

No. 1-12-2021

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IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> DESHAWN G., a Minor)	Appeal from the
)	Circuit Court of
)	Cook County.
(PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Petitioner-Appellee,)	No. 12JD1095
)	
v.)	
)	The Honorable
Deshawn G.,)	Lori Wolfson,
)	Judge Presiding.
Respondent-Appellant.))	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Where stop and detention of respondent for show-up identification was reasonable under *Terry*, trial counsel was not ineffective for failing to file motion to quash arrest and suppress identification, which motion would have been futile. Trial court affirmed.

¶ 2 Respondent Deshawn G., a juvenile currently confined in the Juvenile Department of Corrections, was adjudicated delinquent based on a petition alleging he, along with two co-

1-12-2021

offenders, committed aggravated robbery, battery, and theft from a person.¹ Following a hearing in which respondent was found guilty of all charges, and a subsequent dispositional hearing, respondent was made a ward of the court and committed to the Department of Juvenile Justice. On appeal, respondent contends he was denied the effective assistance of trial counsel where counsel failed to file a motion to quash arrest and suppress identification. For the following reasons, we affirm.

¶ 3

I. BACKGROUND

¶ 4 At the adjudicatory hearing, victim Van Epinger testified that, at approximately 9:30 p.m. on March 20, 2012, he visited his friend Brian's apartment at 4629 South Drexel Boulevard in Chicago. As he approached Brian's building, he noticed a group of eight or nine kids walk past him. At the front door to Brian's building, Epinger keyed in the apartment code to Brian's apartment, and Brian buzzed the front door open for him. As Epinger opened the door to the vestibule, he looked to his right and saw three of the boys from the group of kids walk back towards him. After Epinger entered the vestibule, one of the boys caught the door before it closed and walked into the vestibule behind Epinger. Two other boys entered, as well. Epinger identified these boys as respondent, Marquise B.², and an unidentified third boy. At the time of this incident, Epinger did not know the names of the individuals, but learned their names after the

¹ Initially, respondent was accused of committing aggravated robbery, aggravated battery, and theft from a person. Prior to trial, the State was given leave to amend the petition and reduce the aggravated battery charge to simple battery.

² Co-offender Marquise B. was tried separately and is not a part of this appeal.

1-12-2021

fact from the police. Epinger identified respondent in-court as one of the three individuals who entered the vestibule behind him.

¶ 5 Epinger testified that the vestibule was well-lit with fluorescent lighting, and that he could see very well. Epinger passed through the vestibule to the other side, and reached the door to enter the apartment building proper. As he grabbed the door handle, Marquise B. drew a gun and pointed it at him. At that point, Marquise was only two or three feet away from Epinger. Marquise ordered Epinger to "take the screws out of [his] ear," to remove everything from his pockets, and to give him the Gucci belt Epinger was wearing. Epinger refused to do so, telling the boys they were going to have to kill him first.

¶ 6 Epinger testified that respondent and the unidentified individual then approached him and "tussled" with him for a number of minutes. Respondent and the unidentified individual hit Epinger on his arms, legs, and torso, while Marquise continued to point the gun at Epinger. During this time, respondent reached into Epinger's pocket and removed his driver's license, debit card, and approximately \$200 in cash. Epinger testified that he did not see any of these items again.

¶ 7 Epinger testified that, after respondent took the items from Epinger's pocket, he heard somebody shout, "shoot him, just shoot him." Epinger then opened the stairwell door and ran upstairs to his friend's apartment. He told his friend that "some shorties tried to rob [him]." Epinger and Brian did not call the police, but immediately went downstairs and outside, looking for the group of boys. When they did not see anybody, Epinger used his cellphone to call friends and cousins.

1-12-2021

¶ 8 Brian and Epinger then went to Epinger's car, a white Dodge Charger, that was parked nearby. Epinger looked across the street and saw a group of people coming out of a gangway. Then, as Epinger started the car, a "black figure" approached the car and started shooting at them. Epinger drove quickly away.

¶ 9 Epinger eventually pulled into a parking lot, where he saw he had a flat tire and a bullet hole in the back trunk area. Epinger drove Brian back to his apartment and dropped him off there because Brian had left the apartment door open. As he was driving away, there was a police officer parked in the middle of the street at 46th Street and Ellis Avenue. Epinger stopped to talk with the officer. He told the officer about the robbery and explained that his car had been shot at.

