

NOTICE  
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2013 IL App (4th) 120233-U  
NO. 4-12-0233  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

FILED  
August 20, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
DURRELL D. SIVELS,	)	No. 11CF577
Defendant-Appellant.	)	
	)	Honorable
	)	Patrick W. Kelley,
	)	Judge Presiding.

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JUSTICE HOLDER WHITE delivered the judgment of the court.  
Justices Appleton and Pope concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The appellate court affirmed, concluding (1) trial counsel's failure to file a motion to suppress evidence did not constitute ineffective assistance of counsel when the motion would have been futile and (2) the trial court did not abuse its discretion in imposing defendant's sentence.
- ¶ 2 In July 2011, the State charged defendant, Durrell D. Sivels, by information with unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). During a December 2011 trial, the jury heard evidence that officers, driving an unmarked vehicle, observed defendant walking down the street. Defendant, upon seeing the vehicle, immediately fled the area, despite an officer's commands to stop. The officers, who acknowledged defendant was engaged in no illegal conduct, pursued defendant on foot. After apprehending defendant, an officer discovered a handgun along defendant's path of flight.
- ¶ 3 Following deliberations, the jury found defendant guilty. After a February 2012

hearing, the trial court sentenced defendant to 10 years in the Illinois Department of Corrections (DOC).

¶ 4 Defendant appeals, asserting (1) trial counsel's failure to file a motion to suppress the recovered handgun constituted ineffective assistance of counsel and (2) the trial court erred in considering inappropriate evidence in aggravation at the sentencing hearing. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 In July 2011, the State charged defendant by information with one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) and two counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) (West 2010)).

¶ 7 A. Fitness Examination

¶ 8 During the pendency of the case, trial counsel expressed a *bona fide* doubt as to defendant's fitness to stand trial because defendant became "virtually non-communicative" with trial counsel. The trial court then ordered a fitness examination. Defendant refused to cooperate with the examination; therefore, the psychiatrist was unable to reach a conclusion regarding defendant's fitness. During the November 2011 fitness hearing, Vincent Fox, an officer with the Sangamon County sheriff's department, testified defendant had the ability to answer questions and follow directions while incarcerated. The court determined defendant was fit to stand trial, noting defendant's refusal to cooperate with the psychiatrist and trial counsel did not constitute unfitness. Trial counsel filed no further pretrial motions.

¶ 9 B. The Trial

¶ 10 In December 2011, the case proceeded to a jury trial. The State elected to proceed

only on the unlawful possession of a weapon by a felon charge (count I) and dismissed the remaining counts.

¶ 11 During the trial, Officer Charles Redpath testified, on July 3, 2011, he was on duty with the Springfield police department. About 9:16 p.m., he and his partner, Officer Ricky Burns, were patrolling high crime areas of Springfield in an unmarked, blue Dodge Durango. He described the area he patrolled as being known for drugs, weapons, and shots fired, as noted by reports that come into the police station and tips from members of the community. As their vehicle approached the intersection of Twenty-fifth Street and Kansas Street, Redpath noticed a black male walking northbound on Twenty-fifth Street. Upon closer inspection, Redpath recognized the black male to be defendant, whom Redpath knew from a prior encounter. During the prior encounter, Redpath was driving the unmarked, blue Dodge Durango. Redpath admitted defendant was not committing any illegal acts when Redpath saw him.

¶ 12 Redpath observed defendant slow his walk as he appeared to notice the officers. Burns slowed his driving, at which time defendant appeared very nervous and turned at a 45-degree angle to walk between two homes. Burns stopped the Durango, at which time Redpath started to exit the vehicle. As Redpath unlatched his door, defendant started running. Redpath shouted, "Stop, police!", and pursued defendant. Defendant appeared to be running in an unusual manner, with his hands on his waistband rather than swinging at his sides. While running, defendant attempted to climb over a four-foot chainlink fence, but he fell in the process. Redpath, on the other hand, managed to jump over the fence easily. After taking approximately two steps, Redpath caught and handcuffed defendant.

