

No. 1-10-2857

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 16417
	)	
EMMETT MARSH,	)	Honorable
	)	John T. Doody,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE SALONE delivered the judgment of the court.  
Justices Neville and Murphy concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant failed to establish entitlement to plain error review of claim that the trial court improperly applied the surveillance location privilege, forfeiture of that issue honored; \$200 DNA fee vacated; mittimus corrected; judgment affirmed in all other respects.

¶ 2 Following a bench trial, defendant Emmet Marsh was found guilty of two counts of possession of a controlled substance with intent to deliver and sentenced to current terms of 4 ½ years' imprisonment. On appeal, defendant contends that the trial court improperly applied the surveillance location privilege where the State failed to meet its initial burden, that he was erroneously assessed a \$200 DNA fee, and that the mittimus should be corrected.

¶ 3 Prior to trial, defendant filed a "motion for pre-trial disclosure of surveillance location." Defendant alleged that the State's case rested exclusively on the ability of police to observe the purported narcotics transactions, and that disclosure of the surveillance point "[a]t trial" will be compelled if the allegedly privileged information is material on the issue of guilt. Defendant further alleged that to effectively exercise his right to confrontation, he must investigate the ability of police to observe him, and that pretrial disclosure of the surveillance location "is the only way to effect that investigation."

¶ 4 The State filed a response to defendant's motion alleging that it enjoys a "qualified privilege" regarding the disclosure of secret surveillance locations. The State further alleged that defendant may overcome this privilege by making a strong showing that the disclosure of the location is material or necessary to his defense and that the need for the information outweighs the public's interest in keeping the location secret. The State maintained that the public has an interest in protecting the integrity of the surveillance location for future use and in ensuring the safety of police.

¶ 5 At the proceeding on defendant's motion for pretrial disclosure of the surveillance location, defendant argued that his case falls under *People v. Knight*, 323 Ill. App. 3d 1117 (2001), and that disclosure of the surveillance location was required. He maintained that there is no information regarding the original location where the police spotted him, but that the police allege that he relocated to a vacant lot in the area of 2901 West Flournoy Street. Defendant noted that the officers also alleged that there were three transactions, but that no detailed description was given of the offender other than what he was wearing, a white T-shirt and blue jeans, which was also the clothing description police gave for two of the three buyers.

¶ 6 The State responded that the surveillance officer, Officer Brian McHale, used binoculars, and never lost sight of defendant during the time he conducted the surveillance until the time the

enforcement officers approached and detained defendant. Officer McHale then identified defendant as the person he was watching. The State noted that although a general description was provided of defendant, Officer McHale never lost sight of defendant during the 10 minute surveillance, and defendant was the only person observed going to and from the vacant lot where the narcotics were recovered. The State maintained that this case was similar to *People v. Quinn*, 332 Ill. App. 3d 40 (2002), rather than *Knight*, in that the surveillance officer radioed a description and was able to maintain radio contact with the responding officers until defendant was detained.

¶ 7 An *in camera* hearing was requested at that point, and the court held one in chambers with Officer McHale. Following that, the trial court denied the motion for disclosure of the surveillance location. In doing so, the court noted that it has "done an *in camera* with Officer McHale relating to the surveillance location," listened to the arguments of counsel, considered the pertinent case law, and must balance the need for the flow of information relating to the officer and other public protection and the need for the defense to prepare its case. The court noted that, unlike *Knight*, the surveillance officer, who was also using binoculars, never lost sight of defendant and observed three transactions. After applying the balancing test, the court denied the motion for disclosure of the surveillance location.

¶ 8 At trial, Chicago police officer Brian McHale testified that at 11 a.m. on August 5, 2009, he was conducting a surveillance in the vicinity of 2902 West Flournoy Street in Chicago. His enforcement team consisted of officers John Murphy, Thomas Hanrahan and McGrory. While he was conducting this surveillance, he observed defendant about 150 feet away from him. He had a clear and unobstructed view of defendant who was wearing a white t-shirt and blue jeans, and standing near the corner of Francisco Avenue and Flournoy Street.

¶ 9 During a 10-minute surveillance period, he observed defendant conduct three separate transactions. In the first transaction, a black male wearing a white t-shirt and blue jeans approached defendant, and tendered him money. Defendant then walked to a vacant lot 15 feet away from him at 2902 West Flourney Street, and retrieved an item from underneath a piece of concrete which he then gave to the person who had approached him. About two minutes later, another black male wearing a white t-shirt and blue jeans approached defendant, and tendered him money. Defendant again walked to the vacant lot, retrieved an item from underneath the same concrete slab, and tendered that item to the individual who had approached him. The third transaction was identical to the first two transactions except that the buyer was wearing a tan jacket. Officer McHale noted that throughout the three transactions, there was no other person around the concrete slab in the vacant lot.