¶ 10 After approximately twenty minutes, another police officer approached Epinger and asked him to look into the back of a squad car. When Epinger approached the squad car, the officer opened the car door and shone a flashlight in an individual's face. The officer asked Epinger if the person in the car was one of the individuals who had robbed him. Epinger immediately recognized respondent and answered, "yes." At the hearing, when Epinger was asked how sure he was that respondent was the same person he saw in the vestibule, Epinger answered, "One hundred percent sure."

¶ 11 Epinger was not injured during the robbery. He never recovered the stolen items or cash. Epinger admitted that, in June 1997, he was convicted of a misdemeanor and was sentenced to one year of probation, which was terminated satisfactorily. He testified that the conviction did not have any effect on his ability to testify truthfully in the instant case. He also acknowledged that, at the time of trial, he had another pending misdemeanor charge that had not yet gone to

1-12-2021

trial.

¶ 12 On cross-examination, Epinger testified that he first learned respondent's name from the police on the day of the incident. He also explained that, when he was interviewed by the police, he gave them a description of what the assailants were wearing, as well as a description of what the assailants looked like. He testified he told the police the assailants were wearing black hooded sweatshirts, and one had on a reddish-orange hooded sweatshirt. At the hearing, he did not further describe the assailants' appearance.

¶ 13 Chicago Police officer Arthur Davis also testified at the hearing. Officer Davis testified that on March 20, 2012, he and his partner responded to a "call of shots being fired and a robbery [that] had just occurred" near 4600 South Drexel Avenue in Chicago. As they responded, however, they received another "call from the dispatcher saying that unknown male subject had ran into restaurant located at 45th and Cottage Grove, the description and it might be involved in the shooting." Defense counsel objected to this testimony as hearsay, but the trial court overruled the objection, considering the testimony not hearsay but course of conduct testimony. Officer Davis and his partner then went to the restaurant at 45th Street and Cottage Grove Avenue, where they found respondent exiting the restaurant. Officer Davis identified respondent in court as the individual he had seen exiting the restaurant. The officers stopped respondent and asked him where he was coming from. Respondent told them he was coming from the restaurant. The officers "told him he matched the description of someone." They then drove respondent to 46th Street and Cottage Grove Avenue in their squad car. Once there, the officers saw victim Epinger with other officers. Officer Davis testified to the following events that transpired after the

1-12-2021

officers approached Epinger:

"[ASSISTANT STATE'S ATTORNEY] Q: Now, what happened with Van Epinger when you got to the scene with this minor?

[OFFICER DAVIS] A: At that point we asked him if he could identify the person that was involved in the crime; he said, yes he could. I took him to our squad car; I opened the door; I said, 'Does he look familiar?' He said - - immediately said, 'Yeah, that's him.' "

Officer Davis explained that it took Epinger "[j]ust a matter of seconds" to identify respondent as being involved in the crime, that "[a]s soon as we opened the door, he said, 'That's him.' "

¶ 14 On cross-examination, Officer Davis explained he became involved in this incident because he was responding to an "OCEM call," commonly known as a 9-1-1 call. At the hearing, Officer Davis did not recall what respondent was wearing on the night in question. Officer Davis searched respondent when he picked him up, and, to his knowledge, respondent did not have any of Epinger's property on his person.

¶ 15 The State rested its case at the close of Officer Davis' testimony. Defense counsel moved for a directed finding, arguing that the State had not met its burden, particularly where the victim testified incredibly. The court denied the motion for a directed finding. Defense counsel then rested without presenting any evidence. After hearing closing arguments in which defense counsel again argued that the victim's testimony was incredible, the court found respondent guilty on all counts. The court noted:

"[THE COURT]: Okay. I've listened to the evidence; considered

1-12-2021

the testimony. Certainly, Mr. Van Epinger carries some baggage; it's minor baggage, it's misdemeanor baggage. But there's nothing in his past that indicates a motive to testify less than falsely in this matter [*sic*].

He did testify very credibly and honestly. He answered questions both on direct and cross-examination, I believe, very straightforward and I believed him. His choices are peculiar and, certainly, if someone is pointing a gun at my face, I think I would probably give up my property. I have no idea why he has the sort of bravado that he does, but he expressed that and I believed his - - his story.

I think that the testimony does support that the minor was one of the three individuals who took property from him. When he talked about the attempt, I believe it's because all of his property was not taken. It was just what was in his pockets. They did not unscrew and take off his earrings or take off whatever belt he had that had Gucci bag off his waist, [as] he described. So perhaps that was what he meant by attempting to rob.

But I do believe his property was taken; that it was taken while one of the three individuals was armed with a - - what appeared to be a handgun and although I certainly wouldn't go

1-12-2021

down and look for people that had stolen from me without calling the police first, I believe he did it for his own reasons and fortunately the police were nearby, were able to apprehend the minor, who I believe was one of the individuals responsible for this case. And there will be a finding of guilty, all counts will merge for purposes of sentencing."