¶ 13 While Redpath handcuffed defendant, Burns arrived on scene. Burns examined

the area where defendant fell and discovered a silver handgun with four live rounds of ammunition in the magazine. Neither Burns nor Redpath observed defendant with a gun on his person prior to finding the gun on the ground. Additionally, neither officer observed defendant making a throwing or dropping motion while fleeing.

¶ 14 The officers placed defendant in the Durango and read him his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)). In response to questioning by Redpath, defendant told the officers he was a convicted felon and that he had recently found the handgun. Defendant then declined to provide any further statements.

¶ 15 Burns testified consistently with Redpath's testimony. On this evidence, the jury returned a guilty verdict.

¶ 16 C. The Sentencing Hearing

¶ 17 In February 2012, defendant's sentencing hearing commenced. Neither party presented evidence and defendant's statement in allocution consisted of defendant shaking his head. The State recommended a sentence of 10 years in DOC, while the defendant recommended a sentence of 4 years in DOC. The trial court agreed with the State's recommendation and sentenced defendant to 10 years in DOC.

¶ 18 In sentencing defendant, the trial court explained it considered the facts ascertained at trial, the factors in aggravation and mitigation, and the arguments of the parties. The court emphasized,

"[T]he aggravating factor that stands out here is the [d]efendant's criminal history. He has been sentenced to prison twice.

Normally, the cost of business goes up the more times a person

goes to prison, and I believe it should in this case particularly since it involves a firearm, and though it is not a violent offense, generally felons in possession of firearms do not often have nonviolent consequences. So, I believe that sentence [(10 years in DOC)] is appropriate given the aggravating factor."

¶ 19 The trial court also noted it considered defendant's diminished mental capacity as evidence in mitigation that supported a midrange sentence of 10 years in DOC rather than the maximum sentence of 14 years in DOC. The court then went on to say, "Though not a specific factor, this [d]efendant has not accepted responsibility for his offense and, in fact, he didn't even participate in the trial."

¶ 20 The presentence investigation report (PSI) contained the following information. Defendant, by age 26, had already accumulated a significant criminal history. Among his prior offenses were two felony convictions. In 2005, defendant received a sentence of three years in DOC for burglary. In 2008, defendant was sentenced to three years in DOC for possession of a controlled substance. While on parole in 2010, defendant accrued a misdemeanor driving under the influence (DUI) conviction. With respect to his personal life, defendant reported (1) ongoing drug usage (cannabis) when not incarcerated; (2) no employment since 2004; (3) no high school diploma, though he had taken some general equivalency degree (GED) courses while incarcerated; and (4) suffering from undiagnosed depression. Defendant also received social security disability due to his diminished mental capacity.

¶ 21 Trial counsel filed both a posttrial motion for an acquittal or new trial and a motion to reconsider sentence. The motion to reconsider sentence asserted the trial court gave

"too much weight to the factors in aggravation presented at the sentencing hearing." Following a March 2012 hearing, the court denied both motions.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendant asserts (1) trial counsel's failure to file a motion to suppress evidence constituted ineffective assistance of counsel and (2) the trial court erred in considering inappropriate evidence in aggravation at the sentencing hearing. We address these contentions in turn.

¶ 25 A. Ineffective Assistance of Counsel Claim

¶ 26 Defendant first claims trial counsel provided ineffective assistance of counsel by failing to file a pretrial motion to suppress evidence. We disagree.

¶ 27 In order to successfully assert an ineffective assistance of counsel claim, defendant must meet the requirements set forth by *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant must show (1) that counsel's performance fell below an objective standard of reasonableness (*Strickland*, 466 U.S. at 687-88) and (2) the deficient performance prejudiced defendant such that a "reasonable probability" exists that the result would have been different but for the deficient performance (*Strickland*, 466 U.S. at 694). If defendant fails to prove either of these requirements, his argument asserting ineffective assistance of counsel must fail. *People v. Patterson*, 217 Ill. 2d 407, 438, 841 N.E.2d 889, 907 (2005).