¶ 10 Based on his experience and the fact that he was in a high narcotics area, Officer McHale believed that defendant was conducting narcotics transactions. Officer McHale stated that he never lost sight of defendant at any point, and used binoculars periodically throughout his surveillance of defendant. Following the third transaction, Officer McHale contacted his enforcement officers, and then observed them pull up to defendant who dropped something, which Officer Hanrahan recovered. After defendant was detained, Officer McHale relocated to that area.

¶ 11 When Officer McHale was asked by defense counsel if he was in an alleyway conducting the surveillance, the State objected, and the court sustained the objection. In doing so, the court noted that "[o]bviously obstruction, lighting, weather, distance that you are getting into already."

¶ 12 Officer John Murphy testified that on August 5, 2009, he was in constant communication with Officer McHale who relayed information to him to approach defendant. When he did so, he observed defendant exit a vacant lot, and drop a small object to the ground which Officer

Hanrahan recovered. After Officer McGrory detained defendant, Officer Murphy was given a description of the location where defendant was observed recovering narcotics, then went to that vacant lot where he recovered a strip of tape containing ten purple ziplock bags of suspect heroin from underneath a concrete slab. Officer Murphy noted that the packaging, namely, the purple ziplock bags, was the same as the packaging of the item defendant dropped and Officer Hanrahan recovered.

¶ 13 Officer Thomas Hanrahan testified that he approached defendant, who was wearing a white t-shirt and blue jeans, and observed him drop an object to the ground. Officer Hanrahan recovered this item, a purple ziplock bag containing suspect heroin. Officer Hanrahan inventoried this item under number 11748656. Officer Hanrahan testified that Officer Murphy handed him the 10 purple ziplock bags of suspect heroin that he had recovered from under the concrete slab, and he inventoried them under number 11748658. Officer McGrory searched defendant and found \$68 on him.

¶ 14 The parties then stipulated that a proper chain of custody of the recovered suspect heroin was maintained at all times. The parties also stipulated that inventory number 11748658 (10 ziplock bags) tested positive for the presence of 1.1 grams of heroin, and inventory number 11748656 (1 ziplock bag) tested positive for the presence of .2 gram of heroin.

¶ 15 Defendant testified that at the time in question, he was walking down Francisco Avenue to his aunt's house with his friends, Red and Jimmy, when he observed the officers, who just testified, arresting "Calvin" in the 2800 block of Lexington Street. The officers then arrested him. He denied having any drugs on him or selling any drugs, and also denied that his friends had been selling drugs. In rebuttal, the State admitted defendant's prior convictions for manufacture and delivery of cannabis within a 1,000 feet of a school in 2007, for which he was

sentenced to 18 months' probation, and possession of cannabis in 2006 with a sentence of 24 months' probation, which was terminated unsatisfactorily.

¶ 16 At the close of evidence, the court found defendant guilty of two counts of possession of a controlled substance with intent to deliver. In doing so, the court noted that it "will make a specific finding that Officers McHale, Murphy and Hanrahan were credible." Defendant subsequently filed a motion for a new trial, which the court denied.

¶ 17 On appeal, defendant asserts that the trial court improperly applied the surveillance location privilege because the State failed to meet its initial burden of proving that Officer McHale's surveillance location was either on private property with permission of the owner or in a location that is useful and whose utility would be compromised by disclosure. Defendant maintains that his conviction should therefore be reversed and his cause remanded for a new trial because he was denied his right to confront the witnesses against him.

¶ 18 As an initial matter, we observe that defendant has waived this issue due to his failure to raise it in his post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant has acknowledged his failure to properly preserve the issue, but claims that the application of the surveillance privilege amounted to plain error.

¶ 19 The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited error where the evidence was closely balanced or where the error was so egregious that defendant was deprived a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). To obtain relief, defendant must first show that there was clear or obvious error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The burden of persuasion remains with defendant, and the first step in plain error review is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 20 In this case, defendant maintains that the trial court erroneously granted the surveillance privilege because the State failed to meet its initial burden of proving that the surveillance privilege should apply. He claims that the State was required to demonstrate that the surveillance location was either on private property with permission of the owner, or in a location that is useful and whose utility would be compromised by disclosure. Because the State failed to demonstrate either of these factors, defendant maintains that it failed to meet its initial burden, and there was no need for him to overcome the privilege. The State responds that it did not have the initial burden in establishing the surveillance privilege where defendant raised the issue in his pretrial motion to compel disclosure; and, in the alternative, that it met any burden it had in its response to defendant's pretrial motion where it stated that the surveillance point was useful and disclosure would compromise its utility in the future.

