

No. 1-10-2203

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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 18043
)	
ELIECER DEJESUS,)	Honorable
)	John J. Moran, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Steele, P.J., and Salone, J., concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant did not establish ineffective assistance by his trial counsel in failing to utilize a particular theory in support of a motion to suppress where trial counsel's decision to only use one theory was a matter of trial strategy. Charge of \$600 assessed against defendant was vacated where it was not applicable to defendant's situation.

¶ 2 In a bench trial, defendant Eliecer Dejesus was convicted of burglary of a motor vehicle and sentenced to 30 months' probation. Defendant's trial counsel moved to suppress evidence obtained in a search of defendant on the basis that the search was incident to an arrest made without probable cause. On appeal defendant contends that counsel was ineffective because he should have moved to suppress this evidence as the product of a *Terry* search where the police

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officer who performed the pat-down of defendant had no articulable basis for fearing that defendant possessed a weapon and posed a threat to her. Defendant also contends that his trial counsel should have moved to suppress that evidence because when the police officer felt an object in defendant's pocket she had no basis for believing that the object was a weapon and therefore should not have seized it. Finally, defendant contends that the trial court improperly imposed a \$600 "local anti-crime program" charge against him pursuant to a statute which did not apply to him.

¶ 3 At trial, Kevin Klein testified that on the night of November 20, 2009, his car was burglarized while it was parked in back of his Greenview Avenue apartment in Chicago. Klein stated that at about 12:30 that evening he was on the back porch of his first-floor apartment, which overlooked the building's parking lot where his car was parked. That area was lighted by an alley light as well as a spotlight from Klein's building which lighted the entire area. Klein saw that two people were in his neighbor's SUV, which was parked three spots from his car. A man was in the front seat area and a woman was standing by the car, bending over the rear seat area. Klein did not get a good look at the man, who was wearing a hooded sweat shirt, but he described the woman as a "white Hispanic" with curly hair and wearing scrubs. After about a minute these people appeared to notice Klein and they ran to a very large unmarked white van which was parked in the alley. The man entered the driver's side and the woman entered the front passenger side. Klein was able to identify the woman in court as defendant's codefendant, who was being tried in joint bench trials with defendant, but he could not identify defendant as the man he saw that night.

¶ 4 As Klein called 911 he saw that the van had circled around and come back. The van drove off again and again came back, then drove down the alley in the opposite direction. Klein called 911 back to inform them of the new direction taken by the van. He was able to clearly see the female passenger as they passed by. The second time the van came by, it stopped and the man got out and went to the back of the van, saw Klein and got back into the van and drove

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away. Klein could not see his face because he was still wearing the hooded sweatshirt and was in the shadows. During this time Klein noticed that the blinking red security light in his car, which indicated the doors were locked, was no longer on. He went to his car and saw that somebody had broken into it. The center console armrest was open and the wallet he kept there was missing, along with \$85 he had in it. Also, the glove compartment was open and a GPS unit he kept in it was missing. After Klein called 911 again to inform them of the different direction the van had taken, the police met him by his building and drove him one block away to another alley where two suspects were being held. A woman was in a squadrol and a man was in another vehicle. When the police took the woman out of the squadrol, Klein was able to identify her as the same person he had seen in the van. He told the police he could not identify the man and he was not asked to attempt to do so. Klein was subsequently taken to the police station where he identified his wallet and his GPS unit. These items were returned to him along with \$85 in the same denominations he had in the wallet before it was stolen. Klein testified that the description he gave the police in his first 911 call was of a man and a "white Hispanic" woman in a big white van with two double doors.

¶ 5 Chicago police officer Clare Rosado testified that on the night in question she and her partner received the report of a burglary that had just occurred. They also received a description of a man and a woman in a white van. The woman was "white possibly Hispanic," but there was no description of the man. Officer Rosado drove their marked police car to an alley in the vicinity of Klein's building, where she saw a man and woman in a white van driving toward her car. The man was driving. She identified defendant and codefendant as the man and woman she saw that night. The van was one block from Klein's building and was the only vehicle in the vicinity.

¶ 6 Officer Rosado stopped the van by putting on her vehicle's emergency lights and shining a spotlight on it. She and her partner got out of their vehicle and approached the van. According to Officer Rosado, their guns were not drawn. They asked defendant and codefendant to show

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them their hands and to turn off the ignition, which they did. Then they waited for a back-up police vehicle to arrive. When four other officers arrived, defendant and codefendant were asked to get out of the van. Officer Rosado denied that this was done at gunpoint. She had been on the passenger's side where codefendant was, but when a back-up police officer came to her side she went to the other side of the van where she asked defendant to get out of the van, moved him toward the rear of the van, and patted him down to "make sure that he [didn't] have any weapons on him, for security purposes." Officer Rosado testified "What we look for is for anything that might be harmful, hard ***." She described the object she felt in defendant's pocket as large, bulky and hard. She testified that she did not know what it was but she removed it because she did not know if it could be used as a weapon but it was "large enough." When she removed it she found that it was a GPS unit, rectangular in shape and about three inches by four inches or three inches by five inches. She also specifically testified that it could be used as a weapon. Officer Rosado testified that when she looked inside the van she saw a wallet in the console area. The doors to the van were open and it "was obvious" that the wallet was there. Upon inspection she saw that it had Klein's identification in it. The police also recovered a laptop computer from the van. At that location, after discovering the GPS unit in defendant's pocket, Officer Rosado advised defendant of his *Miranda* rights. She then asked him how he got into the car and he told her it was unlocked. Five to ten minutes after the stop of the van, police officers brought Klein to the scene, where he identified codefendant.