Following a dispositional hearing, respondent was made a ward of the court and committed to the Department of Juvenile Justice. Respondent appeals.

¶ 16

II. ANALYSIS

¶ 17 On appeal, respondent contends that his trial counsel was ineffective for failing to file a motion to quash arrest and suppress identification. Specifically, respondent argues that the police conducted an illegal *Terry* stop where there was less than reasonable suspicion of criminal activity, after which they transported respondent to an illegal show-up identification. Respondent does not argue that the show-up identification would have been suppressed because it was unreliable, but instead argues that it would have been suppressed as "fruit of the poisonous tree," that is, an illegal show-up identification stemming from the initial illegal seizure. For its part, the State does not contest the fact that respondent's initial encounter with the police was a seizure, but maintains that respondent's detention constituted a wholly lawful *Terry* stop. For the following reasons, we affirm.

¶ 18 We begin by noting that our courts have long recognized three types of police-citizen encounters, including: (1) consensual encounters, involving no detention and therefore not

1-12-2021

implicating a citizen's fourth amendment rights; (2) brief investigatory stops, referred to as *Terry* stops, which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) arrests, which must be supported by probable cause. *People v. Surles*, 2011 IL App (1 st) 100068, ¶ 21 (citing *People v. Vasquez*, 388 Ill. App. 3d 532, 546-47 (2009) and *People v. Leudemann*, 222 Ill. 2d 530, 544 (2006)).

¶ 19 The two latter types of encounters are governed by the United States and the Illinois Constitutions, which explicitly prohibit the government from subjecting citizens to unreasonable searches and seizures. U.S. Const., Amends. IV, XIV; Ill. Const. 1970, art. I, § 6; *People v. Lopez*, 229 Ill. 2d 322, 345 (2008).

¶ 20 For constitutional purposes, a person is seized when he is placed under arrest. *Lopez*, 229 Ill. 2d at 346. Under the fourth amendment, an arrest must be accompanied by a warrant supported by probable cause. *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001); see also *People v. Robinson*, 167 Ill. 2d 397, 405 (1995) ("A warrantless arrest is unlawful absent probable cause"); *People v. Montgomery*, 112 Ill. 2d 517, 525 (1986) ("An arrest executed without a warrant is valid only if supported by probable cause"). "Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Wear*, 229 Ill. 2d 545, 563-64 (2008) (citing *People v. Love*, 199 Ill. 2d 269, 279 (2002)). The existence of probable cause depends upon the totality of the circumstances at the time of the arrest. *Wear*, 229 Ill. 2d at 564 (citing *Love*, 199 Ill. 2d at 279). Under the fruit of the poisonous tree doctrine, a "fourth amendment violation is deemed the 'poisonous tree,' and any evidence obtained by exploiting that violation is

1-12-2021

subject to suppression as the 'fruit' of that poisonous tree." *People v. Henderson*, 2013 IL 114040, ¶ 33.

¶ 21 A *Terry* stop is a recognized exception to the probable cause requirement of the fourth amendment, which allows for an officer to detain a citizen without an arrest warrant and without probable cause where his observations create a reasonable articulable suspicion that a crime has been or is about to be committed. *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (codified in the Illinois Code of Criminal Procedure of 1963 as 725 ILCS 5/107-14 (West 2010)). Such a stop must, at its inception, be based on specific and articulable fact, which the officer can point to as a reasonable basis for such an intrusion. *People v. Thomas*, 198 Ill. 2d 103, 109 (2001).

¶ 22 Our courts have recognized that there is no bright-line test for determining whether an encounter is a *Terry* stop or an arrest. See *Surles*, 2011 IL App (1st) 100068, ¶ 24; *Vasquez*, 388 Ill. App. 3d at 549. Generally, an arrest occurs when a person's freedom of movement is restrained by physical force or a show of authority. *Vasquez*, 388 Ill. App. 3d at 549; see also *Lopez*, 229 Ill. 2d at 346 (" 'An arrest occurs when the circumstances are such that a reasonable person, innocent of any crime, would conclude that he was not free to leave.' [Citation.]") In determining whether an encounter is a *Terry* stop or an arrest, our courts have analyzed several factors, including, but not limited to: (1) the time, place, length, mood, and mode of the encounter; (2) the number of officers present; (3) use of handcuffs, weapons, or other formal restraint; (4) the intent of the officers; (5) whether the defendant was told he could refuse to cooperate or that he was free to leave; (6) whether the defendant was transported by the police in a police car; and (7) whether the defendant was told he was under arrest. *Surles*, 2011 IL App

1-12-2021

(1st), ¶ 24; see also *Vasquez*, 388 Ill. App. 3d at 549.

