

2014 IL App (1st) 12-1797-U  
No. 1-12-1797  
March 31, 2014

THIRD DIVISION

**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 DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS, )	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee, )	
)	
v. )	No. 10 CR 17285
)	
BRIAN SMART, )	The Honorable
)	Matthew E. Coghlan,
Defendant-Appellant. )	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court, with opinion.  
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* Police officers' inability to describe the alleged buyer of narcotics, and their testimony that the defendant behaved oddly when selling the narcotics, did not make their testimony so incredible as to warrant reversal of the conviction for possession of narcotics. The failure to file a futile motion does not show ineffective assistance of counsel. The prosecution may add new charges not raised at the preliminary hearing, as long as the new charges do not differ fundamentally from the charges approved at the preliminary hearing. When a claim of ineffective assistance of counsel depends on documents not included in the record on appeal, the appellate court lacks a sufficient basis for reversing the conviction.

¶ 2 The trial court found Brian Smart guilty of possessing heroin and violating the armed habitual criminal statute. In this appeal, Smart argues that the evidence does not support the

convictions and his counsel provided ineffective assistance. We find the testimony of the arresting officers sufficient to sustain the convictions. We also find that, on this record, Smart has failed to show that his counsel provided ineffective assistance. Accordingly, we affirm the trial court's judgment.

¶ 3

### BACKGROUND

¶ 4

On September 24, 2011, Chicago Police Officers Thomas Carey and Brian McDevitt entered a first floor apartment on the south side of Chicago, where they found a gun. They arrested Brian Smart and Nicki Harris. Prosecutors charged Smart with possession of heroin and unlawful possession of a weapon by a felon. A court found probable cause for the charges at a preliminary hearing held in October 2011. Prosecutors subsequently added a charge that Smart violated the armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2010)).

¶ 5

At the bench trial, Carey testified that around 9:30 p.m. on September 24, 2011, he and McDevitt were parked in an alley on the south side, watching for narcotic transactions. Forty feet away from them, a man in the alley knocked on a window of a first floor apartment. Carey testified that he saw Smart lean out of the window. Street lights in the alley let him see Smart's face. Smart came out of the building and walked into the alley a few seconds later. Carey saw Smart give a small item from a plastic bag to, and take money from, the man who knocked on the window.

¶ 6

Carey and McDevitt approached and yelled, "police." The man who took the small item ran down the alley, and neither officer chased him. Smart dropped the plastic bag and ran back into the building. Carey testified that he picked up the plastic bag, which held taped

clumps of white powder. Carey also saw Harris, in the courtyard, drop two items. Carey picked up the items and arrested Harris. He then entered the first floor apartment, where McDevitt had arrested Smart. Carey patted down Smart and found a handgun in his pocket. Carey saw no one other than Smart, Harris and McDevitt in the apartment.

¶ 7 According to Carey, at the police station, Smart said he bought the handgun for \$40. Carey did not ask Smart for a written statement. On cross-examination, Carey admitted that he could not describe the man he said he saw knock on the window in the alley. He could not describe even the clothing, or the approximate height or weight of that man.

¶ 8 McDevitt corroborated Carey's account of the arrests. He, too, could not describe the man he saw in the well-lit alley with Smart.

¶ 9 The parties stipulated that the plastic bag Carey identified as the one Smart dropped contained heroin. The parties further stipulated that Smart had prior felony convictions for armed robbery and aggravated unlawful use of a weapon.

¶ 10 For the defense, Harris gave an account of the arrests that conflicted with the officers' account in almost all respects. Harris testified that the officers approached her as she stood in the courtyard, and they asked her what she was doing. She said, "I'm not on shit," and went into the apartment. Two men, two women and two children joined her and Smart in the apartment, which belonged to a woman named Mary. Smart did not live in the apartment. Some minutes later, the officers broke down the back door to the apartment and ordered everyone to the floor. One officer searched the apartment, but he found nothing. That officer then took Harris, then 16 years old, to a separate room. He said he would let everyone go if Harris showed him drugs and related items. She showed him some heroin,

kept in a refrigerator, and a gun hidden beneath some clothes in a closet. The officers then arrested Smart and her, but let the others go.

