

No. 1-11-2027

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. 11 CR 1518
)	
JAWAN ROBINSON,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where probable cause to arrest existed and the search of the defendant's person was a lawful search incident to arrest, there was no reasonable probability that a motion to quash arrest and suppress evidence would have been granted, and trial counsel was not ineffective for failing to make such a motion.
- ¶ 2 Following a bench trial, defendant Jawan Robinson was convicted of robbery and sentenced to three years in prison. On appeal, the defendant contends that he received ineffective assistance of counsel in that counsel failed to file a motion to quash his arrest and suppress evidence flowing from an illegal search of his person.
- ¶ 3 For the following reasons, we affirm.
- ¶ 4 The defendant was charged with the armed robbery of Raymond Richard (Richard). At trial, Richard testified that about 2:30 a.m. on January 9, 2011, he arrived at the CTA's Pulaski Blue Line

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"L" station to begin his commute to work. There were two other people at the station: a security guard in the booth; and a man inside the turnstiles. In court, Richard identified the man inside the turnstiles as the defendant. He stated that the area was well-lit and he could see the defendant's face. He noted that the defendant was wearing jeans and a black and red sports jacket with a hood. Richard asked the defendant whether the train went by yet, and the defendant answered, "Depends which way." Instead of asking any follow-up questions, Richard paid his fare using his seven-day bus pass, went through the turnstile, and started down the ramp toward the platform.

¶ 5 Richard testified that when he was about halfway down the ramp, he felt something hard hit the back of his head. He put his hand on his head and felt "like cylinders to a gun." He turned quickly and saw the barrel of a gun. He also saw that the defendant was holding the gun. Richard put his hands out slowly and said that he did not have any money. The defendant told Richard to give him "something," so Richard reached into his pocket and took out his cell phone, bus pass, and \$7. The defendant took the items and told Richard to continue down the ramp.

¶ 6 Richard testified that he heard footsteps going the other way, and by the time he turned around, the defendant was heading north on Pulaski. Richard went back up the ramp and told the security guard he had been robbed. The guard called the police, who arrived at the scene shortly thereafter. Richard told the police what happened. While he was talking to the police, Richard noticed a person by the gas station on Pulaski about half a block north of the "L" station. When asked about that person in court, Richard pointed to the defendant and said, "I seen that person, because I seen the same jacket."

¶ 7 The police asked Richard to make an identification of the defendant. Richard agreed, and the police drove him to the man he had noticed at the gas station. Richard stated that the man at the gas station was the defendant. As to what happened next, Richard stated, "And after doing a routine, I guess, you know, checking, check to see if that was the guy, and they asked me was that him, but I was still sitting in the car though, and they had got the things, the items that I had --." When asked

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where he was when he saw his cell phone again that morning, Richard answered, "At first when they searched him and they had the items and said, is that it, and -- no, at the police station. The police station." Richard then identified photographs of a cell phone, a seven-day bus pass, and \$7 as the items that were taken from him during the robbery.

¶ 8 On cross-examination, defense counsel asked Richard whether the police searched the defendant in front of him. Richard answered, "They had already searched him before I got there." Richard also stated that when the police drove him to the defendant, the police had the defendant in handcuffs.

¶ 9 Chicago police officer Borkowski (Officer Borkowski) testified that shortly after 2:30 a.m. on January 9, 2011, he and his partner received a call to assist other officers who had responded to the robbery. Officer Borkowski and his partner toured the area looking for anyone who fit the description of the offender: a black male wearing a black jacket and black jeans. They saw such a person just north of a gas station on Pulaski and detained him. In court, Officer Borkowski identified that person as the defendant.

¶ 10 Officer Borkowski testified that Richard was brought to them in the back of a squad car, and that he positively identified the defendant as the person who robbed him. The defendant was taken into custody. Officer Borkowski's partner searched the defendant on the scene and recovered a cell phone, a bus pass, and \$7 from the defendant. Later, at the police station, Richard identified these items as his property.

¶ 11 Chicago police detective Peter Maderer (Detective Maderer) testified that he conducted several custodial interviews with the defendant on the morning in question. During the first conversation, he read the defendant his *Miranda* rights and confronted him with the allegation against him. The defendant denied having been at the "L" station that morning and claimed he bought the recovered cell phone from someone on the train. During a second conversation about an hour later, Detective Maderer told the defendant that the "L" station had video surveillance cameras.

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After receiving this information, the defendant eventually admitted he had been involved in a robbery that day. The defendant told Detective Maderer that he approached a man walking down the ramp, put his own cell phone against the man's ear, demanded property, took the man's phone, bus card, and cash, and then fled. Detective Maderer testified that the video surveillance was later recovered by another detective.

¶ 12 The parties stipulated that if called to testify, Chicago police detective Cibis would have stated that he received a CTA surveillance video showing the defendant both entering the Pulaski station's turnstile around the time of the robbery and leaving through the turnstile. The video, which depicted only the turnstile area, was not admitted into evidence at trial.

¶ 13 After the State rested, the defendant made a motion for a directed finding. The trial court found that a question existed as to whether a gun was used during the offense, and concluded that the defendant would remain on trial for the lesser included offense of robbery.

¶ 14 The defendant rested without presenting any witnesses. Following argument, the trial court found the defendant guilty of robbery. Subsequently, the court sentenced the defendant to three years in prison.