¶ 28 Failure to file a motion to suppress evidence is not *per se* incompetence of counsel. In criminal proceedings, decisions regarding trial strategy, trial tactics, and procedural matters are within the attorney's purview. *People v. Phillips*, 217 Ill. 2d 270, 280, 840 N.E.2d

1194, 1200 (2005). There exists "a strong presumption that the challenged action of counsel was the product of sound trial strategy and not of incompetence." *People v. Barrow*, 133 Ill. 2d 226, 247, 549 N.E.2d 240, 249 (1989). A defendant's claim that his trial counsel provided incompetent representation will be unsuccessful if the reviewing court determines counsel's failure to file a motion to suppress was a tactical decision. *People v. Moore*, 307 Ill. App. 3d 107, 111, 716 N.E.2d 851, 854. Moreover, trial counsel cannot be found ineffective when filing a motion to suppress would have been futile. *People v. Henderson*, 2012 IL App (1st) 101494, ¶ 8, 965 N.E.2d 1285.

¶ 29 In determining whether defendant could have successfully suppressed the gun recovered by police, we begin by addressing whether Redpath engaged in an unlawful pursuit of defendant.

¶ 30 1. *Whether Redpath Engaged in an Unlawful Pursuit of Defendant*

¶ 31 Defendant argues Redpath had no probable cause or reasonable suspicion to pursue defendant as defendant fled the area. The State, on the other hand, asks us to consider the totality of the circumstances and find Redpath had the authority to pursue defendant.

¶ 32 In deciding whether Redpath had the authority to pursue defendant, we look to whether Redpath possessed a reasonable suspicion that defendant was engaged in illegal behavior "based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). Reasonable suspicion must be based on the totality of the circumstances. *United States v. Sokolow*, 490 U.S. 1 (1989). In *Wardlow*, the United States Supreme Court held that although an individual's presence in a high crime area is not enough on its own to constitute reasonable suspicion of a crime, a defendant's sudden flight from a high

crime area after observing law enforcement's approach can be sufficient to establish reasonable suspicion for a stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). *Wardlow*, 528 U.S. at 125.

¶ 33 In support of his claim Redpath lacked probable cause or reasonable suspicion to pursue him, defendant asserts the present case is similar to *People v. Harris*, 2011 IL App (1st) 103382, 957 N.E.2d 930, in which the appellate court affirmed the trial court's suppression of a gun recovered during a pat-down search of suspects who fled from police. In *Harris*, the State argued police had reasonable suspicion to conduct a *Terry* stop of the suspects due to their flight from police in a high crime area. *Harris*, 2011 IL App (1st) 103382 at ¶ 12, 957 N.E.2d 930. The appellate court concluded the State failed to present sufficient evidence that the suspects were in a high crime area. *Harris*, 2011 IL App (1st) 103382 at ¶ 15, 957 N.E.2d 930. Defendant urges us, based on the facts of *Harris*, to conclude Redpath lacked reasonable suspicion to pursue defendant for a *Terry* stop. However, we find the case at bar is distinguishable from *Harris* in two respects. First, Redpath knew additional factors about defendant—namely, that defendant had a criminal background and defendant was exhibiting nervous behavior. Second, the State presented evidence through Redpath's testimony that the neighborhood where officers encountered defendant was considered "high crime" based on the number of reports received by his department from the general area.

¶ 34 In the present case, it is undisputed the officers lacked reasonable suspicion and probable cause when they first observed defendant walking down the street, as defendant was not engaged in any illegal or suspicious activity. The circumstances changed, however, when defendant noticed the officers. At that point, Redpath observed defendant appeared nervous and immediately changed his direction. When Redpath unlatched his door, defendant immediately

began running, and continued to run, despite Redpath's yelling, "Stop, police!" Moreover, defendant began running in an awkward manner that aroused the suspicion of the officers. Redpath knew defendant from a prior encounter and was aware defendant had seen the Durango during the previous encounter with Redpath. Those factors, in conjunction with the high crime neighborhood, defendant's nervousness, and defendant's unprovoked flight lead us to conclude Redpath had reasonable suspicion to pursue defendant for further inquiry.

