370, 376 (1989).

The affirmative defense of entrapment is codified in section 7-12 of the Criminal Code of 1961 which provides that "[a] person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. 720 ILCS 5/7-12 (West 2006). Section 7-12 is "inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated." 720 ILCS 5/7-12 (West 2006). Accordingly, to establish the affirmative defense of entrapment as a matter of law, the evidence must show (1) that the State improperly induced the defendant to commit the crime, and (2) that the defendant lacked the predisposition to commit the crime. *People v. Placek*, 184 Ill. 2d 370, 380-81 (1998), citing *People v. Tipton,* 78 Ill. 2d 477, 487-88 (1980). The factors relevant in assessing predisposition include the defendant's (1) initial reluctance or willingness to commit the crime; (2) familiarity with drugs and the defendant's willingness to accommodate the needs of drug users; (3) willingness to profit from the illegal act; (4) current or prior drug use; (5) participation in cutting or testing the drugs; and (6) ready access to

a supply of drugs" *Placek,* 184 Ill. 2d at 381. If Toscano presented some evidence to support the entrapment defense, the State then bore the burden of rebutting the entrapment defense beyond a reasonable doubt, in addition to proving all other elements of the crime. *Placek,* 184 Ill. 2d at 381. However, because Toscano raised the defense of entrapment, he admitted that he committed the crime of possession of a controlled substance. *People v. Landwer*, 166 Ill. 2d 475, 488 (1995); *People v. Gillespie*, 136 Ill. 2d 496, 501 (1990).

Following a conviction, a reviewing court must affirm where, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Placek,* 184 Ill. 2d at 381; *Tipton,* 78 Ill.2d at 487.

Applying these principles to the facts in the instant case, we find that the trial court did not err when it rejected Toscano's entrapment defense. *Tipton*, 78 Ill. 2d at 487. At trial, Toscano testified that he was initially unwilling to get involved in the drug transaction, that he was approached by Rios and that Rios enticed him by offering him a management position at a restaurant. However, entrapment will not be found to exist merely because a government official initiates a transaction with a defendant that leads to the sale of a controlled substance. *Tipton*, 78 Ill. 2d at 488 (entrapment is not available as a defense to a person who has the intent and design to commit a criminal offense, and who does commit the essential acts constituting it, merely because an officer of the law, for the purpose of securing evidence, affords such a person the opportunity to commit the criminal act, or purposely aids and encourages him in its perpetration). In this case, the State also presented witnesses, Rios, ASA Wrenn, Sergeant Sanchez, whose testimony conflicted with Toscano's testimony regarding his predisposition and willingness to commit the crime. Rios

testified that Toscano initiated involvement in the transaction and he informed Toscano that he wanted to do a drug deal with Cruz, who was Toscano's friend. Rios also testified that after initially meeting Toscano, Toscano told him that he knew he could get the drugs from Cruz, and Toscano obtained 10 kilos of drugs within two or three weeks after meeting Rios for the first time. ASA Wrenn testified that she met with Toscano after he was arrested and he signed a statement admitting that he told Rios he was willing and able to supply Rios with drugs. Sergeant Sanchez testified that he followed Toscano on December 5, observed Toscano meet with Albarran and drive to Albarran's garage and eventually arrive at the West 18th street address with a box that contained bricks of cocaine.

We find that Toscano's testimony was considered by the trial court, but the trial court determined that, based on the totality of the evidence, Toscano was not entrapped. The trial court, as fact finder, was in the best position to assess the credibility of the witnesses, weigh the evidence, and resolve any conflicting testimony. *People v. Felella*, 131 Ill. 2d 525, 534 (1989). Toscano's contention that the trial court believed that he had the burden of proving entrapment is incorrect and is not supported by the court's statements in the record: the court said that Toscano's entrapment defense was not "shown to be clear enough to say that he had no predisposition at all to involve himself, to get hooked up and involved with the informant."

We find that there was evidence to support the trial court's finding that Toscano was predisposed to commit the crime: (1) Toscano's willingness to supply Rios with drugs; (2) Toscano's willingness to profit from the drug transaction; and (3) Toscano's ability to supply a large quantity of drugs within weeks after meeting Rios. We also find that the trial court was correct when it found

that Toscano was not induced by the State to commit the crime. Therefore, we find, reviewing the evidence in the light most favorable to the State (*Placek*, 184 Ill. 2d at 318, *Tipton*, 78 Ill. 2d at 487), that the trial court did not err when it found that the State had met its burden of proof and rejected Toscano's affirmative defense of entrapment. Accordingly, because the trial court did not err when it made its findings there can be no plain error and this issue is forfeited. *Wade*, 131 Ill. 2d at 376.

