

2014 IL App (1st) 123400-U  
No. 1-12-3400  
October 28, 2014

SECOND DIVISION

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party in the limited circumstances allowed under Rule 23(e)(1).

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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 Cook County.
Plaintiff-Appellee, )	
	)
v. )	No. 10 CR 09830
	)
MARIO DIAZ, )	The Honorable
	) Joseph M. Claps,
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:* Defense counsel provided ineffective assistance when he failed to move to suppress evidence seized in a warrantless search, where the suppression of the evidence provided the strongest defense to the prosecution's case. Because police obtained an anticipatory warrant, and then searched premises that did not, at the time of the search, fit the description of the premises for which the judge permitted a search, exigent circumstances could not justify the warrantless search. Since the State failed to show any other line of investigation would have led to the discovery of the evidence, the inevitable discovery doctrine did not apply. Double jeopardy did not preclude retrial because the totality of the evidence admitted at trial, including inadmissible evidence, sufficiently supported the conviction, as it showed that the defendant knew the boxes he received contained cannabis. The appellate court reversed the conviction for possession of cannabis and remanded the cause.

¶ 2 In this appeal from a conviction for possession of cannabis with intent to deliver, Mario Diaz contends that the prosecution failed to prove that he knew the boxes in his warehouse and the boxes he received outside his warehouse contained cannabis. He also argues that his attorney provided ineffective assistance by failing to move to suppress the evidence found in the search of his warehouse, where the search violated the terms of the search warrant. We hold that Diaz showed that (1) his trial counsel provided objectively unreasonable assistance when he failed to move to suppress evidence police found in a search conducted without a warrant, (2) the trial court probably would have granted a motion to suppress if defense counsel had filed such a motion, and (3) the trial likely would have ended with a different result if the trial court had suppressed the evidence found in the warrantless search. We find that the evidence admitted at trial sufficiently supports the finding that Diaz knew the boxes contained cannabis, so double jeopardy does not prevent the State from retrying Diaz. We reverse the trial court's judgment and remand for further proceedings.

¶ 3 **BACKGROUND**

¶ 4 On April 29, 2010, a Missouri state highway patrolman stopped a truck headed to Chicago because the driver weaved in and out of his lane. The driver permitted the patrolman to search the truck. The patrolman saw many boxes in good condition, but he found a few in poor condition. In the boxes in poor condition, he found bundles of cannabis weighing a total of 362 pounds. The Missouri state highway patrol contacted the Drug Enforcement Agency.

¶ 5 The truck driver agreed to cooperate with the Drug Enforcement Agency and Chicago police. He informed them he did not know his exact destination, which he would learn only when he made calls as he reached the Chicago area. Chicago police obtained an anticipatory

warrant to search "any premises or vehicle containing the packages of suspect cannabis once they have been unloaded" from the truck. The driver proceeded as arranged, stopping on the street near a warehouse. Diaz drove a forklift out of the warehouse to the truck. Diaz and another man brought a pallet out, and put it in the truck. The driver loaded the boxes that held cannabis onto the pallet. Diaz backed the forklift away from the truck, carrying the pallet loaded with the closed boxes of cannabis. He had the forklift more than 150 feet from the warehouse when police approached. Several men ran away, but Diaz stayed with the forklift. Police arrested several persons, including Diaz.

¶ 6 Chicago police officer David Pearson searched the warehouse. He saw construction equipment, some boxes, and a white and blue truck. Inside the truck he found several open boxes that looked like the boxes on the forklift. The open boxes in the white and blue truck held 146 pounds of cannabis.

¶ 7 Diaz spoke with special agent G. Gutierrez at the police station. Prosecutors charged Diaz with possession of cannabis with intent to deliver.

¶ 8 At the bench trial, Gutierrez testified that Diaz said he owned the warehouse and the white and blue truck. Diaz told Gutierrez that a man named Luis who worked at a nearby bar asked Diaz for permission to store some boxes in Diaz's warehouse. Diaz agreed to store the boxes in exchange for a bar tab, with a limit of \$200 worth of drinks per week. Luis and several other persons had keys to the warehouse.