¶ 35 2. *Whether Redpath's Apprehension of Defendant Required Suppression of the Gun*

¶ 36 Defendant next argues Redpath placed him under arrest without probable cause, and the subsequently recovered handgun should have been suppressed due to Redpath's illegal seizure of defendant. We disagree, concluding the gun should not have been suppressed because defendant abandoned it *before* Redpath apprehended him; thus, it cannot be the fruit of an unlawful seizure. Therefore, we need not address whether Redpath's act of handcuffing defendant constituted an illegal seizure.

¶ 37 We find this situation analogous to *People v. Keys*, 375 Ill. App. 3d 459, 874 N.E.2d 577 (2007). In *Keys*, officers conducted an unlawful *Terry* stop on the defendant, Keys. *Keys*, 375 Ill. App. 3d at 461, 874 N.E.2d at 579; *Terry v. Ohio*, 392 U.S. 1 (1968). Keys then fled from police, during which time the officer briefly lost sight of Keys. *Keys*, 375 Ill. App. 3d at 461, 874 N.E.2d at 579. During his flight, Keys disposed of narcotics before police eventually apprehended him. *Keys*, 375 Ill. App. 3d at 461, 874 N.E.2d at 579. After officers apprehended Keys, they retraced Keys' path of flight and discovered narcotics. *Keys*, 375 Ill. App. 3d at 461, 874 N.E.2d at 579. The parties contested the legality of the initial stop, but this court found that inquiry to be irrelevant. *Keys*, 375 Ill. App. 3d at 464, 874 N.E.2d at 581. This court ultimately

held Keys was not seized by police when he abandoned the contraband; therefore, Keys could not assert a violation of his fourth-amendment right against unlawful search and seizure because the discovery of the contraband was not the fruit of an unlawful seizure. *Keys*, 375 Ill. App. 3d at 464, 874 N.E.2d at 581.

¶ 38 In *Keys*, even where officers engaged in an unlawful stop initially, the central question was whether defendant was seized *at the time he abandoned the contraband*. *Keys*, 375 Ill. App. 3d at 464, 874 N.E.2d at 581. At the time defendant abandoned the gun in the present case, he was in the process of fleeing from the police, just like the situation in *Keys*. Even more compelling is the fact that Redpath was engaged in the lawful pursuit of defendant based on reasonable suspicion at the time defendant abandoned the gun. Thus, we can answer the central question of whether defendant was seized at the time he abandoned the handgun in the negative.

¶ 39 In light of *Keys*, defendant's assertions as to whether he was illegally seized after he abandoned the gun but before officers discovered the gun are irrelevant to this inquiry.

¶ 40 Based on the foregoing, we conclude filing a motion to suppress evidence would have been futile in this matter and, thus, defendant cannot establish the first prong of *Strickland*. We therefore hold defendant did not receive ineffective assistance of counsel due to counsel's failure to file a motion to suppress evidence.

¶ 41 B. Sentencing Issues

¶ 42 Defendant next argues he should receive a new sentencing hearing because the trial court considered inappropriate evidence in aggravation. In particular, defendant challenges the court's consideration of (1) defendant's failure to accept responsibility for his actions and (2) defendant's failure to participate in the trial.

¶ 43 The State initially argues defendant has forfeited these sentencing issues on appeal because trial counsel did not specifically challenge those factors in defendant's motion to reconsider his sentence; instead, trial counsel asserted the court erred "by giving too much weight to the factors in aggravation presented at the sentencing hearing." The purpose of requiring criminal defendants to submit written motions to reconsider sentence in order to preserve issues for appeal is to "allow the trial court the opportunity to review a defendant's contention of sentencing error and save the delay and expense inherent in appeal if they are meritorious." *People v. Reed*, 177 Ill. 2d 389, 394, 686 N.E.2d 584, 586 (1997). Although defendant did not specifically call the court's attention to the aggravating factors now challenged on appeal, we conclude the language contained within the motion to reconsider sentence gave the court sufficient notice that defendant wanted the court to reconsider all factors in aggravation, including those raised on appeal. Therefore, we conclude defendant has not forfeited the sentencing issues raised on appeal.