¶ 21 A qualified privilege exists for the disclosure of secret surveillance locations. *People v. Criss*, 294 Ill. App. 3d 276, 281 (1998). The surveillance privilege is treated differently when it is raised pretrial as opposed to at trial. *People v. Price*, 404 Ill. App. 3d 324, 332 (2010). The State bears the initial burden of proof when it invokes the privilege at trial, and carries that burden by presenting evidence to the court that the surveillance location was either on private property with permission of the owner or in a location that is useful and whose utility would be compromised by disclosure. *Price*, 404 Ill. App. 3d at 331-32. Once the State meets its initial burden, defendant bears the burden of persuasion, and need only show that the location is relevant and helpful to his defense or is essential to the fair determination of the cause; the trial court then must balance the interests of the State and defendant to determine if the surveillance location privilege is overcome. *Price*, 404 Ill. App. 3d at 332-33.

¶ 22 In a pretrial hearing, on the other hand, defendant must make a strong showing that disclosure of the location is material or necessary to his defense and that his need for the

information outweighs the public's interest in keeping the location secret. *Price*, 404 Ill. App. 3d at 332 citing *People v. Criss*, 294 Ill. App. 3d 276, 280-81 (1998). In other words, he must demonstrate a need for disclosure, not merely speculate that the information might possibly prove useful. *Criss*, 294 Ill. App. 3d at 281. If defendant cannot overcome the surveillance location privilege, he should be permitted to cross-examine police officers' observations with regard to distance, weather, and any possible obstructions. *Criss*, 294 Ill. App. 3d at 281.

¶ 23 Here, relying on *Price*, defendant maintains that the State had the initial burden. In *Price*, however, the State invoked the privilege at trial, and this court found that the State failed to carry its initial burden in making the claim, and the trial court erred in recognizing the privilege.

*Price*, 404 Ill. App. 3d at 333. Unlike *Price*, the surveillance privilege in this case was raised *pretrial by defendant* in a motion titled "motion for pre-trial disclosure of surveillance location."

¶ 24 Furthermore, under the circumstances of this case, the State met whatever burden it may have had where it showed that the location was useful and its utility would be compromised by disclosure when it noted in its response to defendant's motion that it was protecting the location for future use and police safety. In addition, an *in camera* hearing was conducted by the trial court with Officer McHale, after which the court announced the need to balance the interests of the parties, and found, under the facts presented, that disclosure of the surveillance location was unwarranted. Defendant, on the other hand, failed to even show how disclosure of the surveillance location was relevant or helpful to his defense. Under these circumstances, we find no error to excuse his forfeiture of this issue, and affirm.

¶ 25 Defendant next maintains that the \$200 DNA assessment must be vacated because he was previously convicted of a felony and has already submitted a DNA sample. Based on the supreme court's decision in *People v. Marshall*, 242 Ill. 2d 285, 297, 303 (2011), the State agrees that a DNA analysis fee is authorized only where defendant is not currently registered in the

DNA database. Pursuant to our authority under Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we therefore vacate the \$200 DNA assessment, and direct that the trial court's order be modified to that effect.

¶ 26 Finally, defendant contends that the mittimus should be corrected to reflect two convictions for possession of a controlled substance with intent to deliver instead of manufacturing or delivery of a controlled substance. The State maintains that the mittimus correctly reflects the language of the statute defendant violated.

¶ 27 We observe that the indictment shows that defendant was charged, in relevant part, with "possession of a controlled substance with intent to deliver," under sections 401(c)(1) and (d) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(c)(1), (d) (West 2010)). The title of section 401 of the Act is "Manufacture or delivery unauthorized by Act; penalties." However, the actual offenses described in that section include not just manufacture or delivery but also possession with intent to deliver or manufacture. 720 ILCS 570/401(c)(1), (d) (West 2010). We, therefore, order the clerk of the circuit court to correct the mittimus to accurately reflect the offenses of which defendant was convicted, namely, two counts of possession of a controlled substance with intent to deliver (Counts III and IV). *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 28 In light of the foregoing, we affirm the judgment of the circuit court of Cook County, vacate the \$200 DNA fee, and order the clerk of the circuit court to correct the mittimus as instructed.

¶ 29 Affirmed; mittimus corrected.