¶ 11 Smart testified that seven or eight persons were in the apartment when police broke in. Smart had neither heroin nor a gun, and he had not leaned out of the window or engaged in any transactions in the alley or the courtyard that evening. He did not live in the apartment.

¶ 12 Defense counsel argued that the court should find Harris and Smart more credible than Carey and McDevitt. The court found Carey and McDevitt more credible, and found Smart guilty of possessing heroin, unlawfully using a weapon, and violating the armed habitual criminal statute.

Defense counsel filed a motion for a new trial. At the hearing on the motion, counsel presented several photographs to the trial court. No witness testified about the photographs. Counsel claimed that the photographs depicted the scene of the purported drug sale. He said the photographs showed a window to the first floor apartment about nine feet off the ground, too high for knocking, and no street lights in the alley. The trial court denied the motion for a new trial. The court did not include the photographs in the record. The court sentenced Smart to seven years in prison. Smart now appeals.

¶ 13 ANALYSIS

¶ 14 Sufficiency of the Evidence

¶ 15 Smart first argues that the prosecution did not present sufficient evidence to support the convictions. This court will not reverse the convictions for insufficient evidence unless the evidence, viewed in the light most favorable to the prosecution, leaves a reasonable doubt of the defendant's guilt. *People v. Toy*, 407 Ill. App. 3d 272, 286-87 (2011).

¶ 16 Smart contends that the trial court should have rejected Carey's and McDevitt's testimony as incredible. Both officers could not describe the man who allegedly purchased narcotics from Smart in the allegedly well-lit alley. Neither officer chased that man. No one offered any explanation for Smart's choice of going into the alley to sell heroin when he could have completed the transaction at the window or in the apartment. Nor did any witness explain why Smart would take more heroin into the alley that the buyer wanted to buy. We cannot say that these aspects of the evidence render the testimony of Carey and McDevitt so incredible as to warrant reversal of the convictions. See *People v. Bailey*, 265 Ill. App. 3d 262, 271 (1994). We find the testimony of Carey and McDevitt sufficient to support Smart's convictions.

¶ 17 **Ineffective Assistance of Counsel**

¶ 18 Next, Smart argues that his counsel provided ineffective assistance. We review the claim under the familiar test from *Strickland v. Washington*, 466 U.S. 668, 687, 695 (1984). To show ineffective assistance of counsel, Smart must show that "his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Patterson*, 192 Ill. 2d 93, 107 (2000). Smart maintains that his attorney's work fell below an objective standard of reasonableness in three ways: the attorney (1) failed to move to suppress the gun police found at the time of the arrest, (2) failed to move to dismiss the armed habitual criminal charge, and (3) failed to present at trial the photographs that, according to the attorney, showed critical errors in the testimony of the prosecution's witnesses.

¶ 19

Motion to Suppress

¶ 20

"In order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed. [Citation.] The failure to file a motion to suppress does not establish incompetent representation when the motion would have been futile." *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 21

Smart argues that the trial court should have suppressed the gun as the product of an arrest made without probable cause. He claims that the officers testified that they only saw him exchange a small item from a plastic bag for money, and he contends that viewing the transaction did not give the officers probable cause to believe that Smart violated any law. See *People v. Stewart*, 217 Ill. App. 3d 373, 376 (1991). But the officers testified that, in an area with frequent narcotics trafficking, after they saw the transaction, Smart ran when they approached, and as he ran he dropped a bag that contained a white powder that looked like heroin. We find that the officers' testimony, which the trial court believed, sufficiently showed probable cause for the arrest. See *People v. Stamps*, 108 Ill. App. 3d 280, 287 (1982). We find no reasonable probability that Smart would have achieved a better result if his attorney had filed a motion to suppress the gun the officers said they found in Smart's pocket at the time of the arrest.