¶ 15 On appeal, the defendant contends that defense counsel was ineffective for failing to file a motion to quash arrest and suppress evidence. The defendant argues that his initial detention by the police was a *Terry* stop, but that the detaining officers' evidentiary search of his person exceeded an allowed *Terry* pat-down search for officer safety. See *Terry v. Ohio*, 392 U.S. 1 (1989). Rather, the defendant argues, the officers conducted an improper evidentiary search of his person that was not supported by probable cause to arrest. The defendant asserts that because the search was improper, the items recovered from his person, Richard's show-up identification of him, and his custodial statement would have been subject to suppression as fruit of the poisonous tree. According to the defendant's argument, because a motion to suppress would have had a reasonable probability of success and the evidence flowing from the illegal search constituted nearly the entirety of the State's

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case, it was unreasonable for counsel not to file a motion to quash arrest and suppress evidence.

¶ 16 As an initial matter, we note that the State argues that it is fundamentally unfair for the defendant to raise this issue on direct appeal, since the legality of the search was not questioned below, minimal evidence on the issue was adduced during trial, and therefore, the record on appeal is necessarily incomplete. It is true that in some cases, the trial record is insufficient to assess the propriety of a search when a defendant challenges his trial counsel's failure to file a motion to quash arrest and suppress evidence. See *People v. Vasser*, 331 Ill. App. 3d 675, 681-82 (2002). However, in the instant case, as explained below, we find that the evidence at trial was sufficient to establish a finding of probable cause. Accordingly, we need not address the State's reviewability argument. See *Vasser*, 331 Ill. App. 3d at 682.

¶ 17 The standard for a claim of ineffective assistance of counsel has two prongs: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. In order to establish this prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶ 18 Generally, the decision whether to file a motion to suppress evidence is considered a matter of trial strategy that is immune from ineffective assistance claims. *People v. Deloney*, 359 Ill. App. 3d 458, 466-67 (2005). To succeed on a claim of ineffectiveness based on the failure to file a motion to quash arrest and suppress evidence, a defendant must demonstrate a reasonable probability both that the motion would have been granted and that the outcome of the trial would have been different if the evidence had been suppressed. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000).

¶ 19 "Probable cause to arrest exists when the facts known to the officer at the time of the arrest

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are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime.' " *People v. Jackson*, 232 Ill. 2d 246, 275 (2009) (quoting *People v. Wear*, 229 Ill. App. 3d 563-64 (2008)). The totality of the circumstances at the time of the arrest determines whether probable cause exists. *People v. Love*, 199 Ill. 2d 269, 279 (2002). The standard for determining whether probable cause exists is probability of criminal activity, not proof beyond a reasonable doubt. *People v. Lee*, 214 Ill. 2d 476, 485 (2005).

¶ 20 In the instant case, Officer Borkowski testified that he and his partner received an assist call shortly after the robbery took place. They responded to the area and stopped the defendant, who matched the general description of the offender. According to Officer Borkowski, Richard was brought to them and positively identified the defendant as the person who robbed him. The defendant was then taken into custody and searched by Officer Borkowski's partner on the scene.

¶ 21 Given the totality of the circumstances as described by Officer Borkowski, we find that at the time of arrest, a reasonably cautious person would believe that the defendant had committed a crime. Therefore, at the time Officer Borkowski's partner searched the defendant, there was probable cause to arrest the defendant and the search of the defendant's person was a lawful search incident to arrest. The defendant has not demonstrated a reasonable probability that a motion to quash arrest and suppress evidence would have been granted. In light of the defendant's failure to make this showing, we need not consider whether the trial's outcome would have been different had the motion been granted.

¶ 22 The defendant makes much of Richard's testimony describing what occurred after the police asked him to identify a suspect and drove him to the location where the defendant was detained. On direct examination, Richard stated, "And after doing a routine, I guess, you know, checking, check to see if that was the guy, and they asked me was that him, but I was still sitting in the car though, and they had got the things, the items that I had --." In addition, when asked where he saw his cell phone again that morning, Richard answered, "At first when they searched him and they had the

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items and said, is that it, and -- no, at the police station. The police station." Later, on cross-examination, when asked whether the police searched the defendant in front of him, Richard answered, "They had already searched him before I got there." Richard also stated on cross-examination that "when the police brung [*sic*] me down to ID him, they had him in handcuffs." According to the defendant, if Richard's account is believed, it means the detaining officers carried out an evidentiary search and seized the recovered items before Richard made the identification that provided probable cause.

¶ 23 In our view, Richard's testimony gives little or no insight into the issue of when the officers conducted the evidentiary search. First, if we assume that Richard's initial statement listed events in chronological order, it would appear that the officers first "asked me was that him," and then "got the things, the items that I had." That conclusion is bolstered by Richard's second statement on direct examination, in which he said twice that he was at the police station before he saw his cell phone. As for Richard's statement on cross that "They had already searched him before I got there," this assertion is conclusory, and in any case, does not identify what kind of search Richard assumed had already taken place. Finally, while Richard's statement that the defendant was in handcuffs when he was asked to make an identification was clear, it does not speak to the timing of the evidentiary search. In these circumstances, we cannot agree with the defendant that Richard's testimony indicates the officers subjected the defendant to an evidentiary search prior to having probable cause.

¶ 24 A motion to quash arrest and suppress evidence in the instant case would not have succeeded. Accordingly, defense counsel was not ineffective for failing to file and pursue what would have been a futile motion. See *People v. Rucker*, 346 Ill. App. 3d 873, 889 (2004); *Rodriguez*, 312 Ill. App. 3d at 926. The defendant has not overcome the strong presumption that counsel's decision not to file a motion to quash arrest and suppress evidence was the product of sound trial strategy. Because the defendant has failed to establish that trial counsel's performance was deficient, we need not consider whether prejudice resulted from counsel's actions.

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

¶ 26 Affirmed.