

2015 IL App (1st) 122571-U
No. 1-12-2571
Order Filed January 23, 2015

SIXTH DIVISION

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	No. 11 CR 10583
v.)	
)	
ANDRE BANKS,)	
)	Honorable
Defendant-Appellant.)	Jorge Luis Alonso,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's conviction and sentence for being an armed habitual criminal was upheld where the defendant failed to establish that defense counsel's failure to file a motion to challenge the search warrant denied him the effective assistance of counsel.

¶ 2 Following a bench trial, the defendant, Andre Banks, was found guilty of being an armed habitual criminal in violation of section 24-1.7 of the Criminal Code of 1961 (720 ILCS 5/24-1.7 (West 2010)). The defendant was sentenced to a term of 8 years' imprisonment in the Department of Corrections. The sole issue on appeal is whether defense counsel's failure to file a motion to quash the search warrant and suppress evidence denied the defendant his constitutional right to the effective assistance of counsel. Based on the facts and the law governing the defendant's claim, we concluded that the defendant was not denied the effective assistance of counsel and affirm the defendant's conviction and sentence.

¶ 3 On June 14, 2011, Officer Kyle Mingari and "J/Doe" appeared before the circuit court of Cook County and subscribed and swore to a complaint to search an individual named Andre Banks and the premises located at 4951 West Rice Street, Chicago. The complaint for search warrant sought the seizure of the following items:

"[a] black Mossberg 12 gauge shotgun, any ammunition, Heroin, to wit a controlled substance and any documents showing residency, any paraphernalia used in the weighing, cutting or mixing of illegal drugs. Any money, any records detailing illegal drug transactions. [W]hich have been used in the commission of, or which constitute evidence of the offense of: Unlawful Use of a Weapon by a Felon [citation] [and] Manufacture or Delivery of a Controlled Substance [citation] [.]"

¶ 4 In the complaint, Officer Mingari stated that he had probable cause to believe the items to be seized were located on the person of Andre Banks, and the premises at 4951 West Rice Street, Chicago, based upon the following facts:

"I, Officer Kyle Mingari #4755 have been a Chicago Police Officer for more than 4 1/2 Years. I, Officer Kyle Mingari have been assigned to the 15th District for over 3 1/2 years, with the last 2 1/2 years in the narcotics tactical unit. I, Officer Kyle Mingari have participated in approximately 200 narcotics surveillances and approximately 1000 narcotics related arrests. I, Kyle Mingari, met with J/Doe 09 Jun 11, who related the following information to me.

On 14 June 11, I had the opportunity to speak to an individual that I will refer to as J/Doe. J/Doe related to P.O. Mingari #4755 that J/Doe was at the location of 4951 W. Rice, a brown two story apartment building 1st floor apartment with connected basement located in the City of Chicago, Cook County, Illinois on 12 Jun 11 in the presence of Banks, Andre a male black, 5'11", 160 lbs, 20 years of age, IR#1682895. J/Doe related to the R/O that while in the front room of the residence of Banks, Andre, J/Doe observed an unknown male black enter the residence and state to Andre Banks, 'I need a pack.' J/Doe then related that Andre Banks went to the front bedroom, lifted the mattress, removed an item and returned with a knotted plastic bag containing several taped tinfoil packets of heroin and gave it to the unknown male black. J/Doe related to P.O. Mingari #4755 that J/Doe sold heroin and the only heroin that J/Doe has been selling is the heroin that J/Doe received from Banks, Andre IR#1682895. J/Doe has received heroin from Banks, Andre IR#1682895 for sale and has several repeat customers who never complained about the product. J/Doe has never known Banks, Andre IR#1682895 to be without heroin. J/Doe also related to P.O. Mingari #4755 that while in the residence of Andre Banks on 12 Jun 11 in the basement, Andre Banks stated to J/Doe 'I bought a new banger.'

Banger is the street term for a firearm. J/Doe then related to P.O. Mingari #4755 that Andre Banks went to a rear room in the basement and returned with a black Mossberg 12 gauge shotgun and handed it to J/Doe. J/Doe is familiar with guns and knew the black Mossberg 12 gauge shotgun that he observed with Andre Banks IR#1682895 to be a real shotgun from past experience with guns. J/Doe has known Andre Banks for over 15 years.

On 14 Jun 11, I, P.O. Kyle Mingari #4755 then was accompanied by J/Doe to the address of 4951 W. Rice, where J/Doe pointed out a Brown brick two story apartment building with the numbers 4951 clearly visible on the front entrance of the building. J/Doe pointed out the residence and stated, '[t]he drugs are on the first floor and the shotgun is in the basement.'