¶ 23 In Illinois, an immediate show-up identification near the scene of the crime can be proper police procedure. *People v. Lippert*, 89 Ill. 2d 171, 188 (1982); *People v. Ramos*, 339 Ill. App. 3d 891, 897 (2003). Under certain circumstances, a prompt show-up identification can aid police in determining whether a suspect may be guilty or whether police should continue searching for a fleeing culprit while the trail is still fresh. *Lippert*, 89 Ill. 2d at 188; *Rodriguez*, 387 Ill. App. 3d at 830.

" 'Although one man show-ups are generally condemned, they have been consistently upheld when they are justified by the circumstances. One of the circumstances in which a show-up has been justified by the court is when it is necessary to facilitate a police search for the real offender, and the Supreme Court has consistently upheld prompt identification of a suspect by a witness or victim near the scene of the crime where they foster the desirable objectives of a fresh, accurate, identification which may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing offender while the trail is still fresh.' " *Ramos*, 339 Ill. App. 3d at 897 (quoting *People v. Hicks*, 134 Ill. App. 3d 1031, 1036 (1985)).

¶ 24 Because show-up identification procedures are generally considered inherently suggestive, however (*People v. Carrero*, 345 Ill. App. 3d 1, 10 (2003)), show-up identifications

1-12-2021

derived from such procedures violate a defendant's due process rights when the identification is found to be unreliable under the totality of the circumstances. *People v. Moore*, 266 Ill App. 3d 791, 797 (1994); *People v. Brackett*, 288 Ill. App. 3d 12, 20 (1997).

¶ 25 To establish a claim of ineffective assistance of counsel, a defendant must show that: (1) his attorney's representation fell below an objective standard of reasonableness; and (2) he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *Palmer*, 162 Ill. 2d at 475-76.

¶ 26 In order to establish prejudice with regard to the failure to seek the suppression of evidence, the defendant must show there is a reasonable probability " 'a defendant must show that a reasonable probability exists both that the motion would have been granted and that the outcome of the trial would have been different had the evidence been suppressed.' [Citations.]" *People v. Lundy*, 334 Ill. App. 3d 819, 830 (2002); *Henderson*, 2013 IL 114040, ¶ 12 (In order to establish prejudice with regard to the failure to seek the suppression of evidence, the defendant must show there is a reasonable probability both that the unargued suppression motion was meritorious and that the verdict would have been different without the excludable evidence); *People v. Little*, 322 Ill. App. 3d 607, 611 (2001) (To overcome the strong presumption that counsel's representation was effective, and "prevail on a claim of ineffectiveness based on counsel's failure to file a motion to quash and suppress, the defendant must show, first, a reasonable probability that the motion would have been granted and, second, that the outcome of

1-12-2021

the trial would have been different if the motion had been granted"); *Rodriguez*, 387 Ill. App. 3d at 829. An attorney will not be deemed ineffective for failing to file a futile motion. *Lundy*, 334 Ill. App. 3d at 830. The decision whether to file a motion to suppress is generally considered a matter of trial strategy that will typically not support a claim of ineffective assistance of counsel. *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2003).

¶ 27 Here, the facts adduced at trial reveal the following scenario: As Epinger arrived at his friend's apartment building, he noticed a group of kids nearby. When Epinger opened the vestibule door to his friend's building, three of these kids followed him inside. One of them was respondent, as identified by Epinger both in the show-up procedure the night of the incident as well as in court. These kids proceeded to pull a gun on Epinger and demand that Epinger give them his belongings. Epinger refused to do so. The kids beat him up and respondent reached inside Epinger's pants and took his driver's license, debit card, and approximately \$200 in cash. Throughout this time, Epinger was able to clearly see respondent, as respondent was nearby him and in a well-lit vestibule area. After the attack, Epinger ran to his friend's apartment upstairs. The two of them then went back out to the street to look for the assailants, at which time an unidentified black individual shot at them. Epinger drove quickly away in his white car, now with a flat tire and bullet holes in its trunk. Eventually, Epinger was pulled over by police, at which time he reported the events of the evening, including giving them a description of what the assailants were wearing, as well as a description of what the assailants looked like. Epinger told the police the assailants were wearing black hooded sweatshirts, and one had on a reddish-orange hooded sweatshirt.

