

No. 1-10-2092

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. 09 CR 7490
)	
SHERARD CROWDER,)	The Honorable
)	John A. Wasilewski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was not prejudiced by his trial counsel's failure to file a motion to quash the search warrant and suppress the evidence, and thus cannot establish his claim for ineffective assistance of counsel. Further, defendant's sentencing as a Class X offender requires a three-year term of mandatory supervised release, despite his being convicted of a Class 1 offense.

¶ 2 Following a bench trial, defendant, Sherard Crowder, was convicted of possession of between 100 and 400 grams of cocaine, a Class 1 offense. Based on his criminal history, he was

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sentenced as a Class X offender to 12 years' incarceration and 3 years of mandatory supervised release (MSR). On appeal, defendant contends that: (1) his trial counsel was ineffective for failing to file a motion to quash the search warrant and suppress evidence where there was a reasonable probability that the motion would have been granted; and (2) his MSR term must be reduced from three years to two because despite being sentenced as a Class X offender, he was convicted of a Class 1 offense.

¶ 3 Defendant was arrested on the morning of April 1, 2009, at the house located at 8109 South Bishop Avenue in Chicago. Police obtained a search warrant for the house on March 31, 2009. To obtain the warrant, Officer Anthony Rouba and an informant identified only as J. Doe appeared before the issuing judge and swore to a complaint for search warrant.

¶ 4 J. Doe gave the following description in the complaint for search warrant: he/she knew "Rob" for approximately 10 years and during that time, he/she purchased heroin from "Rob" two to three times during the past month at the 8109 South Bishop address. J. Doe knew from personal experience from selling narcotics that the item purchased was heroin. J. Doe further stated that "Rob" told J. Doe to come to the house whenever J. Doe was ready to purchase "blow," a street term for powder heroin. J. Doe also stated that he/she had been inside the home and observed various amounts of heroin located on the dresser in the front bedroom.

¶ 5 On March 31, 2009, Officer Rouba drove J. Doe past the home and J. Doe positively identified it as the residential family house where he/she purchased the heroin from "Rob." Rouba also showed J. Doe a photograph of defendant and J. Doe positively identified him as having sold J. Doe heroin. The signed search warrant indicated that Rouba and J. Doe

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subscribed and swore to a complaint for a search warrant before the issuing judge. The judge found probable cause "upon examination of the complaint."

¶ 6 The issuing judge found that the complaint stated facts sufficient to show probable cause and issued a search warrant to search defendant and the single family residential house located at 8109 South Bishop.

¶ 7 A team of police officers testified to executing the search warrant at the house on April 1, 2009, at approximately 9:30 a.m. Officer Rodriguez testified that upon entering and securing the home, the officers called in the canine unit. Defendant and his brother were arrested. Rodriguez recovered from the dresser in the first bedroom located in the front of the house the following items: a clear plastic baggy containing white powdery substance, another clear plastic bag with a scale, a large plastic bag with a chunky rock-like substance from behind the dresser mirror and an Illinois identification card for defendant. Officer Hamilton testified to observing the recovery of the following items from the third bedroom in the back of the house: two boxes of ammunition, a scale and cannabis. Hamilton photographed and stored the evidence.

¶ 8 The parties stipulated to the weight and composition of the cocaine and cannabis. Defense counsel did not object to the narcotics evidence and made no pretrial motions and specifically made no motion to quash the search warrant or to suppress the evidence.

¶ 9 The trial court found defendant guilty of possession of between 100 and 400 grams of cocaine and sentenced him as stated above. On appeal, defendant first contends that he was denied effective assistance of counsel because his trial counsel did not file a motion to quash the warrant and suppress evidence recovered during the search despite the search warrant complaint's

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failure to establish the reliability of an unidentified informant and failure to corroborate the allegations contained in the search warrant complaint. The State counters that defendant was not prejudiced by his trial counsel's failure to file the motion because counsel made a strategic decision not to file and because the motion would not have been granted.

¶ 10 To establish a claim for ineffective assistance of counsel, the defendant must show that his counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance was so serious as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *People v. Albanese*, 104 Ill. 2d 504, 525 (1984) (adopting *Strickland*).

¶ 11 The inquiry into counsel's performance "must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. A reviewing court defers to counsel's challenged action and without engaging in hindsight analysis, the court "must presume that counsel's performance fell within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; see also *People v. Little*, 322 Ill. App. 3d 607, 610 (2001). The defendant must overcome the strong presumption that counsel's action was sound trial strategy and not the result of incompetence. *Little*, 322 Ill. App. 3d at 610.

¶ 12 To show prejudice, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. A reviewing court may

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dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance. *Id.* at 697. To prove prejudice, the defendant must affirmatively show within a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Id.* at 694.

