2012 IL App (1st) 111176-U

FIFTH DIVISION
November 21, 2012

No. 1-11-1176

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. 10 CR 13754
	)	
DWIGHT BROWN,	)	Honorable
	)	John T. Doody, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's claim of ineffective assistance of counsel rejected where his arrest was based on probable cause and therefore he was not prejudiced by counsel's failure to file a futile motion to quash arrest and suppress evidence.

¶ 2 Following a bench trial, defendant Dwight Brown was found guilty of possession of a controlled substance, then sentenced to an extended four-year term of imprisonment. On appeal, defendant contends that his trial counsel was ineffective for failing to file a motion to quash his arrest and suppress evidence based on a lack of probable cause to arrest.

¶ 3 The record shows, in relevant part, that on July 5, 2010, defendant was arrested on a charge of solicitation of unlawful business, a violation of a municipal ordinance. He was subsequently charged by information with two counts of possession of a controlled substance with intent to deliver.

¶ 4 At trial, Chicago police officer Velez testified that about 1:10 p.m. on July 5, 2010, he and his partner, Officer Lewis, were conducting a narcotics surveillance near 4854 West Superior Street in Chicago, which he knows to be a high narcotics area. Both officers were dressed in plain clothes and driving an unmarked police car, which they parked near an alley. Officer Velez exited the car and approached the mouth of the alley, while Officer Lewis remained in the car "watching [his] back." Officer Velez testified that he was using binoculars to conduct his surveillance, and that his attention was drawn to a black man standing on the corner approximately 100 feet away from him, who he identified in court as defendant.

¶ 5 Officer Velez further testified that he saw a black, four-door vehicle approach the corner of Superior and Lamon, which defendant waved down, yelling, "blows, blows." Officer Velez testified that he has been a police officer for seven years and has made over 1,500 narcotics-related arrests. Based on his experience, he knows the term "blows" to be street terminology for the sale of heroin.

¶ 6 Officer Velez further testified that he saw defendant approach the driver's side of this vehicle and engage the driver in a brief conversation, which he could not hear. He then saw the driver give defendant money in the form of multiple bills, which defendant counted and placed in his right, front pocket before retrieving a baggie from his rear waistband with his left hand. As Officer Velez watched, defendant manipulated the baggie and tendered a small item that was roughly the size of a quarter, to the driver of the vehicle, who then drove away.

¶ 7 After making these observations, Officer Velez ran back to his vehicle and informed Officer Lewis of what he had observed. They drove eastbound in the alley, where Officer Velez saw defendant in the same area where he had previously been standing. Defendant looked in their direction, then quickly walked away and ascended the stairs to the porch of a nearby building. Officers Velez and Lewis approached defendant and placed him in custody for solicitation, performing a brief pat down at that time, which did not yield any narcotics. Their attempt to search defendant's waistband area proved difficult because defendant was handcuffed with his hands behind his back, and so they transported him to the police station.

¶ 8 Officer Lewis testified that he conducted a custodial search of defendant at the police station and recovered one plastic bag containing 13 bags of suspect heroin from his rear waistband area and $46 from his right, front pocket. The narcotics and money were inventoried by Officer Jones and sent to the crime lab for testing.

¶ 9 The parties stipulated that forensic chemist Penny Evans tested 6 of the 13 items inventoried in this case and, in her expert opinion, determined that those items tested positive for the presence of heroin and weighed 1.1 grams. The total estimated weight of all 13 packets was 2.4 grams. The parties further stipulated that a proper chain of custody of this material was maintained at all times.

¶ 10 The court found defendant guilty of the lesser included offense of possession of a controlled substance. On appeal, defendant seeks reversal of that conviction, solely contending that because he was arrested without probable cause, his trial counsel was ineffective for failing to file a motion to quash his arrest and suppress the evidence attendant thereto.

¶ 11 To establish ineffective assistance of counsel, defendant must show both that counsel's performance was deficient and that he suffered prejudice as a result of that deficiency. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). If such a claim can be disposed of on the ground that

defendant did not suffer prejudice, this court need not consider whether counsel's performance was deficient. *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992). To establish prejudice based on counsel's failure to file a motion to quash arrest and suppress evidence, defendant must, *inter alia*, show a reasonable probability that such a motion would have been granted. *Givens*, 237 Ill. 2d at 331. Where the motion would have been futile, counsel's failure to file a motion to suppress does not establish incompetent representation. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). In this case, the dispositive question is whether a motion to quash arrest and suppress evidence probably would have been granted, and our review is *de novo*. *People v. Bailey*, 375 Ill. App. 3d 1055, 1059 (2007).

¶ 12 The existence of probable cause is determined at the time of the arrest and depends on whether the facts known to the police officer at that time are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime. *People v. Love*, 199 Ill. 2d 269, 279 (2002). Probable cause does not require a showing that the officer's reasonable belief was correct or more likely true than false that defendant was involved in criminal activity, and an officer may rely on his training and experience in drawing inferences and making deductions. *People v. Jones*, 215 Ill. 2d 261, 274, 277 (2005). The existence of probable cause is based on the totality of the circumstances at the time of the arrest, and that determination is governed by common sense considerations. *People v. Jackson*, 232 Ill. 2d 246, 275 (2009).