¶ 22 Motion to Dismiss

¶ 23 Smart also contends that his attorney should have moved to dismiss the charge for violation of the armed habitual criminal statute, because the prosecution did not include that charge at the preliminary hearing held in October 2011. Prosecutors added the armed habitual criminal charge later, without objection from defense counsel.

¶ 24 Smart cites *People v. Velez*, 2012 Ill. App. (1st) 110801, as authority showing that competent counsel would have moved to dismiss the armed habitual criminal charge. In *Velez*, the court at a preliminary hearing found cause to charge Velez with aggravated vehicular hijacking and armed robbery. *Velez*, 2012 Ill. App. (1st) 110801, ¶ 11. Prosecutors later sought to add a charge that Velez violated the armed habitual criminal statute. The trial court granted Velez's motion to dismiss the added charge, because at the preliminary hearing, the prosecution had not mentioned the charge and the court had not made any finding regarding cause for bringing that charge. The prosecution appealed.

¶ 25 The appellate court applied section 111-2(f) of the Code of Criminal Procedure (725 ILCS 5/111-2(f) (West 2010)), which provides, "Where the prosecution of a felony is by information or complaint after preliminary hearing, \*\*\* such prosecution may be for all offenses, arising from the same transaction or conduct of a defendant even though the complaint \*\*\* filed at the preliminary hearing charged only one or some of the offenses arising from that transaction or conduct." 725 ILCS 5/111-2(f) (West 2010).

¶ 26 The *Velez* court noted that under this statute, the court should permit the prosecution to add a new charge unless the new charge differs fundamentally from the offenses originally

charged. *Velez*, 2012 Ill. App. (1st) 110801, ¶ 10; see *People v. Robinson*, 104 Ill. App. 3d 544, 550 (1982). The *Velez* court then held that the armed habitual criminal charge arose from the same conduct as the charges considered at the preliminary hearing. *Velez*, 2012 Ill. App. (1st) 110801, ¶ 11. Accordingly, the court reversed the dismissal of the armed habitual criminal charge and remanded for trial on all charges.

¶ 27 Smart's attorney apparently recognized the proper application of section 111-2(f), as the *Robinson* court interpreted it. We cannot say that Smart's attorney provided objectively unreasonable assistance when he did not file a motion to dismiss the armed habitual criminal charge, when the success of that motion would have depended on the trial court misinterpreting the controlling statute, and when the misinterpretation lacked support in the case law. Counsel's failure to file a motion to dismiss the armed habitual criminal charge does not justify reversal of the convictions.

¶ 28 Photographs

¶ 29 Finally, Smart argues that his attorney provided ineffective assistance when he failed to present at trial photographs that purportedly proved that the state's witnesses made critical errors in their testimony. But "[i]t is axiomatic that any direct appeal is confined to the contents in the trial record." *People v. Wilson*, 2013 IL App (1st) 112303, ¶ 16.

¶ 30 The record does not include the photographs, and no testimony or other admissible evidence informs this court of the content of the photographs. Accordingly, the photographs cannot justify the reversal of the conviction at this stage of proceedings. Smart should bring any claim related to the photographs in a postconviction petition, properly supported by the

photographs and a sworn statement about the import of the photographs. See *Wilson*, 2013 IL App (1st) 112303, ¶ 16.

¶ 31

### CONCLUSION

¶ 32

The evidence, viewed in the light most favorable to the prosecution, sufficiently supports the convictions. Smart did not show a reasonable likelihood that he would have achieved a better result if his attorney had moved to suppress the gun police seized in the course of arresting Smart. Smart's attorney did not provide ineffective assistance when he failed to ask the court to misinterpret controlling law as a basis for dismissing a charge against Smart. The record on appeal does not support Smart's claims that photographs his attorney showed to the trial judge prove that his attorney provided ineffective assistance of counsel. Accordingly, we affirm the trial court's judgment.

¶ 33

Affirmed.