

No. 1-10-2014

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).

**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. 07 CR 10788
)	
SHERMAN WILLIAMS,)	The Honorable
)	Victoria Stewart,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

Held: We hold that defendant was deprived of his right to the effective assistance of counsel because his counsel filed, but did not bring to hearing, a motion to quash arrest and to suppress statements and evidence that had a reasonable probability of being successful. We cannot say, nor has the State shown, that defense counsel's inaction was reasonable or strategic. Defendant has shown that he was prejudiced by the failure of his counsel to bring the motion to hearing.

¶ 1 Defendant, Sherman Williams, was convicted of aggravated unlawful use of a weapon after a bench trial and was sentenced to six years in prison. Prior to trial, defendant's counsel

filed a motion to quash arrest and to suppress statements and evidence. The circuit court, however, did not have a hearing on the motion. The record does not disclose why defense counsel did not proceed on the motion nor does it indicate that the motion was withdrawn. At issue is whether defense counsel's failure to persist in the filed motion deprived defendant of the effective assistance of counsel.¹ We hold that defendant was deprived of his right to the effective assistance of counsel because the filed motion to quash arrest and to suppress statements and evidence had a reasonable probability of being successful. We cannot say, nor has the State shown, that defense counsel's inaction was reasonable or strategic. Defendant has shown that he was prejudiced by the failure of his counsel to bring the motion to hearing.

¶ 2 JURISDICTION

¶ 3 The circuit court sentenced defendant on June 17, 2010. Defendant timely filed his notice of appeal on the day of sentencing. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

¶ 4 BACKGROUND

¹ Defendant, in addition to his ineffective assistance of counsel argument, also asks this court to review the following issues on appeal: whether the circuit court discounted testimony from two testifying witnesses, depriving him of his right to a fair trial; whether he was proven guilty beyond a reasonable doubt; and whether the Illinois aggravated unlawful use of a weapon statute is unconstitutional. Due to the disposition of this appeal, we need not determine whether the circuit court improperly discounted testimony from the trial or whether the Illinois aggravated unlawful use of a weapon statute is unconstitutional. Due to double jeopardy grounds, we will review *infra* whether the evidence presented at trial was sufficient to sustain his conviction.

¶ 5 On May 18, 2007, defendant was charged with six counts of aggravated unlawful use of a weapon and two counts of unlawful use of a weapon by a felon. On July 10, 2007, in open court, defendant's counsel indicated to the court that she "will be filing a motion to quash." The State agreed to a hearing on the motion to be set for September 10, 2007, despite the fact that the motion had not yet been filed. The court then set the motion for hearing on September 10, 2007, and gave defendant seven days from July 10, 2007, to file the motion to quash. On July 13, 2007, defendant's counsel filed a motion to quash arrest and suppress statements and evidence.

¶ 6 On September 10, 2007, defense counsel stated to the court that "[t]his is set for motion and/or trial today." Later on that day, after the case was passed and re-called, defendant's counsel stated to the court that "[I]m preparing for the motion to suppress and go to trial" and informed the court that defendant had provided names of "some people that I need to try to bring in to court."

¶ 7 After numerous continuances, on October 6, 2008, defense counsel indicated to the court that he "filed a motion to suppress and for trial" and asked the court whether they could "do both of them at the same time." The State informed the court that it did not have a copy of defendant's motion. Defense counsel stated on the record that he had copies of the motion, which he had filed on July 13, 2007. The court responded that it had "a pretrial motion *** in the court file." The case was again continued without resolution of the motion.

¶ 8 On July 7, 2009, after several more continuances, defendant's bench trial began. Chicago police officer Angelina Palermo testified on the State's behalf. Officer Palermo recalled that on May 8, 2007, at approximately 12:55 a.m. she responded to a "shots fired call." When she and

