

No. 1-11-2589

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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. 08 CR 6641
	)	
RANDY WILLIAMS,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Hyman and Justice Mason concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant was not prejudiced by counsel's inability to present evidence of officer's prior statement that contradicted his trial testimony, defendant could not establish ineffective assistance of counsel; the judgment of the trial court was affirmed.

¶ 2 Following a bench trial, Randy Williams, the defendant, was convicted of possession of cocaine with intent to deliver. Due to his criminal background, the trial court imposed a Class X sentence of nine years in prison. On appeal, defendant contends his conviction should be reversed and his case remanded for a new trial because his counsel provided ineffective assistance when he

did not have a prover present during a pretrial interview with a police officer who stated that, while conducting surveillance, he observed defendant engage in several drug transactions, therefore preventing counsel from impeaching the officer's account. We affirm.

¶ 3 Before trial, the defense filed a motion asking the State to disclose the surveillance location used in defendant's arrest. The State filed a response to that motion but later complied with the defense's request. The pretrial disclosure as to the police surveillance location is not contained in the record.

¶ 4 Also before trial, defense counsel filed a motion to quash defendant's arrest and suppress evidence asserting that the police lacked probable cause to search defendant. Counsel later withdrew that motion.

¶ 5 At trial, Chicago police officer Erich Rashan testified that at about 7:45 p.m. on March 12, 2008, he was conducting surveillance with a team assigned to "track down a burglary offender" and was in a backyard at 9600 South Merrill in Chicago.

¶ 6 Rashan observed a dark blue Oldsmobile parked within 30 feet of him and identified defendant in court as the driver. The officer witnessed defendant and a female passenger in defendant's car complete what he believed was a drug transaction with a person standing outside the vehicle. Rashan testified that the person outside the car handed the passenger what appeared to be money, and defendant reached toward the floor of his vehicle and handed the person a white item the size of a golf ball.

¶ 7 Rashan reported his observation to his partner, Chicago police officer Robert McHale. When defendant drove away from Rashan's location, he was stopped by McHale. Rashan arrived at the scene of the stop and identified defendant and the female in the car as the participants in the drug sale he had just observed. When defendant and his passenger, Erica Berry, were at the police station, Rashan heard defendant tell Berry he was sorry for getting her involved in the "dope."

¶ 8 On cross-examination, defense counsel showed Rashan a photograph and asked if that was the house he was standing behind when he observed the transaction. Rashan said he could not recall; he stated many of the houses in that area "look very similar." Defense counsel asked the officer how far it was from the house to the curb, and Rashan replied, "To the curb? Twenty feet maybe."

¶ 9 The State objected to the relevance of the defense's question, and defense counsel stated he would be able to "tie up that this is the house and I will be able to tie up through other witnesses this is the exact location according to the arrest report." The court stated it would "overrule the objection based on the promise to tie [the impeachment] up."

¶ 10 Defense counsel continued to question Rashan about his distance from the vehicle, and Rashan again stated he was "approximately 30 feet away from the vehicle." Rashan stated that he did not think the photograph showed his location but, instead, was depicting the "general location across the street from where I was."

¶ 11 Counsel asked if Rashan remembered that counsel had filed a motion to have the location of the officer's surveillance disclosed before trial, and if he recalled a previous conversation they had regarding the officer's "point of surveillance." Rashan said he did, and the following colloquy occurred:

"Q. Do you recall you telling me that you were in the gangway at 9601 through 9630 on Merrill?

A. No.

Q. Do you recall telling me that the vehicle was on the west side of the street and you were on the east side of the street?

A. No.

Q. Do you recall telling me that at that time you were approximately 50 to 60 feet away from the car that pulled up?

A. No.

Q. According to your testimony today, you said that while you were in this surveillance you saw an unknown male black come up to the passenger side of the vehicle, am I correct?

A. That is correct."

¶ 12 After defense counsel further questioned Rashan, the officer stated on redirect examination that he estimated the distance from his surveillance point to the defendant's vehicle but that he "could see [the occupants] very clearly."

¶ 13 McHale testified that he performed a stop on defendant's car, which also contained a female passenger. McHale placed defendant in custody for not having a driver's license and conducted a patdown search of defendant. From inside defendant's sock, the officer recovered a plastic bag containing 12 smaller bags of suspect crack cocaine. No money was recovered from defendant; however, more than \$700 in cash was recovered from Berry. Berry consented to a search of her residence, where McHale recovered an American Tourister bag containing two shoe boxes of suspect cocaine and two different types of suspect cannabis. Both officers testified that defendant described one type of cannabis as "kush" that he received from Arizona or California that sold for \$20 a bag, as opposed to the standard \$10.

