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SECOND DIVISION
June 5, 2012

No. 1-10-1933
2012 IL App (1st) 101933-U

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.)	09 CR 20369
)	
TYRONE MAHOMES,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment.

ORDER

Held: Defense counsel was not ineffective for failing to file motion to quash search warrant where a John Doe informant personally appeared before the issuing magistrate and attested that he saw defendant, who was confirmed to be a twice-convicted felon, in possession of a handgun. Further, the armed habitual criminal statute is not unconstitutional on *ex post facto*, due process, or second amendment grounds.

¶1 At a bench trial, the trial court convicted defendant Tyrone Mahomes of violating the armed habitual criminal statute and unlawful use of a weapon by a felon. On appeal, defendant contends (1) that his trial counsel was ineffective for failing to file a motion to quash the warrant because it was obtained with the help of an allegedly unreliable John Doe informant, and (2) that

the armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2009)) is unconstitutional for a variety of reasons. We affirm.

¶2

I. BACKGROUND

¶3

The basic facts of this case are undisputed on appeal. Equipped with a search warrant, police raided defendant's apartment and, after a brief search, found a .357 revolver in a cardboard box in the rear bedroom along with some live ammunition and suspected narcotics. Defendant was in the bedroom when the officers executed the warrant, and the officers arrested him. After defendant waived his *Miranda* rights at the police station, he stated that he would not deny ownership of the weapon and narcotics but "wanted to know who gave him up so he could handle his business."

¶4

Defense counsel did not challenge the search warrant. At trial, the main issue was whether the State had sufficient evidence to prove that defendant, a twice-convicted felon, lived in the apartment and therefore had constructive possession of the revolver. The trial court convicted defendant of armed habitual criminal and unlawful use of a weapon by a felon, merged the second count into the first, and sentenced defendant to eight years of incarceration. This appeal followed.

¶5

II. ANALYSIS

¶6

Defendant raises two issues on appeal: whether his trial counsel was ineffective for failing to challenge the warrant, and whether the armed habitual criminal statute is unconstitutional.

¶7

A. Ineffective Assistance of Counsel

¶8

A claim of ineffective assistance of counsel is governed by the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (adopted by *People v. Jones*, 144 Ill. 2d 242,

253-54 (1991)). In order to prevail, a defendant must demonstrate both that his counsel's representation was deficient and that counsel's deficient performance prejudiced the defendant. See *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). "The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *Id.* When counsel's allegedly deficient performance is based on the failure to file a motion to suppress evidence, "a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed. [Citation.] The failure to file a motion to suppress does not establish incompetent representation when the motion would have been futile." *Id.*

¶9 In this case, defendant argues that defense counsel should have moved to quash the search warrant for lack of probable cause. Because essentially all of the evidence against defendant was obtained pursuant to the warrant, we will assume without deciding that there is a reasonable probability that the result of the trial would have been different had the warrant been quashed and the evidence suppressed. The key issue in this case is whether there is a reasonable probability that a motion to quash the warrant would have been granted had defense counsel filed one.

¶10 Defendant argues that the complaint for the warrant was insufficient to support a finding of probable cause by the magistrate who issued the warrant. The supreme court has summarized the appropriate analysis in this sort of situation as follows:

¶11 "Whether probable cause exists in a particular case depends on the totality of facts and circumstances known to an affiant applying for a warrant at the time the warrant is sought. [Citation.] Thus, the existence of probable cause in a particular case means simply that the totality of the facts and circumstances

within the affiant's knowledge at that time 'was sufficient to warrant a person of reasonable caution to believe that the law was violated and evidence of it is on the premises to be searched.' [Citation.] Accordingly, the probable cause requirement is 'rooted in principles of common sense.' [Citation.] The issuing magistrate's task ' "is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." ' [Citation.] In light of these considerations, a reviewing court must not substitute its judgment for that of the magistrate in construing an affidavit. [Citation.] Rather, the court must merely decide whether the magistrate had a ' "substantial basis" ' for concluding that probable cause existed." *People v. McCarty*, 223 Ill. 2d 109, 153 (2006).