Using the Chicago Police Intranet Data Warehouse computer system, I, P.O. Kyle Mingari #4755 then performed a search of Banks, Andre a male black, 5'11", 160 lbs, 20 years of age, DOB 22 Sep 88 with the IR#1682895. I then showed the C.L.E.A.R. picture of Andre Banks IR#1682895 to J/Doe who positively identified the photo as the male black, J/Doe knows as Andre Banks, and who J/Doe gets his heroin from and who he seen in possession of a shotgun. Using the Chicago Police Intranet Clear system, I, P.O. Kyle Mingari #4755 also performed a criminal history check of Andre Banks IR#1682895 which revealed Andre Banks IR#1682895 is currently on parole and was convicted of a felony in *** in 2010, *** in 2009 and *** in 2007.

* * *

J/Doe is cooperating due to prior felony arrests. J/Doe's criminal history including possible pending investigations is and have been presented and made available to the undersigning judge." (Emphasis Omitted.)

¶ 5 Noting that both Officer Mingari and J/Doe appeared before it and had subscribed to and sworn to the complaint, the circuit court examined the complaint and found that the complaint "states facts sufficient to show probable cause" and issued a warrant to search "Banks, Andre a male black, 5'11", 160 lbs, 20 years of age, DOB 22 Sep 88, IR#1682895, and the premises at 4951 W. Rice, a brown brick two story apartment building 1st floor apartment with connected basement located in the City of Chicago, Cook County, Illinois." The search warrant further directed the seizure of "the following instruments, articles and things *** which have been used in the commission of, or which constitute evidence of the offense[s] of Unlawful Use of a Weapon by a Felon [citation] [and] Manufacture or Delivery of a Controlled Substance [citation] [.]" The warrant specified the following items:"[a] black Mossberg 12 gauge shotgun, any ammunition, Heroin, to wit a controlled substance and any documents showing residency, any paraphernalia used in the weighing, cutting or mixing of illegal drugs. Any money, any records detailing illegal drug transactions." (Emphasis omitted.)¹

¶ 6 The evidence at the defendant's bench trial revealed that on June 14, 2011, Officer Mingari and other police officers executed the search warrant. In a small room adjacent to the living room, the police found a letter addressed to the defendant at the Rice Street apartment. The room also contained male clothing and deodorant. In the connected

¹Hereinafter, the first floor apartment with connected basement at 4951 W. Rice will be referred to as the Rice Street apartment.

basement, the police located a black Mossberg 12 gauge shotgun in the storage room. At the time of the search, two women were the only ones present in the apartment.

¶ 7 On June 21, 2011, Officer Mingari was notified that the defendant was in custody. After Officer Mingari advised the defendant of his *Miranda* rights, the defendant agreed to answer the officer's questions. The defendant told the officer that another man and he purchased a shotgun from a man named Terrell. The shotgun had been in the Rice Street apartment for about three weeks. The defendant admitted that he knew he should not have had the shotgun. On cross-examination, Officer Mingari acknowledged that he did not write in his report that the defendant described the gun as a shotgun or stated that what he purchased from Mr. Terrell was a gun. The officer further acknowledged that he mentioned to the defendant that it was a shotgun. The defendant did not state that the shotgun was in the basement.

¶ 8 The defendant waived his right to testify in his own behalf. The defense rested.

¶ 9 Based on the defendant's prior convictions for manufacture/delivery of a controlled substance, the trial court found the defendant guilty of being an armed habitual criminal and sentenced him to 8 years' imprisonment. The defendant filed a timely notice of appeal.

¶ 10

ANALYSIS

¶ 11

I. Standard of Review

¶ 12

"Where the facts surrounding the ineffective assistance claim are undisputed and the claim was not raised below, this court's review is *de novo*." *People v. Wilson*, 392 Ill. App. 3d 189, 197 (2009).

¶ 13

II. Discussion

¶ 14

We apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine if a defendant has been denied his right to effective assistance of

counsel. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11. The defendant must show (1) counsel's performance was deficient, and (2) the deficient performance must be prejudicial to the defendant. *McGhee*, 2012 IL App (1st) 093404, ¶ 11. "The performance prong is satisfied if 'counsel's performance was objectively unreasonable under prevailing norms,' and the prejudice prong is satisfied if there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' (Internal quotation marks omitted.)" *McGhee*, 2012 IL App (1st) 093404, ¶ 11 (quoting *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010)). Both prongs of the *Strickland* test must be satisfied, or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 15 "[W]here an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *People v. Henderson*, 2013 IL 114040, ¶ 15. Counsel is not required to file futile motions in order to provide effective assistance. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). The question of whether to file a motion to suppress evidence is generally a matter of trial strategy and has little bearing on counsel's competency. *People v. Kornegay*, 2014 IL App (1st) 122573, ¶ 20. The decision to file or not to file a motion to suppress is best left up to counsel's discretion, and we will not extend our inquiry into areas involving the exercise of discretion. *Kornegay*, 2014 IL App (1st) 122573, ¶ 20.