No. 1-10-2014

her partner arrived on the scene in uniform in a marked police car, she "observed a car that was obstructing traffic in the middle of the street." Officer Palermo explained that the car was obstructing traffic because "[c]ars could not pass in that lane." She then conducted a traffic stop. When asked whether anyone was "behind the wheel" of the vehicle obstructing traffic, Officer Palermo identified defendant. She testified that defendant was not able to provide her with a driver's licence, registration, or proof of insurance. She and her partner then "removed [defendant] from the vehicle and placed him in custody." She then did a custodial search of defendant and "found one clear Zip lock plastic baggie containing a green leafy substance, suspect cannabis in his front right pocket" and "a large bundle of [United States currency]." Around the vehicle there were "three or four people." When she initially approached the vehicle, no one else was inside the vehicle. After performing a custodial search of defendant, she placed him in the back of the squad car and called for backup. Officer Palermo testified that she observed the backup officer, an Officer Johnson, search the vehicle and "recovered a handgun from underneath the passenger side." The handgun was loaded and "was six-shot capacity, one spent round." When asked by the ASA "did you Mirandize the defendant?" Officer Palermo answered "Yes, we did." They then spoke with defendant, who told them it was his gun which he had bought two years prior. Officer Palermo testified that when defendant was asked about whether he owned the car, defendant "said that he was thinking about purchasing it" but he did not own it at that time.

¶ 9 On cross-examination, Officer Palermo admitted that she did not include defendant's statement regarding that he was thinking of purchasing the vehicle in her police report. She also

No. 1-10-2014

had not seen defendant drive the subject vehicle prior to that date nor did she know how long defendant had been inside the vehicle prior to the stop. When asked whether she had seen "him make any furtive movement towards the passenger seat of that car" she answered that she "did not." She also could not see the weapon from where she was standing beside the car. She described the gun as "a small revolver, a 357." When they "ran the plate" she discovered that the car was registered to someone other than defendant. Officer Palermo denied seeing two young African American girls sitting in the back of the vehicle. She testified that she believed that one female African American was arrested "that night" for cannabis possession, but that person was not in the vehicle. Officer Palermo admitted that she did not record or memorialize defendant's statement that the gun was his, but rather, she believed she "stated that to the State's Attorney when we had called felony review." When asked whether she asked defendant to move the car, she answered, "I asked him why he was parked there." She did not ever see defendant with the weapon nor did she recover any of defendant's fingerprints from the weapon.

¶ 10 Before resting, the State presented evidence of defendant's prior felony conviction. Defense counsel did not object to this evidence. Defendant then motioned for a directed finding, arguing that the State did not present sufficient evidence that defendant had constructive possession of the weapon or knowingly possessed the weapon. In response, the State argued that defendant had admitted that the gun was his. The court granted the motion as to all counts except counts three and four because the other counts all alleged that defendant possessed the gun "about his person."

¶ 11 Brittany Johnson testified on defendant's behalf. Johnson testified that on May 7, 2007,

No. 1-10-2014

at approximately 11:30 in the evening she was in a red Cadillac car with two individuals named Jeremy and Lance. Jeremy was driving, Lance was in the front passenger seat, and she was sitting in the back seat. They then picked up Keyonna Hall. The group then "rode around, went to the store." and then "came back on 69th and Perry." At this point, Jeremy double parked the car and Jeremy and Lance "went upstairs and said they will be back." However, they "never came down." Johnson testified that next the police arrived on the scene, and told defendant to move the car and park it. Defendant at this time was "just on the sidewalk." While defendant was parking the car, she and Hall were in the car. The car had been double parked for five to seven minutes. Johnson testified that after defendant moved the car, "the police told us to get out. They searched us, they searched him and searched the car." She had never seen defendant in the car prior to that time nor did she know who was the owner of the car. She testified defendant was in the car "[t]wo minutes. Just to park the car." She further stated, "I just remember [the police] saying over the intercom to move the car out of the street and then that's when he proceeded to move the car."

¶ 12 On cross-examination, Johnson testified that she did not move the car because she did not have a license. She testified that Hall also did not have a license. Johnson testified that she had known defendant for about two years. Johnson also denied knowing a Debra Warfield, whom the ASA stated was also arrested that same night. Johnson only saw defendant arrested that night.

¶ 13 Keyonna Hall also testified on defendant's behalf. She testified that on May 7, 2007, at approximately 11:30 p.m. she was in a red Cadillac with Brittany Johnson, Lance, and Jeremy.

No. 1-10-2014

After riding around and going to a store, Lance and Jeremy double parked the car on Perry. They went upstairs but never came back down. She testified that five minutes after Lance and Jeremy went upstairs, the police arrived. When the police arrived, they told defendant to park the car. They told her, defendant, and Johnson to get out of the car. She testified that the police then searched them and the car. She had not previously seen defendant drive the car.