¶ 14 McHale stated on cross-examination that he did not know Rashan's surveillance location on the night of defendant's arrest. Defense counsel asked McHale if he recalled the motion filed to obtain that location, and the court asked counsel if he was attempting to elicit from McHale an earlier statement made by Rashan in McHale's presence, in which Rashan told counsel of the location of his surveillance. Counsel stated that where Rashan "said he was at the time" differed from where Rashan stated at trial. The following exchange then occurred:

"THE COURT: So, are you basically calling Officer McHale as your prover?

MR. INGLES [defense counsel]: He was there. Whether or not it will work out that way, I don't know, but he was present and what I was told I wrote right on the front of my file and see if he will recall.

THE COURT: So, you are asking him basically as your prover because you can't testify to that?

MR. INGLES: Correct."

¶ 15 The State objected that defense counsel was not attempting to perfect impeachment but instead sought to elicit the surveillance location. The court overruled the State's objection, noting that defense counsel sought to use McHale as a prover of Rashan's statement describing his surveillance location but that McHale could not have testified as to where Rashan's location was. The court stated McHale could testify "as to what he recalls Officer Rashan saying in terms of the location." The cross-examination of McHale continued:

"Q. Officer, you recall when we had this case originally in Judge Wasilewski's courtroom, am I correct?

A. Vaguely I recall.

Q. You recall that there was a time when there was a female prosecutor on the case, a light-skinned black woman named Notasha?

A. I remember her as the [p]rosecutor; yes.

Q. Do you remember that she agreed to allow the point of surveillance to be disclosed and you and your partner were present

when your partner Rasha [*sic*] told me what his location was? Do you recall that?

A. No.

Q. Do you recall anything about him disclosing where his location was?

A. No.

Q. And you have no idea where he was at, am I correct?

A. I know where he said he was at. I didn't see him myself.

Q. Where was that?

MR. HANICHAK [Assistant State's Attorney]: Objection.

THE COURT: Sustained."

¶ 16 The defense completed its cross-examination of McHale as to his stop and arrest of defendant.

¶ 17 The parties stipulated that the substances recovered were inventoried separately and were found to be cocaine and cannabis. Of the 12 small bags recovered from defendant's sock, two of the bags tested positive for 6.5 grams of cocaine. The substances in the bag recovered from Berry's residence were determined to be cocaine and at least 31.9 grams of cannabis.

¶ 18 Before the defense presented its case, the trial court granted defendant's motion for a directed finding on the count pertaining to the cocaine that was recovered from the residence. However, after reviewing the testimony of both officers in detail, the court denied the motion as to the cocaine recovered from defendant and the cannabis that was found in the residence.

¶ 19 In the defense case, Nushun Waters testified that on the night in question, he was sitting in the front room of his house at 2182 East 96th Street, which is next door to 9600 South Merrill, at about 7:30 p.m., which was 15 minutes before the officer witnessed the transaction. Waters said

defendant arrived at Waters' house and Waters let him in. Waters saw defendant's car parked in the driveway with a female passenger sitting inside. Waters was getting a haircut at his home and testified that defendant was also there for a haircut. When defendant was told there would be a 15- to 30-minute wait, defendant left and did not return. Waters testified he did not see anyone approach defendant's car or witness any drug activity in the area that night.

¶ 20 On cross-examination, Waters said he had known defendant since kindergarten. Waters acknowledged he had discussed his testimony with defendant, that they had traveled together to court that day, and that defendant asked him to be a witness. Waters sat in the dining room facing a window while getting his hair cut, and he said he could not see what was next to his house from that vantage point. Waters said defendant was present for 5 or 10 minutes.

¶ 21 Defendant testified that at the time of the offense, he lived at 9533 South Bennett. He said that between 7:30 and 7:45 p.m. on the day in question, he was with a female and went to Waters' house to get a haircut. Defendant spoke for a "few minutes" to Waters and the hairstylist and left shortly thereafter. He said he was stopped by police on East 97th Street but denied participating in any drug transaction or having narcotics in his possession.

¶ 22 To impeach defendant's testimony, the State entered evidence that defendant had two prior felony convictions within the past 10 years: a Class 2 felony of possession of a controlled substance with intent to deliver and a Class 1 voluntary manslaughter.

¶ 23 After closing arguments, the court found defendant guilty on two counts: (1) possession of between 1 and 15 grams of cocaine with intent to deliver, and (2) possession of between 30 and 500 grams of cannabis with intent to deliver. The court noted the officers' testimony in detail and contrasted it to the accounts of Waters and defendant, stating that it found the "testimony of the State's witnesses to be more credible." The court denied defendant's motion for a new trial and imposed a sentence of nine years in prison on the cocaine-related conviction only.