II. Toscano's Right to the Informant's Address

Next, prior to trial, defense counsel requested and was provided with information about Rios, including his name and his Federal and Chicago Police Department ("CPD") files. Defense counsel also requested Rios's address so that he could be interviewed prior to trial. After the trial court found that Rios was still an informant, the court denied Toscano's request but directed the State's Attorney to see if Rios was willing to talk and, if not, Rios was to provide an affidavit. Toscano argues that his sixth amendment right to confrontation and to prepare a defense, and that Supreme Court Rule 412 was violated when the trial court refused to order the State to disclose Rios's address.

The State argues that Toscano has forfeited this argument by failing to raise the issue in a written posttrial motion. *Johnson*, 238 Ill. 2d at 484, citing *Enoch*, 122 Ill. 2d at 186. Toscano responds that forfeiture does not apply because this is a constitutional issue and it is reviewable pursuant to the plain error doctrine.

A. Sixth Amendment Right to Confrontation

In this case, the record establishes that Toscano's defense counsel was given wide latitude and an opportunity to conduct a thorough cross-examination of Rios regarding his involvement in

other cases, and his aliases, work experience with the DEA and CPD, compensation, reasons for becoming a paid informant, and the details surrounding his involvement with Toscano. In cases like this where the defendant was allowed an opportunity for effective cross-examination of the informant, reviewing courts have held that a trial court's refusal to allow a question concerning the informant's street address did not deprive the defendant of his constitutional right to confrontation. See also *People v. McMurray*, 6 Ill. App. 3d 129, 134-35 (1972) (where record showed that the defendant exercised full and complete cross-examination of witness, failure to provide informant's address did not deprive defendant of his right to confrontation).

We find that Toscano's argument that he was denied an opportunity to prepare a defense and to confront the informant is devoid of merit because (1) the defendant was not denied his right to confront Rios because Rios testified at trial and the defense counsel thoroughly cross-examined him, and (2) defense counsel was provided with Rios's name and Federal and CPD files regarding his involvement in other cases, six months prior to trial, and the information disclosed to Toscano's counsel allowed Toscano to adequately prepare his defense. In addition, we note that the trial court directed ASA Wrenn to arrange a meeting with Rios or provide Rios's affidavit. Therefore, we hold that Toscano was not denied his constitutional right to confrontation or to adequately prepare his defense.

B. Supreme Court Rule 412

Next, we must decide whether the trial court violated Rule 412 by refusing to order the State to disclose Rios's address. Once again, before we can determine whether the trial court committed plain error, we must first determine whether the court committed an error. *Wade*, 131 Ill. 2d at 376.

Supreme Court Rule 412(a)(i) requires the disclosure of "the names and last known addresses of persons whom the State intends to call as witnesses." Ill. S.Ct. R. 412(a)(i)(eff. Mar. 1, 2001). However, the court may deny the disclosure "if it finds that there is substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure which outweighs any usefulness of the disclosure of counsel." 134 Ill. 2d R. 412(I). The decision to require disclosure of the informant is within the trial judge's discretion. *People v. Elworthy*, 214 Ill. App. 3d 914, 922 (1991).

In *People v. Gaytan*, 186 Ill. App. 3d 919 (1989), cited by the State, the court noted that where the defendant already knew the name of the informant, his address could be withheld if the court determined that the public interest in protecting the flow of information outweighs the defendant's right to prepare his defense. Here, Toscano had access to Rios's federal and state files and had an opportunity to thoroughly cross-examine Rios at trial. The court determined that this information adequately allowed Toscano to prepare his defense and that the lack of access to Rios's address did not prevent him from presenting a defense. Compare *People v. Durley*, 51 Ill. 2d 590, 592-93 (1972). The trial court noted that Rios was still a paid informant working with both the federal and state government, and we find that Rios's work made him a target and that his life might be in danger because he was an informant. See *People v. Mays*, 188 Ill. App. 3d 974, 982 (1989). We also find that the trial court exercised its discretion, pursuant to Rule 412(I) (Ill. S. Ct. R. 412(i)(eff. Mar. 1, 2001)), and did not err when it determined that Toscano had adequate information with which to prepare his defense. We hold that the trial court did not abuse its discretion. Accordingly, because we find that the trial court did not err, there can be no plain error and this

argument is also forfeited. *Wade*, 131 Ill. 2d at 376.