1-12-2021

¶ 28 At the same time, Officer Davis responded to a 9-1-1 call that there were a "shots being fired and a robbery [that] had just occurred" near 4600 South Drexel Boulevard in Chicago. As they responded, however, they received another "call from the dispatcher saying that unknown male subject had ran into restaurant located at 45th Street and Cottage Grove Avenue, the description and it might be involved in the shooting." The trial court specifically allowed this testimony as course of conduct. Officer Davis and his partner then went to the restaurant, where they found respondent exiting the restaurant. Officer Davis identified respondent in court as the individual he had seen exiting the restaurant. The officers stopped respondent and informed him "he matched the description of someone." They then drove respondent to 46th Street and Cottage Grove Avenue in their squad car. Once there, Officer Davis brought Epinger over to the squad car, where he looked inside and "immediately" identified respondent as one of the assailants. Epinger testified at the hearing that he was "100 percent sure" respondent was one of the assailants.

¶ 29 Initially, we note that the decision whether to file a motion to suppress is generally considered a matter of trial strategy that will typically not support a claim of ineffective assistance of counsel. *Rucker*, 346 Ill. App. 3d at 885. Here, even if defense counsel was unreasonable in his failure to file a motion to quash arrest and suppress identification, respondent's claim nonetheless must fail because he is unable to show resulting prejudice where he cannot show a reasonable probability that, if he had filed the motion to suppress, (1) the unargued suppression motion would have been meritorious; nor (2) that the verdict would have been different without the excludable evidence. See *Henderson*, 2013 IL 114040, ¶ 12;

1-12-2021

Rodriguez, 387 Ill. App. 3d at 829.

¶ 30 The record before us establishes that, when the police officers detained respondent for a *Terry* stop and subsequently transported him for a show-up identification, the police possessed the requisite reasonable suspicion that respondent had been involved in the recent robbery (and possibly shooting) of Epinger. Epinger testified at the hearing that he told the police what the assailants were wearing and what they looked like. Additionally, Officer Davis testified that he responded to a 9-1-1 call that an individual—later determined to be respondent—who might have been involved in a robbery and shooting was in a particular restaurant. Although the description provided to Officer Davis in the 9-1-1 call is not apparent in the record, Officer Davis testified at the hearing that the call included the description and, in response to the call, Officer Davis and his partner proceeded to the restaurant, discovered respondent, and informed respondent that he matched the given description.

¶ 31 Respondent urges us to determine that the lack of a precise description in the record of what the assailants looked like is sufficient to overcome the strong presumption that trial counsel was aware of the content of Epinger's description as well as the description provided by the 9-1-1 caller and, from that, properly determined the police had reasonable suspicion to support the *Terry* stop and subsequent show-up identification. We decline to do so. Rather, we are cognizant that "the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 134 S.Ct. 10, 17 (2013). Although Officer Davis did not testify regarding the specific description provided in the 9-1-1 call, and Epinger did not testify in detail regarding the description he

1-12-2021

provided the officers, the record establishes that respondent was stopped because he matched the 9-1-1 caller's description of someone who may have been involved in the shooting. Officer Davis and his partner were working in concert with other officers who were investigating both the robbery and the shooting. "Under the 'collective-or imputed-knowledge' doctrine, information known to all of the police officers acting in concert can be examined when determining whether the officer initiating the stop had reasonable suspicion to justify a *Terry* stop." *People v. Ewing*, 377 Ill. App. 3d 585, 593 (2007). The police had a reasonable suspicion to believe that respondent may have been involved in one or both of these crimes. When respondent was initially detained, his conversation with Officer Davis and his partner did not dispel the officers' reasonable suspicion that respondent may have been involved in either the robbery or the shooting. Therefore, it was reasonable for the officers to transport respondent to Epinger's location, as Epinger could confirm or dispel their suspicion that respondent was involved in one of the crimes, particularly in light of the fact that one of the assailants who was still at large was carrying a handgun. See *Lippert*, 89 Ill. 2d at 188 (Under certain circumstances, a prompt show-up identification can aid police in determining whether a suspect may be guilty or whether police should continue searching for a fleeing culprit while the trail is still fresh).

¶ 32 Here, the stop and detention of respondent for a show-up identification was justified under *Terry*. A motion to quash arrest and suppress identification in this case would not have been meritorious and, accordingly, counsel cannot be deemed incompetent for failing to file such a motion. See *Lundy*, 334 Ill. App. 3d at 830 (An attorney will not be deemed ineffective for failing to file a futile motion).

1-12-2021

¶ 33

III. CONCLUSION

¶ 34 For all of the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 35 Affirmed.