¶ 44 The trial court's sentencing decisions are granted great deference and will not be overturned absent an abuse of discretion. *People v. Ward*, 113 Ill. 2d 516, 526, 499 N.E.2d 422, 425 (1986). The reviewing court will set aside a defendant's sentence if the trial court states it based its decision, at least in part, on defendant's choice to avail himself of his right to a trial. *People v. Moriarty*, 25 Ill. 2d 565, 567, 185 N.E.2d 688, 689 (1962). While the trial court may grant concessions to the defendant who enters a plea of guilty, it may not penalize a defendant for exercising his right to trial. *Ward*, 133 Ill. 2d at 526, 499 N.E.2d at 425. However, the court may consider defendant's protestations of innocence in considering defendant's potential for rehabilitation and his truthfulness. *Ward*, 133 Ill. 2d at 528, 499 N.E.2d at 426. In determining

whether the court abused its discretion, the reviewing court should consider the entire record, not isolated words or statements made by the court. *Ward*, 133 Ill. 2d at 526-27, 499 N.E.2d at 426.

¶ 45 In reaching its sentence, the trial court specifically emphasized, "[T]he aggravating factor that stands out here is the [d]efendant's criminal history. He has been sentenced to prison twice. Normally, the cost of business goes up the more times a person goes to prison, and I believe it should in this case particularly since it involves a firearm, and though it is not a violent offense, generally felons in possession of firearms do not often have nonviolent consequences. So, I believe that sentence [10 years in DOC] is appropriate given the aggravating factor."

The trial court then went on to say, "Though not a specific factor, this [d]efendant has not accepted responsibility for his offense and, in fact, he didn't even participate in the trial."

Defendant argues this statement demonstrates the court placed inappropriate weight on defendant maintaining his innocence and defendant's diminished mental capabilities. We disagree.

¶ 46 Defendant argues we should remand this case for resentencing based on the factors set forth in *People v. Dowding*, 388 Ill. App. 3d 936, 904 N.E.2d 1022 (2009). In *Dowding*, the court set forth two factors in determining whether a case should be remanded for resentencing—"(1) whether the trial court made any dismissive or emphatic comments in reciting its consideration of the improper factor; and (2) whether the sentence received was substantially less than the maximum sentence permissible by statute." *Dowding*, 388 Ill. App. 3d at 945, 904 N.E.2d at 1030.

¶ 47 First, we find nothing in the record to suggest the trial court punished defendant for maintaining his innocence or exercising his right to trial. The court noted defendant had not accepted responsibility for his offense, which the court can consider in determining defendant's truthfulness or rehabilitative potential. See *Ward*, 133 Ill. 2d at 528, 499 N.E.2d at 426. However, clearly the court's emphasis, by its own words, was on defendant's significant criminal history. Taken in total, we conclude the trial court's remarks do not demonstrate the trial court punished defendant for maintaining his innocence.

¶ 48 Second, we disagree the trial court's consideration of defendant's failure to participate in trial amounted to punishing defendant for his diminished mental capacity. Defendant's argument is refuted by the court's statement that it considered defendant's diminished mental capacity as a factor in mitigation, justifying a midrange sentence of 10 years in DOC rather than a maximum sentence of 14 years in DOC. We interpret the court's remarks to reflect that defendant failed not only to participate in his own defense, but that he failed to cooperate with his attorney, which appeared to be an ongoing problem throughout the pendency of the case that prompted, at one point, an unsuccessful fitness petition.

¶ 49 In light of the trial court's remarks, we conclude the court did not punish defendant for maintaining his innocence or for his diminished mental capacity such that reversal is warranted under *Dowding*; rather, the court emphasized defendant's criminal history and the need to protect the public. Moreover, though defendant received a sentence "only" four years below the maximum sentence of 14 years in DOC, we note the sentence of 10 years in DOC placed defendant squarely in the midrange of penalties, which demonstrates the court did not place undue weight on the factors in aggravation at issue. The PSI reflected defendant had two