Ineffective Assistance of Counsel

Finally, Toscano argues that he received ineffective assistance of counsel. Prior to trial, Toscano's counsel filed a motion to quash arrest and suppress evidence, and a motion to suppress statements. In his motion to suppress statements, Toscano argued that statements he made at the time of his arrest should have been suppressed because at no time prior to his arrest was he informed of his *Miranda* rights. After hearing evidence on both motions, the court ruled on the motion to quash arrest and suppress evidence. Defense counsel then reminded the court that it had not ruled on the motion to suppress statements. The case was continued because the State's witnesses were not available and the case was later set for trial. There was never a ruling on Toscano's motion to suppress statements. Toscano argues that his counsel was ineffective because he failed to fully litigate the motion by seeking a ruling on his motion to suppress statements.

In order to support his claim of ineffective assistance of counsel, Toscano had to show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced him. *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984); *People v. Albanese,* 104 Ill. 2d 504, 525 (1984). Prejudice is established if Toscano can show that there is a reasonable probability that, but for counsel's performance, the result of the proceeding would have been different. *People v. Harris*, 389 Ill. App. 3d 107, 132 (2009), citing *Strickland,* 466 U.S. at 694. Toscano's failure to satisfy either prong, defeats a claim of ineffective assistance of counsel. *Harris*, 389 Ill. App. 3d at 131, citing *Strickland,* 466 U.S. at 687.

Our review of the record reveals that Toscano received effective assistance of counsel.

During the hearing on the motion to quash and suppress evidence, defense counsel argued and presented evidence in support of the motion to suppress statements simultaneously with the motion to quash arrest and suppress evidence. During his opening statement, defense counsel referred to both motions and consistently made references to Toscano being arrested without receiving *Miranda* warnings. The court also stated that "[W]e are going to commence the motions to suppress evidence and statements as to Mr. Toscano," and acknowledged that all evidence was not going to be presented on that same day because some of the State's witnesses were unavailable.

Although there was no ruling on the motion to suppress statements, we find that Toscano's counsel did not fail to litigate the motion to suppress statements and his representation did not fall below an objective standard of reasonableness. We also find that Toscano was not prejudiced because counsel did not receive a ruling on the motion to suppress. In his appellate brief, Toscano states that he sought to suppress statements he made to Officer Banayos regarding the kilos of cocaine found in his vehicle. However, the record reveals that Toscano entered into a stipulation that if Officer Banayos had testified he would have testified that he informed Toscano of his *Miranda* rights on December 5, 2007, before Toscano told him that there were five kilos of cocaine in his vehicle. Trial testimony also established that Toscano was *Mirandized* at the novelty shop shortly after being arrested, that objects were recovered from his vehicle and the objects recovered from Toscano's vehicle were in fact cocaine.

After reviewing the testimony from the hearing and the trial, even if defense counsel had fully litigated the motion to suppress statements and obtained a ruling, the motion probably would have been denied. See *People v. Givens*, 237 Ill. 2d 311, 331 (2010) (failure to file a motion to suppress

prior to trial does not establish incompetent representation when it turns out that the motion would have been denied). The decision of whether to file a motion to suppress is a matter of trial strategy. *People v. Woodard,* 367 Ill. App. 3d 304, 312 (2006). Mistakes in strategy, tactics, or judgment do not, alone, amount to ineffective assistance of counsel. *People v. Palmer,* 162 Ill. 2d 465, 476 (1994). Defense counsel's failure to obtain a ruling on Toscano's motion to suppress was, at best, a mistake in strategy, but does not constitute ineffective assistance because (1) the motion to suppress statements probably would have been denied (*Givens*, 231 Ill. 2d at 331) and (2) the defendant has failed to present any evidence that the result of the trial would have been different if he had prevailed on the motion. *Woodward*, 361 Ill. App. 3d at 312. Our review of defense counsel's representation of the defendant during the pre-trial, trial, and posttrial stages of the proceedings does not establish that defense counsel was ineffective. Accordingly, we hold that Toscano's counsel was not ineffective because he failed to obtain a ruling on the motion to suppress.

CONCLUSION

In this case, we hold that the trial court did not misapprehend the burden of proof that applied to Toscano's affirmative defense of entrapment. We also hold that Toscano's constitutional right to confrontation was not violated and that the trial court did not violate Supreme Court Rule 412 or abuse its discretion when it refused to order the State to provide the defendant with Rios's address. We further hold that Toscano received effective assistance of counsel. Therefore, we affirm Toscano's conviction.

Affirmed.