¶ 9 Peter Stark, who managed the bar where Luis worked, testified that the bar did not permit anyone to run a tab. Stark admitted that Luis could have served Diaz \$200 worth of free drinks each week.

¶ 10 The trial court held that the prosecution proved beyond a reasonable doubt that Diaz knew that the boxes on the forklift, and the boxes in the warehouse, contained cannabis. The court found Diaz guilty of possessing cannabis with intent to deliver. The court sentenced Diaz to six years in prison. Diaz now appeals.

¶ 11 ANALYSIS

¶ 12 Ineffective Assistance of Counsel

¶ 13 Diaz argues that his counsel provided ineffective assistance when he failed to move to suppress evidence that police obtained when they searched Diaz's warehouse. To show ineffective assistance of counsel, Diaz 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). Diaz claims that if his attorney had moved to suppress the evidence obtained in the search, the trial court would have granted the motion, because the police violated the conditions of the search warrant.

¶ 14 The circuit court issued the anticipatory warrant at issue here before police or the driver knew where the driver would deliver the boxes. The court could not use an address to identify the premises subject to search. Instead, the court limited the warrant to "any premises or vehicle containing the packages of suspect cannabis once they have been unloaded" from the truck. At the time police executed the search warrant, Diaz had unloaded several boxes from the truck and put them on his forklift. However, Diaz had not brought the forklift with the boxes into the warehouse.

¶ 15 "The requirement that certain events must take place before the execution of an anticipatory search warrant assures that a search will take place *only* when justified by

probable cause." (Emphasis in original) *People v. Carlson*, 185 Ill. 2d 546, 554 (1999). "If the government were to execute an anticipatory warrant before the triggering condition occurred, there would be no reason to believe the item described in the warrant could be found at the searched location; by definition, the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued." *United States v. Grubbs*, 547 U.S. 90, 94 (2006). Because police searched the warehouse here when the boxes remained 150 feet from the warehouse, the police had no warrant authorizing the search they conducted.

¶ 16 The State offers three attempts to justify the warrantless search. First, the State contends that exigent circumstances excuse the search. "The cornerstone of an exigency analysis is whether the police officers acted reasonably." *People v. Wimbley*, 314 Ill. App. 3d 18, 24 (2000). To assess whether exigent circumstances excuse a warrantless search, the court may consider various factors that affect whether police could have obtained a warrant. The most common factors include "(1) whether the offense under investigation was recently committed; (2) whether there was any deliberate or unjustifiable delay by the officers during which time a warrant could have been obtained; (3) whether a grave offense was involved, particularly one of violence; (4) whether the suspect was reasonably believed to be armed; (5) whether the police officers were acting upon a clear showing of probable cause; (6) whether there was a likelihood that the suspect would have escaped if not swiftly apprehended; (7) whether there was a strong reason to believe that the suspect was on the premises; and (8) whether the police entry, though nonconsensual, was made peaceably." *Wimbley*, 314 Ill. App. 3d at 25. Most of the factors lack relevance here, where the warrant police actually obtained shows that police had enough time to obtain a warrant. Police acted

unreasonably when they precipitously entered and searched the warehouse they had no probable cause to search, because the boxes containing cannabis remained outside the warehouse at the time of the search. The State presented no evidence that any significant circumstances would have changed, or any evidence would have disappeared, if police had abided by the terms of the warrant and waited for Diaz to take the boxes into the warehouse before searching it. Exigent circumstances cannot justify the search here. See *People v. Galdine*, 212 Ill. App. 3d 472, 481-83 (1991).