¶12 In this case, both a Chicago police officer and an unidentified John Doe informant attested to the facts in the complaint for the search warrant. The officer attested that the informant contacted him with information about defendant's illegal possession of a firearm. The informant attested that he had known defendant for over four years. Two days before, the informant was visiting with defendant in defendant's home when defendant walked to a rear bedroom and retrieved a blue steel 9mm handgun. The informant claimed that he had seen this particular weapon at least twice in the past seven days, and that, based on his past experience with firearms, he believed that the weapon was a real firearm. The officer attested that, after he received this information from the informant, he took the informant to the address where the informant saw defendant with the weapon. The informant identified the address as defendant's

home and confirmed the location. The officer also showed the informant a picture of defendant, whom the informant confirmed was the individual who displayed the firearm. Finally, the officer checked a police database and confirmed that defendant was a convicted felon who did not hold a valid firearm owner identification card. Based on all of this information, the officer presented his complaint for a search warrant to a judge, who swore both the officer and the John Doe informant to the facts recited in the complaint. The judge found probable cause and issued the search warrant.

¶13 Defendant’s sole contention regarding the validity of the warrant is that the complaint for the warrant does not contain any information about the informant’s past reliability, which by itself precludes a finding of probable cause. The U.S. Supreme Court, however, rejected such a categorical approach nearly 30 years ago in *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983), in which it abandoned the two-pronged *Aguilar/Spinelli* test for determining probable cause in favor of a totality-of-the-circumstances analysis. Under *Gates*, an informant’s past reliability is only one factor in determining whether probable cause exists, and in fact, the need to balance reliability with other factors was a prime reason that the Supreme Court abandoned the *Aguilar/Spinelli* test:

“[T]he ‘two-pronged test’ directs analysis into two largely independent channels—the informant’s ‘veracity’ or ‘reliability’ and his ‘basis of knowledge.’ [Citation.] There are persuasive arguments against according these two elements such independent status. Instead, they are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated

for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. [Citations.]

If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip.

[Citation.] Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity -- which if fabricated would subject him to criminal liability -- we have found rigorous scrutiny of the basis of his knowledge unnecessary. [Citation.] Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case. Unlike a totality-of-the-circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip, the 'two-pronged test' has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate." *Id.* at 233-34.

¶14 That is not to say, of course, that information from an informant without a track record of reliability will invariably be sufficient for probable cause, given that such informants must at least demonstrate some minimal basis of knowledge. See, *e.g.*, *People v. Damian*, 299 Ill. App.

3d 489, 493 (1998) (no probable cause where informant with no track record of reliability failed to demonstrate sufficient basis of knowledge and allegations were uncorroborated by officer).

¶15 In this case, although the complaint contained no information about the John Doe informant's past reliability, there was information that demonstrated his basis of knowledge. The informant gave the magistrate a fairly detailed description about his interaction with defendant, including the location of the weapon, and the informant was able to point out the location of defendant's home and identify defendant in a picture.

¶16 In defendant's favor, none of these facts other than the location of the gun demonstrate any special knowledge, and "corroboration of innocent details or of information that is readily known or knowable is of little value." *People v. Nitz*, 371 Ill. App. 3d 747, 752 (2007). (It is also interesting that although the informant described the weapon as a 9mm, the weapon that police actually found was a .357 revolver. But police only discovered that discrepancy after they served the warrant, so the issuing magistrate could not have known of it when he reviewed the warrant. It is therefore irrelevant to the question of whether it was reasonable for the magistrate to find probable cause based on the attested facts in the complaint.) Nor was there any way for the officer to corroborate the location and existence of the gun (that was the purpose of getting the search warrant in the first place), so the informant's reliability on that point could not be tested.