¶ 13 The record here shows that defendant was initially taken into custody for solicitation of unlawful business. Pursuant to the Municipal Code of Chicago, no person may "stand upon, use or occupy the public way to solicit any unlawful business," and specifies that "unlawful business" includes the illegal sale of narcotics and that "'soliciting' may be by words, gestures, symbols or any similar means." Chicago Municipal Code § 10-8-515(a), (b) (added Apr. 1, 1998).

¶ 14 The evidence, taken as a whole, shows that Officers Velez and Lewis were conducting a narcotics surveillance in an area that was known to have a high concentration of narcotics activity. In that endeavor, Officer Velez observed defendant flag down an approaching vehicle yelling, "blows, blows," which, Officer Velez knew from his police experience, is a term used for the sale of heroin. Officer Velez then observed defendant make a hand-to-hand transaction with the driver of that vehicle, where money was exchanged for an item roughly the size of a quarter which defendant retrieved from a baggie in his rear waistband. Based on these actions and circumstances, it was reasonable for Officer Velez to infer that defendant had solicited the sale of narcotics and thereby establishing probable cause for his arrest. *Love*, 199 Ill. 2d at 279-80.

¶ 15 Defendant maintains, nevertheless, that at the time of his arrest, the police "at most" had reasonable suspicion to detain him, but did not have probable cause to arrest him based on hearing him yell "blows, blows" at a passing car and witnessing one exchange of money for an unknown object with the car's driver. In doing so, he relies on *People v. Grant*, 2011 IL App (1st) 091107,[1] a case in which defendant was arrested for violating the same ordinance that is at issue in this case.

¶ 16 In *Grant*, defendant was observed yelling, "dro, dro," at passing cars in an area that was known as a "weed spot," but was not observed engaging in any transactions. *Grant*, 2011 IL App (1st) 091107, ¶ 4. One of the arresting officers testified that he knew "dro" to be a term meaning cannabis. *Grant*, 2011 IL App (1st) 091107, ¶ 6. A custodial search of defendant yielded numerous plastic baggies of suspect cannabis, and a more thorough search conducted at the police station yielded numerous baggies of suspect crack cocaine as well as $160. *Grant*, 2011 IL App (1st) 091107, ¶¶ 5, 7. The sixth division of this court held that the circuit court erred in

[1] We note that a petition for leave to appeal in *Grant* was granted and is currently pending before the Illinois Supreme Court. 2011 IL App (1st) 091107, *appeal allowed*, No. 112734 (Sep. 28, 2011).

denying defendant's motion to quash arrest and suppress evidence because probable cause to justify the arrest was not established. *Grant*, 2011 IL App (1st) 091107, ¶ 35.

¶ 17 Since *Grant* was decided, the third division of this court declined to follow the holding of the majority and agreed with the dissent. *People v. Neal*, 2011 IL App (1st) 092814, ¶ 16. In *Neal*, as here, defendant was arrested for soliciting unlawful business after being observed repeatedly yelling the word "blows," to passers-by in what the arrest report indicated was a "high gang and narcotics area." *Neal*, 2011 IL App (1st) 092814, ¶ 2. The trial court denied defendant's motion to quash arrest and suppress evidence, finding that his arrest was based on probable cause. *Neal*, 2011 IL App (1st) 092814, ¶¶ 4-5. This court affirmed that ruling, finding that the overt action of yelling "blows," along with the testimony of an experienced officer with hundreds of narcotics arrests, supported the finding of probable cause for defendant's arrest for violating the ordinance prohibiting the solicitation of the sale of narcotics. *Neal*, 2011 IL App (1st) 092814, ¶¶ 14, 16. We agree with the reasoning in *Neal*, and under the specific facts and circumstances of this case, we reach the same conclusion. The composite of defendant's overt actions as imparted by an experienced police officer, supports the finding of probable cause for defendant's arrest for violating the ordinance prohibiting solicitation of the sale of narcotics and distinguishes this case from *Grant*.

¶ 18 In reaching this conclusion, we have also examined *People v. Little*, 322 Ill. App. 3d 607 (2001), cited by defendant, and find that it does not require a contrary conclusion. In *Little*, defendant was arrested after police observed two separate occasions where unidentified people approached defendant, who stood near the street, and gave him money in exchange for an unknown item that defendant would retrieve from his pants pocket. *Little*, 322 Ill. App. 3d at 611. On appeal, this court held that trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence, which would have had a reasonable probability of success.

Little, 322 Ill. App. 3d at 613. Here, unlike *Little*, defendant was arrested for solicitation of unlawful business, and the issue was whether the officers could believe that defendant *solicited* the sale of narcotics. *Neal*, 2011 IL App (1st) 092814, ¶ 14. The State's evidence showed that defendant engaged in an overt attempt to solicit the sale of narcotics by flagging down a car by yelling, "blows, blows," and then interacted with the driver in what could reasonably be interpreted as a narcotics transaction, thereby providing Officers Velez and Lewis with probable cause to arrest defendant.

¶ 19 In light of this evidence, we conclude that a motion to quash arrest and suppress evidence would not have succeeded, if filed, and that counsel cannot be deemed ineffective for failing to do so. *Bailey*, 375 Ill. App. 3d at 1077.

¶ 20 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 21 Affirmed.