¶ 7 Codefendant and defendant were taken to the police station, where Officer Rosado testified that she asked defendant where the laptop computer was taken. He told her it was from a vehicle which Klein had identified as belonging to his neighbor. Klein was also brought to the station, where he identified the wallet and the GPS unit as belonging to him. He also told the police that there had been \$85 in the wallet, and that was returned to him along with the wallet and GPS unit.

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¶ 8 The defense presented no testimony for the trial. But they did put defendant on the stand to testify in support of his motion to quash arrest and suppress evidence, which was being heard simultaneously with the trials of defendant and codefendant, who joined in the motion.

Defendant testified that on the night in question he was driving his father's van down an alley along with codefendant when he was stopped by Officer Rosado and her partner. Officer Rosado's partner told them to turn off the ignition and then obtained defendant's identification and proof of insurance, which she took back to the police car. About five minutes later, police back-up arrived. According to defendant one of those officers, with his gun pointed at defendant, told him to get out of the van and put his hands on the back of the van. Then a second officer, who was not in uniform, patted defendant down and recovered the GPS unit from defendant's pocket. Defendant denied that Officer Rosado ever patted him down, although he did state that she was the one who drove him to the police station. He also testified that she was one of two officers who he saw go into the van.

¶ 9 At the conclusion of defendant's testimony, his counsel argued that defendant's testimony was credible and that it established that he had been arrested when he was ordered out of the van at gunpoint and then subjected to what counsel contended was a search incident to arrest. Counsel argued that the police had no probable cause to arrest defendant at that time and that all the evidence they obtained against him flowed from the seizure of the GPS unit. The trial court denied the motion to quash and suppress as to both defendant and codefendant and then found them both guilty of burglary. Defendant was subsequently sentenced to 30 months' probation and this appeal ensued.

¶ 10 Defendant contends on appeal that trial counsel was ineffective for arguing that he was arrested and searched without probable cause. Defendant asserts that an argument with a reasonable probability of success would have been that he was subject to a *Terry* stop (*Terry v. Ohio*, 392 U.S. 1, 30-31 (1968)) but that the police had no basis for believing that he was armed and therefore the pat down which revealed the GPS unit was illegal. Defendant also argues that

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even assuming the pat down was proper, there was no basis for seizing the GPS unit as a possible weapon. Because trial counsel failed to make these arguments, defendant argues that he received ineffective assistance of counsel and this cause should be reversed and remanded for a new trial at which all evidence flowing from the seizure of the GPS unit would be excluded. In the alternative, defendant contends that the cause should be remanded for a suppression hearing.

¶ 11 Ordinarily, defendant's failure to argue in his motion to suppress at trial or in his motion for a new trial that he was subjected to a *Terry* stop and frisk would constitute a forfeiture of this argument on appeal. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). Defendant avoids a finding of forfeiture if we find that trial counsel was ineffective for failing to make this argument in an alternative motion to suppress. Instead, trial counsel relied solely upon the argument that defendant was the subject of a full-blown arrest, made without probable cause, and an ensuing illegal search incident to arrest. A decision to even file a motion to suppress is ordinarily considered to be trial strategy, to which reviewing courts accord great deference. *People v. White*, 221 Ill. 2d 1, 21 (2006); *People v. Mendez*, 221 Ill. App. 3d 868, 873 (1991). Indeed, matters of trial strategy are virtually immune from claims of ineffective assistance of counsel. *People v. Manning*, 241 Ill. 2d 319, 326-27 (2011). Here we find that trial counsel's decision to file a motion to suppress solely based upon a theory that defendant was subject to an arrest before he was searched was a matter of trial strategy which we will not disturb. Testifying in support of this motion, defendant asserted that he had been ordered out of the van at gunpoint by a back-up police officer and then was immediately subjected to a search. Thus there was direct testimonial support for this argument from defendant. By successfully arguing the motion to suppress based upon this theory, trial counsel would have negated any prosecution argument that under *Terry*, although the police did not have probable cause to arrest defendant, they had an articulable basis for stopping defendant and a reasonable fear for their safety when they searched defendant and seized as a possible weapon a hard object felt in defendant's pocket. *Terry*, 392 U.S. at 30-31. Because we find that trial counsel was engaged in a reasonable trial strategy in making the

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argument that he did in the trial court, we find no basis for a determination that he provided ineffective assistance to defendant.

¶ 12 In sentencing defendant, the trial court assessed a charge of \$600 under a statute authorizing such a charge to reimburse any local anti-crime program for reasonable expenses incurred by that program in defendant's case. 730 ILCS 5/5-6-3.1(c)(12) (West 2010).

Defendant contends that there is no evidence that any such program was involved in his case and the State concedes that defendant was not subject to this charge. Accordingly we vacate the \$600 charge assessed against defendant.

¶ 13 For the reasons set forth in this order we vacate the \$600 anti-crime program charge assessed against defendant, but otherwise affirm the judgment of the trial court.

¶ 14 Affirmed as modified.