¶ 13 Whether to file a motion to quash arrest and suppress evidence is generally viewed as a decision of trial strategy and there is a strong presumption that failure to file the motion is proper and does not represent *per se* incompetence. *Little*, 322 Ill. App. 3d at 611. To prevail on a claim of ineffective assistance of counsel based on counsel's failure to file a motion to quash the warrant and suppress evidence, the defendant must show that the motion had a reasonable probability of success and that the outcome of the trial would have been different if the motion had been granted. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Failing to file a motion to suppress does not establish incompetent representation if the motion would have been futile. *Id.*

¶ 14 Defendant argues that had his trial counsel filed a motion to quash arrest and suppress evidence, the motion would have been successful because the judge issued the search warrant absent probable cause. For a search warrant to be valid, the complaint and affidavit upon which the warrant is based must show probable cause. *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007). This court will analyze the totality of the circumstances to determine whether a search warrant is based on probable cause. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). “A showing of probable cause means that the facts and circumstances within the knowledge of the affiant are sufficient to warrant a person of reasonable caution to believe that an offense has occurred and that evidence of it is at the place to be searched.” *People v. Moser*, 356 Ill. App. 3d 900, 908

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(2005). The issuing judge may draw reasonable inferences from the material supplied in support of the complaint for search warrant and is not confined by narrow limitations or restrictions on the use of the issuing judge's common sense. *Id.* This court will pay "great deference" to the judge's determination of probable cause. *Gates*, 462 U.S. at 236.

¶ 15 Applying these principles to defendant's claim, defendant cannot satisfy his burden under *Strickland* because there is not a reasonable probability that the trial court would have granted a motion to quash the warrant and suppress the evidence and, as a result, defendant cannot establish prejudice.

¶ 16 Defendant acknowledges that J. Doe appeared before the judge and subscribed to and swore to the affidavit. However, defendant argues that J. Doe's mere appearance was insufficient to establish J. Doe's reliability. Defendant cites *Smith* for the proposition that J. Doe's appearance is only one factor in the *Gates* totality of the circumstances analysis. *Smith*, 372 Ill. App. 3d at 184. Citing the Seventh Circuit's decision in *United States v. Johnson*, 289 F.3d 1034 (7th Cir. 2002), this court concluded in *Smith* 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." *Smith*, 372 Ill. App. at 182; see also *People v. Moser*, 356 Ill. App. 3d 900, 909 (2005). The *Smith* defendant argued that although the informant appeared in person before the issuing judge, the warrant was issued based upon an examination of the complaint and not the informant's statements. *Smith*, 372 Ill. App. 3d at 182. Further, the *Smith* defendant argued that while there was evidence the informant appeared before

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the magistrate, there was no evidence that the informant was actually questioned. Defendant in the present case makes similar arguments.

¶ 17 In relying upon *Johnson*, this court in *Smith* declined to find that the absence of on-the-record questioning of the informant by the magistrate destroyed the indicia of reliability established by the informant's presence. *Smith*, 372 Ill. App. 3d at 184. A similar result was reached in *Johnson*, where the Seventh Circuit noted that while an on-the-record exchange between the magistrate and informant would support a finding of reliability, such evidence was not required, because the informant's presence and opportunity to be questioned were indicative of reliability since they "eliminate some of the ambiguity that accompanies an unknown hearsay declarant." *Johnson*, 289 F.3d at 1040. The Seventh Circuit also noted that the informant's presence "allows the issuing judge to confront the [informant] if necessary." *Id.* Here, J. Doe's presence in front of the issuing judge supports a probable cause finding, although it is only one factor in the "totality of the circumstances" analysis provided for in *Gates*. *Smith*, 372 Ill. App. 3d at 184; see also *Johnson*, 289 F.3d at 1040 n.3.

¶ 18 J. Doe's reliability is further evidenced by J. Doe's self-incrimination in illegal narcotics-related activities. In swearing to personal knowledge of defendant's possession and distribution of narcotics, J. Doe also incriminated himself or herself in selling narcotics. The complaint indicated that J. Doe purchased illegal narcotics from defendant two to three times during the month in which the complaint for search warrant was filed with the court. See *e.g.*, *Smith*, 372 Ill. App. 3d at 184 ("An admission of familiarity with illegal substances bolsters the information's reliability."); and *Johnson*, 289 F.3d at 1039 ("by making statements against his penal interest,

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the [informant] offered another indicium of reliability").

¶ 19 Defendant cites *United States v. Bell*, 585 F.3d 1045 (7th Cir. 2008), to argue that J. Doe's reliability was undermined because the complaint established that J. Doe was a drug dealer. Defendant emphasizes that J. Doe is a drug dealer and not a drug user, arguing that drug dealers are more likely than drug users to have motives to falsely implicate a defendant, including wanting revenge due to a drug rivalry or wanting to secure drug turf owned by defendant. Indeed, the Seventh Circuit court noted in *Bell* that whether the informant is a rival drug dealer is "certainly a factor to consider when assessing the reliability of [the informant's] statements." *Bell*, 585 F.3d at 1050. Although the affidavit indicates that J. Doe was a drug dealer, this factor must be considered in conjunction with the other facts related to J. Doe's reliability. When considering the totality of the circumstances surrounding the issuance of the search warrant, the fact that J. Doe admitted either currently selling narcotics or selling narcotics in the past is not dispositive in deciding whether J. Doe is reliable. Rather, J. Doe's self-incrimination against penal interest and his/her appearance before the judge support the judge's issuance of the search warrant.