¶ 14 On cross-examination, Hall testified that when the police arrived defendant was the only person on the street at that time. Defendant was "just standing there." Hall testified that the police did not ask her or Johnson to move the car, they just asked defendant if he could move the car. She testified neither she nor Johnson have driver's licenses. She denied seeing or knowing Debra Warfield. The defense then rested.

¶ 15 After closing arguments, the court found defendant guilty as to count three, the aggravated unlawful use of a weapon, but not guilty as to count four, also an aggravated unlawful use of a weapon charge. The court found that defendant's witnesses were not credible and were inconsistent with each other. The court found Officer Palermo's "testimony was clear, it was consistent and it was convincing." The court found further that the gun found was within the vehicle, was accessible to defendant, and that defendant admitted that it was his weapon.

¶ 16 On July 9, 2009, defendant filed a motion for a new trial, or in the alternative, an arrest of judgment, which the circuit court denied. After a sentencing hearing, the circuit court sentenced defendant to six years in the Illinois Department of Corrections. Defendant timely appealed.

¶ 17 ANALYSIS

¶ 18 Before this court, defendant argues that he was denied the effective assistance of counsel

No. 1-10-2014

because his trial counsel failed to pursue a motion to quash his arrest and suppress evidence even though the motion was on file. Defendant points out that there is no explanation in the record as to why the filed motion was never brought to hearing. He argues that his initial arrest for the municipal code violation of obstruction of traffic did not justify his custodial arrest and the search of his person. He argues that there was no evidence that he had been driving, and that sitting in a parked car without a valid license is not a crime. Defendant maintains that even if his arrest had been lawful, the search of the vehicle in which he was seated could not be justified as a lawful search incident to arrest because he was already in custody, locked in the back of the police car when the search of the vehicle took place. Accordingly, he argues that the motion to quash should have been litigated, and that had it been litigated, there is a reasonable probability that the motion would have been granted. Had the motion been granted, the gun found in the search of the vehicle, which was the basis of his later conviction in this case, would have been suppressed. Defendant urges this court to reverse his conviction.

¶ 19 In response, the State argues that defendant's claim of ineffective assistance of counsel is speculative and that the record is insufficient to evaluate his claim. The State maintains that defendant's claims of ineffective assistance of counsel would be best brought on collateral review as opposed to direct appeal. In the alternative, the State argues that defendant's request for an "outright reversal" is inappropriate and suggests that the proper action that this court should take is to remand the matter to the circuit court to conduct a suppression hearing.

¶ 20 In reply, defendant points out that the State does not argue that he received the effective assistance of counsel, or that there was probable cause for his arrest, or that the arrest justified the

search of the car. Rather, defendant maintains the State's argument is focused on the lack of an appropriate record and that a reversal is not an appropriate remedy in this case. Defendant contends Officer Palermo's testimony provides a factual record for review of his ineffective assistance of counsel claim. Defendant persists in his argument that his conviction should be reversed, but acknowledges, and requests in the alternative, that this court may remand the matter for further proceedings.

¶ 21 We utilize a two-prong test when reviewing ineffective assistance of counsel claims. *People v. DeLeon*, 227 Ill. 2d 322, 337 (2008) (citing *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984)). A defendant must show both prongs of the *Strickland* standard have been met and failure to meet either one of the prongs defeats a claim of ineffective assistance of counsel. *DeLeon*, 227 Ill. 2d. First, a defendant must show "his counsel's performance was deficient in that 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010) (quoting *Strickland*, 466 U.S. at 687). Under this first prong, "a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *Id.* at 317. Next, under the second prong, defendant must show that he was prejudiced by counsel's deficient performance. *DeLeon*, 227 Ill. 2d at 337. Our supreme court, in describing the two prong standard stated, "the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" "

Id. at 337-38 (quoting *Strickland*, 466 U.S. at 694). "In order to establish prejudice resulting from failure to file a motion to suppress, 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." *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 22 "A search conducted without prior approval of a judge or magistrate is *per se* unreasonable under the fourth amendment." *People v. Bridgewater*, 235 Ill. 2d 85, 93 (2009). A search incident an arrest is an exception to this requirement. *Id.* The United State's Supreme Court has outlined the requirements of this exception in *Arizona v. Gant* (556 U.S. 332, 351 (2009)). The Supreme Court first noted that the search incident to a lawful arrest exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Gant*, 556 U.S. at 338. The court stated further that "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search incident-to-arrest exception are absent and the rule does not apply." *Id.* at 339. The Court concluded by holding "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v. Gant*, 556 U.S. 332, 351 (2009); see also *Bridgewater*, 235 Ill. 2d at 94-95.