¶ 17 Next, the State argues that it would have inevitably discovered the evidence through lawful means. See *People v. Island*, 385 Ill. App. 3d 316, 344 (2008). The inevitable discovery exception to the warrant requirement applies only if the State proves that "(1) the condition of the evidence must be the same when found illegally as it would have been when found legally; (2) the evidence would have been found by an independent line of investigation untainted by the illegal conduct; and (3) the independent line of investigation must have already begun when the evidence was discovered illegally." *People v. Harris*, 297 Ill. App. 3d 1073, 1085 (1998). But here the State did not present any evidence of an independent line of investigation. From this record, we cannot find that Diaz or his warehouse had attracted the attention of any investigators before the truck stopped near Diaz's warehouse. The inevitable discovery doctrine does not apply. See *People v. Nesbitt*, 405 Ill. App. 3d 823, 834 (2010).

¶ 18 In response to Diaz's petition for rehearing, the State contends that when police stopped Diaz, he had already reached the premises that included the warehouse, and therefore police did not violate the terms of the anticipatory warrant when they searched the warehouse. Police stopped Diaz, on the forklift with the boxes, more than 150 feet from the warehouse,

right after Diaz pulled away from the truck in the street. The evidence in the record on appeal does not support the assertion that the forklift had reached a privately owned lot that included the warehouse before the police conducted the search.

¶ 19 The State cites *United States v. Ross*, 456 U.S. 798 (1982), as authority for interpreting the warrant broadly to permit the search of the warehouse even though the warehouse never contained the marijuana unloaded from the truck. The *Ross* court held that the permissible scope of a search for contraband "is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *Ross*, 456 U.S. at 824.

¶ 20 Here, the trial court should interpret the warrant narrowly, as only the contraband in the truck provides probable cause for any search. If defense counsel had filed an appropriate motion to suppress the seized evidence, the trial court probably would have held that once police found the contraband referenced in the warrant, on Diaz's forklift, police could not rely on the warrant to justify a further search of places nearby, even if a single property owner owned the warehouse and the parking area on which police found the marijuana. See *Ross*, 456 U.S. at 824.

¶ 21 Police obtained a valid warrant to search any premises containing the boxes they found on the truck, but then they searched instead a warehouse that never contained the boxes. If defense counsel had moved to suppress the evidence seized in violation of Diaz's right to be

free from unreasonable searches and seizures, the trial court likely would have granted the motion and suppressed the evidence seized in the search of the warehouse. See *Wimbley*, 314 Ill. App. 3d at 34.

¶ 22 We see no possible strategic purpose for failing to move to suppress the illegally seized evidence. When defense counsel fails to make a motion to suppress evidence obtained in an illegal search, and such a motion provides the strongest defense to the State's case, the defendant has shown that his counsel provided objectively unreasonable assistance. See *People v. McPhee*, 256 Ill. App. 3d 102, 110-11 (1993).

¶ 23 If the State did not present the evidence the police obtained without a search warrant, the State could have shown only that Diaz unloaded the unopened boxes from the truck. No evidence would show that Diaz knew what the boxes contained, and a conviction for possession of cannabis requires proof that the defendant knew that he possessed the illicit substance. See *People v. Hodogbey*, 306 Ill. App. 3d 555, 560-62 (1999). We find that Diaz has shown that if his attorney had moved to suppress the evidence obtained in the warrantless search, that motion had a reasonable likelihood of being granted and the trial may have ended with a different result. Due to the ineffective assistance of counsel, we must reverse the conviction. See *People v. Bailey*, 374 Ill. App. 3d 608, 615 (2007).

¶ 24 Sufficiency of the Evidence

¶ 25 Diaz contends that we should not remand the case for further proceedings because the prosecution did not prove he knew the boxes contained cannabis. When we assess the sufficiency of the evidence, we must consider all the evidence admitted at the original trial, including all inadmissible evidence. *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). We will reverse the conviction for insufficient evidence only if, after reviewing the evidence in the

light most favorable to the prosecution, we find that no reasonable trier of fact could have found that the State proved the elements of the offense beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31.