¶ 20 The complaint for search warrant was also sufficiently specific to warrant the judge's belief that defendant possessed narcotics at the home. J. Doe averred to the specific location within the home where defendant kept his narcotics. J. Doe swore in the complaint that he/she had been inside the home and observed various amounts of heroin located on the dresser in the front bedroom.

¶ 21 Moreover, the police corroborated the information provided by J. Doe in the complaint,

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which further supports the judge's finding of probable cause. Defendant's identity was corroborated when Officer Rouba showed J. Doe a photograph of defendant and J. Doe positively identified defendant as having sold J. Doe heroin. J. Doe also stated in the complaint that he/she had known defendant for approximately 10 years. The significant duration of time that J. Doe knew defendant along with J. Doe's purchasing "blow" from defendant provide evidence of the nature of J. Doe's relationship with defendant, thus providing additional indicia of J. Doe's reliability. Additionally, the location of the place to be searched was confirmed when Rouba drove J. Doe past the home and J. Doe positively identified it as the residential family house where he/she purchased the heroin from defendant, furthering J. Doe's reliability.

¶ 22 Defendant relies upon *Florida v. J.L.*, 529 U.S. 266 (2000), and *People v. Brown*, 343 Ill. App. 3d 617 (2003), for his contention that an uncorroborated tip from an anonymous informant, without more, did not amount to reasonable suspicion of wrongdoing and thus did not justify police officers' stopping and frisking defendant. Those cases, however, are inapposite. Neither case involved the level of detailed information provided by J. Doe here. See *J.L.*, 529 U.S. at 271 (the court found the anonymous informant's tip lacked reliability because, without providing any other information, the anonymous caller provided no predictive information and provided the police without means to test the informant's knowledge or credibility where the informant merely reported that a young black male wearing a plaid shirt was standing at a specific bus stop and carrying a gun); and *Brown*, 343 Ill. App. 3d at 626-27 (the appellate court found the anonymous tip was uncorroborated and lacked reliability where the informant merely stated that the defendant was on his way from Chicago with a kilo of marijuana but the informant did not

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provide a specific time or place that the criminal activity would occur). The informants in *J.L.* and *Brown* did not provide any information regarding the basis of their knowledge of the defendants' alleged criminal activity, nor was their information sufficiently predictive. Here, however, J. Doe was not an anonymous informant but was known to the police and appeared personally before the issuing judge, signed the complaint for search warrant before the issuing judge, stating that he or she knew defendant for 10 years, purchased narcotics from him two to three times during the month the warrant was applied for and personally observed narcotics in the home.

¶ 23 Based upon the foregoing, defendant's claim for ineffective assistance of counsel fails because he cannot prove that he was prejudiced by his trial counsel's failure to file a motion to quash the warrant and suppress the evidence. Probable cause to issue the search warrant existed because the information J. Doe supplied to police was reliable and sufficiently detailed and because police adequately corroborated certain details provided by J. Doe. See, e.g., *Smith*, 372 Ill. App. 3d at 184 (weighing the informant's personal observations, the degree of detail offered, police corroboration of the information and the fact that the record did not indicate that the informant testified in support of the warrant).

¶ 24 Defendant next contends that his mittimus should be amended to include a two-year term of MSR, rather than the three-year term of MSR to which he was sentenced. He argues that the two-year term of MSR properly reflects his Class 1 conviction for possession of narcotics, and that sentencing him as a Class X offender is void.

¶ 25 Defendant relies upon *People v. Pullen*, 192 Ill. 2d 36, 43 (2000), for the proposition that

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a three-year MSR term imposed in a case involving sentencing as a Class X offender is void when the underlying offense would require only a two-year MSR period. In support of his argument, defendant argues that although they were decided against him, *People v. Anderson*, 272 Ill. App. 3d 537 (1995), *People v. Smart*, 311 Ill. App. 3d 415 (2000), and *People v. Watkins*, 387 Ill. App. 3d 764 (2009), are unpersuasive authority. He contends that *Anderson and Smart* were decided prior to *Pullen*, and thus are not persuasive authority following *Pullen*. Defendant further contends that *Watkins* is not persuasive because it failed to address or distinguish *Pullen*.

¶ 26 Cases that have been decided after *Pullen* continue to follow *Anderson*, *Smart*, and *Watkins*, and in doing so, reject defendant's position. See *People v. Lampley*, 2011 IL App (1st) 090661-B (December 14, 2011); *People v. Holman*, 402 Ill. App. 3d 645, 652-53 (2010); and *People v. McKinney*, 399 Ill. App. 3d 7, 80-81 (2010). This court in *Lampley* followed the reasoning of *Anderson*, *Smart* and *Watkins* in concluding that a defendant is required to serve the Class X MSR term of three years after being sentenced as a Class X offender. *Lampley*, 2011 IL App (1st) 090661-B, ¶¶ 46, 49. We will not depart from these well-reasoned decisions.

Therefore, we hold defendant's three-year MSR term is not void.

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.