¶17 So the complaint contains some details about the informant's basis of knowledge but lacks corroboration. If all we had was minimal information from an anonymous informant of unproven reliability, then whether probable cause existed might be a close call. But here is the dispositive factor in our analysis: although defendant frames this as an "anonymous" informant case, it is not. A John Doe informant is not the same as an anonymous informant. See *People v.*

Bryant, 389 Ill. App. 3d 500, 518-19 (2009) (discussing the difference between a citizen informant, a confidential informant, and an anonymous informant). This is not a case where probable cause rests only on an uncorroborated, anonymous tip with no predictive information via 911 (see *e.g.*, *Florida v. J.L.*, 529 U.S. 266 (2000)), or a letter (see, *e.g.*, *Gates*, 462 U.S. at 227). Rather, this is a situation where the John Doe informant, even though unnamed in the complaint (probably for good reason, given defendant's statement after his arrest), was known to the police officer, and in fact, he appeared before the judge and was sworn to the facts in the complaint. Unlike a tip from an anonymous informant, corroboration is less important when information comes from a known individual because such individuals can later be punished if they lie. See *Nitz*, 371 Ill. App. 3d at 751. And although information from a paid informant is sometimes considered less reliable than information from an ordinary citizen (see *id.*), there is no indication in this case that the John Doe informant was compensated in any way.

¶18 Perhaps more important than the fact that the informant was known to the officer is that the informant personally appeared and swore to the complaint before the magistrate. In *People v. Hill*, 372 Ill. App. 3d 179, 182 (2007), which also dealt with a John Doe informant, we noted that “where the informant has appeared before the issuing judge, the informant is under oath, and the judge has had the opportunity to personally observe the demeanor of the informant and assess the informant's credibility, additional evidence relating to informant reliability is not necessary.” (Internal quotation marks omitted.) Although there was no indication in that case that the magistrate personally questioned the informant, we declined to hold that “the lack of an on-the-record colloquy between the magistrate and the informant destroys the reliability established by the informant's presence.” *Id.* at 184. As in *Hill*, the John Doe informant's

personal appearance before the magistrate in this case increased his reliability, regardless of whether the magistrate actually examined him or not.

¶19 When we put all of the circumstances discussed above together, there was a substantial basis for the issuing magistrate to conclude that there was probable cause for a search warrant. A known individual, the John Doe informant, personally appeared before the magistrate along with the officer and attested that he had personally seen defendant, whom the officer attested was a known felon, in possession of a firearm on more than one occasion at a known and confirmed location. Although it might have been useful to have additional information, more confirmation, or an informant with a proven track record of reliability, this was more than enough under the circumstances to allow the magistrate to find probable cause. Indeed, even if we were inclined to give defendant the benefit of the doubt, the standard of review requires us to accord the issuing magistrate a significant amount of deference, though our deference is not boundless. See *United States v. Leon*, 468 U.S. 897, 914 (1984). This is not a particularly close case, but even if it were the Supreme Court has

“expressed a strong preference for warrants and declared that ‘in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.’ [Citations.] Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according ‘great deference’ to a magistrate's determination.” *Id.*

¶20 Having found that there was a substantial basis upon which the magistrate could find probable cause, we must conclude that there is not a reasonable probability that a motion to

quash the warrant would have succeeded. Because such a motion would have been futile, defense counsel cannot be deemed ineffective for failing to file one.

¶21 B. Constitutional Arguments

¶22 Finally, defendant argues that the armed habitual criminal statute, section 24-1.7 of the Criminal Code of 1961 (720 ILCS 5/24-1.7 (West 2009)), is unconstitutional because it violates his right to bear arms under the second amendment to the U.S. Constitution, his right to due process under the fourteenth amendment to the U.S. Constitution, and the Illinois and federal constitutional *ex post facto* clauses. We have, however, previously addressed and rejected identical constitutional arguments in other cases. See, e.g., *People v. Davis*, 408 Ill. App. 3d 747 (2011) (second amendment and *ex post facto* arguments); *People v. Adams*, 404 Ill. App. 3d 405 (2010) (*ex post facto* and due process arguments). Defendant's arguments are the same as those raised in our previous cases, so we see no reason to revisit or depart from our prior decisions on these issues.

¶23 III. CONCLUSION

¶24 For the reasons stated above, defense counsel was not ineffective for failing to file a motion to quash the search warrant because such a motion had no reasonable chance of success. We also follow our previous decisions upholding the constitutionality of the armed habitual criminal statute.

¶25 Affirmed.