¶ 26 We find the relevant principles restated in *People v. Stamps*, 108 Ill. App. 3d 280 (1982):

"Proof of the crime of unlawful possession of controlled substances requires that the State establish that the accused had knowledge of the presence of the narcotics \*\*\*. Because knowledge is seldom susceptible of direct proof, it may be proved by evidence of acts, declarations, or conduct from which it is reasonable to infer that the accused knew of the existence of the narcotics at the place they were found. \*\*\*

\*\*\* '[W]here narcotics are found on premises under defendant's control, it may be inferred that the defendant had both knowledge and control of the narcotics. This inference is based largely upon the nature of the commodity and the manner in which its illegal traffic is conducted. \* \* \* [S]ince [the] mere possession [of narcotics] may subject [a] person to severe criminal consequences, the narcotics traffic is conducted with the utmost secrecy and care. \*\*\*.

We are of the opinion, therefore, that where narcotics are found on the premises under the control of defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by him which may be sufficient to sustain a conviction for unlawful possession of narcotics, absent other facts and circumstances which might leave in the mind of the jury \*\*\* a reasonable doubt as to his guilt.'

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\*\*\*The requirement of exclusive control of the premises on the part of the accused does not permit him to defeat prosecution under facts similar to those presented here simply by a showing of joint control." *Stamps*, 108 Ill. App. 3d at 291-93 (quoting *People v. Nettles*, 23 Ill. 2d 306, 308-09 (1961)).

¶ 27 Diaz owned both the warehouse and the truck in the warehouse where Pearson found 146 pounds of cannabis. Even though Diaz gave others access to the warehouse, from the evidence as a whole (including the inadmissible evidence), a trier of fact could infer that Diaz knew about the cannabis in the warehouse.

¶ 28 Diaz relies on *Hodogbey*, 306 Ill. App. 3d 555, as authority for reversal here. *Hodogbey* accepted delivery of a package and left the package unopened in the middle of his living room when he left his apartment. Police approached him on the street and asked if they could look in his apartment. He gave them his keys. They opened the package and found that it contained heroin. The trial court found *Hodogbey* guilty of possessing heroin. The appellate court, applying persuasive authority from Pennsylvania, found the evidence insufficient to support the inference that *Hodogbey* knew the package contained heroin and reversed the conviction. *Hodogbey*, 306 Ill. App. 3d at 560-62.

¶ 29 Cases from several states have established the principles applied in *Hodogbey*. "In the absence of other evidence, possession of an unopened package, containing drugs, addressed to another and received through the mail moments before his arrest, would not warrant an inference beyond a reasonable doubt that a defendant possessed the drugs knowingly." *Commonwealth v. Aguiar*, 350 N.E.2d 436, 442 (Mass. 1976). The prosecution must "show

defendant knew or expected that the package contained [the controlled substance] and intended to control its disposition or use.” *State v. Rashidi*, 617 S.E.2d 68, 74 (N.C. App. 2005).

¶ 30 A New Jersey court said:

"knowing or intentional possession cannot be inferred merely from the fact of delivery to defendant by mail or common carrier of a sealed package containing the illegal goods, and that acceptance of the package by itself cannot yield an inference of knowledge by the recipient of its contents. Rather, something more by way of attendant circumstances must be shown from which an inference can be drawn that defendant also knew what was in the package and intended to assert possessory control over it.

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\*\*\*Either the arrest, which was virtually simultaneous with the delivery, was predicated not only on the delivery itself but on a totality of circumstances surrounding the delivery which implied defendant's knowledge of the contents of the package and intent to exercise dominion over it, or the arrest was made some time after the delivery had been completed and defendant, in the interval between the delivery and the arrest, took some affirmative action *vis-a-vis* the package from which these inferences of knowledge and dominion could be drawn." *State v. Richards*, 382 A.2d 407, 411 (N.J. Super. Ct. App. Div. 1978).

¶ 31 Diaz showed no unusual eagerness to receive the packages. See *United States v. Jackson*, 55 F.3d 1219, 1226 (6th Cir. 1995). He made no effort to conceal the packages kept in the



obtained, the trial probably would have ended with a different result. Open boxes of cannabis found in Diaz's truck, in Diaz's warehouse, support the inference Diaz knew the boxes contained cannabis. Accordingly, we reverse the trial court's judgment and remand for further proceedings in accord with this order.

¶ 35 Reversed and remanded.