¶ 23 In this case, we hold that defendant was denied the effective assistance of counsel because his attorney failed to litigate the previously filed motion to quash arrest and suppress statements and evidence. Under the first prong of our review, defendant has overcome the strong presumption that his counsel's inaction was sound trial strategy as opposed to incompetence.

No. 1-10-2014

Clendenin, 238 Ill. 2d at 317. The record shows that defense counsel both filed a motion to quash arrest and suppress statements and evidence and informed the court about the motion several times. The record does not show that defense counsel withdrew the motion nor does it disclose why the motion was abandoned. The record only shows numerous continuances. The gun in this case was the key piece of evidence linking defendant to his eventual conviction, and moving to suppress evidence of the gun appears to be defendant's best defense to the action against him. It appears defense counsel understood this by filing the motion. We can not think of any legitimate reason, nor has the State shown any reason, why defense counsel would abandon this motion. We cannot say counsel's inaction in litigating the filed motion to quash arrest and suppress statements and evidence was a legitimate strategy or reasonable.

Accordingly, defendant has overcome the presumption that his trial counsel's action was a sound trial strategy and thus, satisfied the first prong of our review.

¶ 24 Defendant has also satisfied the second prong of our review by showing that he was prejudiced by his counsel's failure to litigate the filed motion to quash arrest and suppress statements and evidence. *DeLeon*, 227 Ill. 2d at 337. The facts of this case are unique because defense counsel did file the appropriate motion, but failed to bring the motion to hearing before the court. We hold that there is a reasonable probability that the motion to quash arrest and suppress statements and evidence would have been granted. Officer Palermo arrested defendant for a traffic citation and already had defendant placed in custody before searching the vehicle. Based on Officer Palermo's testimony, *i.e.* that defendant was already in custody locked in the rear of a police car, defendant could not possibly have reached into the vehicle. See *Gant*, 556

No. 1-10-2014

U.S. at 339 ("If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search incident-to-arrest exception are absent and the rule does not apply."). Had evidence of the gun been suppressed, defendant's trial would have had a different outcome. See *Patterson*, 217 Ill. 2d at 438. Accordingly, based on Officer Palermo's testimony, we hold that there was a reasonable probability that defendant's motion to quash arrest and suppress evidence and statements would have been granted.

¶ 25 Due to defense counsel's deficient performance, we hold defendant was deprived of his right to the effective assistance of counsel. We therefore retain jurisdiction and remand the matter to the circuit court to conduct a suppression hearing. Although we hold that the motion to quash arrest and suppress evidence and statements had a reasonable probability of success, at this stage of proceedings it is not our role to rule on a motion never argued before the circuit court. See *People v. Hill*, 2012 IL App (1st) 102028, ¶ 45. The parties on remand will be able to litigate the motion to quash arrest and suppress evidence and statements, which would allow the parties to present any available evidence. *Id.*

¶ 26 We note that defendant has challenged the sufficiency of the evidence against him. It is not the function of this court to retry a defendant when reviewing whether the evidence at trial was sufficient to sustain a conviction. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). "Rather, in such cases the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Smith*, 185 Ill. 2d 532, 541 (1999). In order to preclude a double jeopardy claim on remand, we have reviewed defendant's sufficiency of the evidence

No. 1-10-2014

claim. See *People v. Taylor*, 76 Ill. 2d 289, 309-10 (1979). Viewing the evidence presented in the light most favorable to the prosecution, we hold that the evidence was sufficient to sustain a conviction in this case.

¶ 27

CONCLUSION

¶ 28 We remand defendant's case to the circuit court to conduct a suppression hearing on defendant's filed, but not argued, motion to quash arrest and suppress evidence and statements.

¶ 29 Cause remanded with directions. Jurisdiction retained.