¶ 24 On appeal, defendant contends his counsel provided ineffective assistance when he failed to have a prover present when Officer Rashan told him of his surveillance location. Defendant argues that Rashan's trial testimony that he was within 30 feet of defendant's car differed from his pretrial account that he was 50 to 60 feet away from defendant's vehicle, and defense counsel was unable to impeach Rashan at trial with his earlier statement.

¶ 25 The foundation of defense counsel's purported impeachment is speculative; counsel raises this argument, as he told the court, based on his recollection that he "wrote [Rashan's prior statement] right on the front of [his] file." We note that a claim such as this, which involves matters that are outside the record on direct appeal, is more properly considered in a petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)). See *People v. Millsap*, 374 Ill. App. 3d 857, 863 (2007) (where a defendant's claim of ineffective assistance of counsel involves matters outside of the record, that claim can be addressed in a post-conviction proceeding because a complete record can be made).

¶ 26 The State points out that McHale was present during the statement at issue, as demonstrated by McHale's testimony, and that a prosecutor, who was previously assigned to the case, also may have been present. However, defense counsel's attempt to use McHale as a prover was unsuccessful, and counsel did not try to present the previous prosecutor as a prover. We therefore consider defendant's contention that counsel's incomplete attempt to impeach Rashan, including counsel's decision not to take the stand himself to testify to Rashan's prior statement, constituted ineffective assistance.

¶ 27 Claims of ineffective assistance are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which holds that to prevail on an ineffectiveness claim, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Id.* at 687. More precisely, the defendant must demonstrate that counsel's

performance was objectively unreasonable under prevailing professional norms and, furthermore, there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; see also *People v. Domagala*, 2013 IL 113688, ¶ 36.

¶ 28 The standard for judging any ineffectiveness claim is whether counsel's actions so undermined the adversarial process that the defendant's trial cannot be relied upon as having produced a just result. *Strickland*, 466 U.S. at 696. In establishing actual incompetence, a defendant cannot rely upon speculation as to the outcome of his case, and the fact that another attorney might have acted differently is not an indication of incompetence. *People v. Robinson*, 70 Ill. App. 3d 24, 27 (1979). The examination or impeachment of a witness is generally considered to be trial strategy, which does not support a claim of ineffective assistance of counsel. *People v. Lacy*, 407 Ill. App. 3d 442, 463 (2011). "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997).

¶ 29 Defendant argues his counsel could have impeached Rashan with his prior statement that he was farther away from defendant's vehicle than he stated in his trial testimony. When assessing the importance of the failure to impeach for purposes of a *Strickland* claim, the "value of the potentially impeaching material must be placed in perspective." *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989); *People v. Brown*, 371 Ill. App. 3d 972, 978 (2007).

¶ 30 At trial, Rashan testified that he was within 30 feet of defendant's car. Defense counsel maintains that Rashan told him during a pretrial discussion that he was 50 to 60 feet away from defendant's car. Defendant's ineffectiveness claim fails because there is simply no reasonable probability that but for counsel's failure or inability to impeach Rashan as to that distance, assuming such impeachment was possible, the result of the trial would have been different. See *People v.*

*Graham*, 206 Ill. 2d 465, 476 (2003) (reviewing court may reject an ineffective assistance claim without reaching the performance prong if it is determined the defendant has not satisfied the prejudice requirement).

¶ 31 Rashan testified that he saw the drug transaction, and McHale testified that he recovered 12 small bags of cocaine in defendant's sock in addition to more than \$700 from Berry, the female passenger. Rashan further testified that at the police station, he heard defendant apologize to Berry for getting her involved. Defendant, who was nearly 30 years old at the time of trial in June 2011, presented the testimony of Waters, who had been his friend since kindergarten. Defendant had asked Waters to be a witness. Waters and defendant had discussed their testimony before trial and traveled together to the court on the day of their testimony. Waters and defendant agreed that defendant was in the vicinity of the drug sale at the relevant time and that a female passenger was in defendant's car. Waters and defendant maintained that defendant came to Waters' house to get a haircut but defendant left when told there would be a 15- to 30-minute wait. The trial court expressly found the State's witnesses credible:

"In considering the totality of the testimony, I find the Defense testimony would not only as the State [has] argued have caused the officers to put words in the Defendant's mouth, but also to plant the drugs on him and apparently have no reason in the world to stop that particular car other than the Defendant was not able to get his haircut at the time."

¶ 32 In light of these findings, defendant has not, and cannot, establish that the outcome of the trial would have changed if defense counsel had impeached Rashan about the distance from his surveillance point to the location of defendant's car.

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¶ 33 For all of the reasons stated above, defendant's claim of ineffective assistance of counsel is rejected. Accordingly, the judgment of the trial court is affirmed.

¶ 34 Affirmed.