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No. 3-09-0629

Order filed June 3, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 9th Judicial Circuit,
)	Knox County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	No. 06-CF-220
)	
SCOTT AGANS,)	Honorable
)	James B. Stewart and
)	Steven R. Bordner,
Defendant-Appellant.)	Judges, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Carter and Justice Schmidt concurred in the judgment.

ORDER

Held: The trial court's factual determination that defendant consented to the search of his home was not against the manifest weight of the evidence. In addition, the trial court had no duty to conduct an inquiry into defendant's pretrial claims of ineffective assistance of counsel.

After a bench trial, defendant, Scott Agans, was convicted of possessing, procuring, transporting, storing, or delivering anhydrous ammonia in an unauthorized container. 720 ILCS 646/25(c) (West 2006). He was sentenced to two years in the Department of Corrections. He

appeals his conviction and argues that the trial court committed reversible error by denying his motion to suppress. He also argues that the trial court erred by failing to properly investigate his pretrial claims of ineffective assistance of counsel. We affirm.

FACTS

On April 16, 2006, officers responded to a call alleging that shots had been fired near defendant's home. Three officers, Christopher Dunn, Bart Randall, and Brian Brady, arrived on the scene. When the officers entered defendant's home, they discovered a tank containing anhydrous ammonia, and arrested defendant. On August 1, 2006, defendant filed a motion to suppress and quash arrest arguing that the search of defendant's home was illegal and that, consequently, the anhydrous ammonia should be suppressed.

Before the hearing on the motion to suppress began, each side made an oral motion to exclude witnesses, which the trial court granted. Defendant testified first, and stated that he never gave the officers permission to enter his residence. When the officers arrived at his residence and explained that they were investigating a call about a shotgun, defendant replied that the sound could have been one of his wife's empty mousse cans exploding because he had been burning trash earlier that day.

According to defendant, the officers then saw defendant's houseguest, Dustin Hengle, and pushed their way into the home. After they entered, defendant protested that he did not associate in any way with guns because he cannot have one. Defendant, his family, and Hengle were then all "corralled" into the dining room while the officers searched his home and found the tank. Defendant also testified that he repeatedly protested the officers' presence in his home.

After defendant testified, his attorney informed the court that he had wanted to call

defendant's wife as a witness but, because she had been present during her husband's testimony, she would likely be barred from testifying due to the oral motion to exclude witnesses.

The State then called Officer Brady to testify, and he stated that defendant had given the officers permission to enter the residence. When Brady arrived at the home, he explained to defendant that there had been a call about gunshots and he wanted to confirm that there was no gun and that no one was hurt. Brady further testified that defendant escorted the officers through the premises and showed them the various rooms in the house. According to Brady, defendant became hesitant when they reached a door that led to a breezeway which was then connected to the garage. Defendant suggested that it might be easier to go outside. When Brady responded that he would like to check the garage to make sure no one was injured, defendant said "okay" and opened the door.

Brady stated that he, defendant, and Randall entered the breezeway and there was a door that led to the garage and a door that led to another room on the side. Defendant and Randall continued toward the garage while Brady investigated the side room. From the threshold of the doorway, Brady recognized the unique smell of anhydrous ammonia.

Officer Randall testified that when he arrived on the scene he surveyed the area and then approached defendant's residence. When defendant answered the door, Officer Brady asked him if he could come inside and check on the well-being of everyone in the home. Defendant allowed the officers to enter, and he escorted them throughout the house. As defendant, Randall, and Brady approached the breezeway leading to the garage, defendant stated it would be easier to enter the garage through the front door. Brady informed defendant that he wanted to check the garage, and defendant said "sure" or "okay." After the officers investigated the breezeway, Brady

told Randall that he smelled anhydrous ammonia.

The third officer, Dunn, also testified, and he stated that he was the first to arrive on the scene. He spoke to the complainant and investigated the perimeter of defendant's residence. He testified that when Brady and Randall arrived, defendant held the door open to allow all three officers entry into the home. Dunn stayed with defendant's family and Hengle, while Brady and Randall searched the home with defendant.

When both parties finished presenting evidence, the trial court recited its ruling without requesting oral argument. The trial court stated:

"I mean, this case turns solely on the issue of consent to search.

Without consent, probably the officers would have at least had to have a search warrant and they may not have been able to get it based upon the evidence that they had, the information that they had. It's all--it turns solely on the issue of consent. There are three officers that say there was consent to search.

[Defendant] says he did not give consent to search. [Officer Dunn] is not even the same police force as the other two officers which lends some credibility to their side. It's simply a weight thing. The defendant has the burden of proof on the Motion to Suppress and it's just simply not borne at this time."

After the trial court denied the motion to suppress, defendant was allowed to substitute judges. Defendant also filed a *pro se* motion for "Change of Counsel" which alleged that his trial counsel was ineffective because his error prevented defendant's wife from testifying at the hearing on the motion to suppress. The trial court denied that motion without conducting a hearing on defendant's allegations of ineffective assistance of counsel.

At a bench trial, defendant was found guilty and sentenced to two years in the Department of Corrections. He filed a motion to reconsider his sentence which was denied by the trial court. Defendant timely appealed.

ANALYSIS

On appeal, defendant argues that the trial court erred by denying his motion to suppress because defendant did not voluntarily consent to a search of his residence, the officers lacked probable cause to conduct a search, and the trial court improperly denied defendant an opportunity to present argument on the motion to suppress. In the alternative, he urges this court to remand to the trial court for a *Krankel* hearing on his pretrial claims of ineffective assistance of counsel.

I. Motion to Suppress

When reviewing a circuit court's decision on a motion to suppress evidence, we grant great deference to the trial court's findings of fact and will disturb those findings only if they are against the manifest weight of the evidence. *People v. Jones*, 215 Ill. 2d 261 (2005). However, we review the circuit court's ultimate decision on whether to suppress the evidence *de novo*. *Jones*, 215 Ill. 2d 261.

When the State seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving that the consent was freely and voluntarily given. *People v. Redman*, 386 Ill. App. 3d 409 (2008). Consent is determined from the totality of the circumstances. *People v. Ciccio*, 236 Ill. App. 3d 265 (1992). Whether the consent was voluntary is a factual determination for the trial court, and its decision will not be disturbed unless it was against the manifest weight of the evidence. *People v. Prinzing*, 389 Ill. App. 3d 923 (2009), *appeal*

allowed, 233 Ill. 2d. 587 (2009).

Defendant contends that the trial court did not make any findings of fact supporting the denial of the motion to suppress. However, a specific finding of credibility was not required. See *People v. Long*, 208 Ill. App. 3d 627, 633 (1990) (affirming trial court's factual determinations where it found "credible police testimony to the effect that they entered the apartment with the voluntary consent of the young woman who rented it").

Here, the officers corroborated each other's testimony regarding the voluntariness of the consent and defendant's subsequent actions. The record reveals the trial court found that one of the officers was not from the same police force as the other two officers and that this fact lent credibility to the officers' version of the events. As the court below recognized, there were three officers who testified that defendant gave voluntary consent to search the home, and both Brady and Randall asserted that defendant gave additional permission for the officers to search the breezeway. The only contrary testimony regarding defendant's consent came from defendant himself. After weighing the testimony, the trial court clearly found the officers to be more credible than defendant. We conclude the trial court's assessment was not against the manifest weight of the evidence. Having determined defendant consented to the search, we will not address defendant's argument that the court lacked probable cause to search in light of this consent. *Long*, 208 Ill. App. 3d 627.

Defendant also argues the trial court misapplied the burden of proof in this case. Defendant bears the burden of proof at a hearing on a motion to suppress. 725 ILCS 5/114--12 (West 2008). Once a defendant makes a *prima facie* showing that the evidence to be suppressed was obtained by an illegal search or seizure, the burden of proving the legal propriety for the

search shifts to the State. *People v. Gipson*, 203 Ill. 2d 298 (2003). However, the ultimate burden of proof remains with defendant. *Gipson*, 203 Ill. 2d 298.

Defendant's assertion that the trial court misapplied the burden of proof is not supported by the record. While the trial court did not conduct a lengthy analysis, the court correctly stated that the burden of proof was on defendant. As the appellate court stated in *People v. Bartimo*, 345 Ill. App. 3d 1100, 1105 (2004): "[d]efendant's claim that the trial court incorrectly understood the burden has no support in the record. The court commented on defendant's burden in the context of his motion to suppress evidence and consistent with the burden of the movant in that instance." Similarly, in the instant case, since the actual burden remains on defendant, the trial court's comment was proper in the context of analyzing defendant's motion.

Defendant's final argument regarding the motion to suppress is that the trial court erred by not allowing defendant the opportunity to present closing arguments at the hearing on the motion to suppress. He concedes that we must review this issue under the plain error doctrine because he did not object to the error at trial and did not raise the issue in a posttrial motion. *People v. Faint*, 396 Ill. App. 3d 614 (2009). Under plain error, we will reverse for a new trial if the evidence at trial was closely balanced or the error was so serious that defendant was denied a substantial right. *People v. Herron*, 215 Ill. 2d 167 (2005).

Defendant does not argue that the evidence was closely balanced. Instead, he alleges that he was denied a substantial right when the trial court delivered its oral opinion without first allowing the opportunity for argument. We recently held in *Faint* that a defendant has a constitutional right to present evidence and a closing argument before the fact-finder at trial. *Faint*, 396 Ill. App. 3d 614. However, as the court noted in *People v. Lambert*, 364 Ill. App. 3d

488 (2006), there is no constitutional right to present oral argument on a motion to suppress.

Therefore, we hold that the trial judge did not commit plain error by failing to provide defendant an opportunity to present argument on the pending motion.

II. Pretrial Claims of Ineffective Assistance of Counsel

Defendant also asserts that the substitute trial court failed to conduct a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), on his pretrial, *pro se*, motion for change of counsel, in which he alleged that counsel was ineffective. However, after the parties submitted briefs in this case, our supreme court decided *People v. Jocko*, 239 Ill. 2d 87 (2010), holding that the trial court is not required to conduct an inquiry into *pretrial* claims of ineffective assistance of counsel. Therefore, no error occurred.

CONCLUSION

Consequently, because the trial court's finding of voluntariness was not against the manifest weight of the evidence, the motion to suppress was properly denied. Moreover, the trial court was under no duty to conduct a pretrial *Krankel* hearing on claims of ineffective assistance of counsel.

The judgment of circuit court of Knox County is affirmed.

Affirmed.