¶ 16 A reviewing court must not substitute its judgment for that of the judge issuing the search warrant; it only decides whether the issuing judge had a substantial basis to conclude that probable cause existed. *Kornegay*, 2014 IL App (1st) 122573, ¶ 26. "Whether the necessary

probable cause exists is governed not by technical legal rules, but rather by commonsense considerations that are factual and practical." *Kornegay*, 2014 IL App (1st) 122573, ¶ 21. The court in *Kornegay* found guidance in *People v. Stewart*, 104 Ill. 2d 463 (1984), wherein our supreme court stated as follows:

" ' "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." [Citation.] Read in a common-sense and realistic fashion, the affidavits contained sufficient specificity in light of the totality of the circumstances to justify the issuance of the search warrants. There was a substantial basis for the magistrate's finding of probable cause. [Citation.]' " *Stewart*, 104 Ill. 2d at 477 (quoting *United States v. Ventresca*, 380 U.S. 102, 109 (1965)).

¶ 17 In the present case, Officer Mingari filed a complaint for a search warrant based on information from an unnamed informant. The complaint set forth Officer Mingari's police experience with narcotics and narcotics surveillance. The complaint also set forth: the informant's information regarding his own purchases of heroin from the defendant and his observance of a drug transaction between the defendant and another man at the Rice Street apartment; and the informant's information as to the defendant's possession of a Mossberg 12 gauge shotgun in the basement of the Rice Street apartment.

¶ 18 The complaint contained the informant's physical description of the defendant, the fact that he had known the defendant for 15 years, his positive identification of a photograph of the defendant, and he pointed out the Rice Street apartment to Officer Mingari as they drove

by it. In addition, the informant appeared before the court and signed the complaint under oath.

¶ 19 The defendant maintains that a motion to quash the warrant and suppress the shotgun was meritorious because the complaint for the search warrant was based on the uncorroborated criminal allegations of an unnamed informant whose reliability was not established. Where a defendant challenges the credibility of an informant, the court considers several factors "such as the informant's personal observations, the degree of detail given, independent police corroboration of the *** information, and whether the informant testified at the probable cause hearing. [Citation.]" *People v. Smith*, 372 Ill. App. 3d 179, 183-84 (2007) (quoting *United States v. Johnson*, 289 F.3d 1034, 1038-39 (7th Cir. 2002), *abrogated on other grounds*). See *Smith*, 372 Ill. App. 3d at 182.

¶ 20 The court in *Smith* reiterated its holding in prior cases that "where the informant has appeared before the issuing judge, the informant is under oath, and the judge has had the opportunity to personally observe the demeanor of the informant and assess the informant's credibility, additional evidence relating to informant reliability is not necessary. *Smith*, 372 Ill. App. 3d at 182 (quoting *People v. Moser*, 356 Ill. App. 3d 900, 909 (2005)). The defendant notes that in *Smith*, this court declined to adopt the State's position that the informant's appearance before the court created the presumption that the judge had questioned him and had the opportunity to assess his credibility. *Smith*, 372 Ill. app. 3d at 182. Nonetheless, while an informant's appearance before a magistrate was only one factor to consider in the totality of the circumstances, the court in *Smith* did not find "that the lack of an on-the-record colloquy between the magistrate and the informant destroys the reliability

established by the informant's presence." *Smith*, 372 Ill. App. 3d at 184; see *Johnson*, 289 F.3d at 1040 n.3.

¶ 21 *Kornegay* is instructive. In that case, the court granted a search warrant based on an unidentified informant who told police that he purchased cannabis at a particular address in Chicago from a person named "Sidney." The informant positively identified a picture of the defendant from a police database, admitted purchasing drugs from him within the last 48 hours and appeared before the court at the time the warrant was issued. *Kornegay*, 2014 IL App (1st) 122573, ¶¶ 35-36. Taken as a whole, the court in *Kornegay* found that the evidence provided the court with a substantial basis to conclude that probable cause existed to search the address. *Kornegay*, 2014 IL App (1st) 122573, ¶ 36. The reviewing court held that, while there was no proof that the informant was questioned by the court, the informant appeared before the court when the search warrant was issued and was available for questioning. *Kornegay*, 2014 IL App (1st) 122573, ¶ 36. "The fact that questioning may or may not have occurred does not undermine the magistrate's finding that probable cause existed to issue the search warrant because the informant's very presence supported his or her reliability." *Kornegay*, 2014 IL App (1st) 122573, ¶ 36.

¶ 22 There is no evidence in the record before us that J/Doe was questioned by the court issuing the search warrant. The record did establish that J/Doe was present before the court and under oath, which gave the court the opportunity to observe his demeanor and assess his credibility. In addition, the informant's reliability was also supported by his personal observations, the degree of detail he provided, his positive identification of a photograph of the defendant, and his admission that he obtained heroin from the defendant on several

occasions and distributed it to his "customers." See *Johnson*, 289 F.3d at 1039-40 (statements against penal interests supported reliability of the informant).

¶ 23 The defendant argues that the informant's drug-related admissions support his unreliability, citing *People v. Lewis*, 25 Ill. 2d 396, 399 (1962) ("the testimony of a narcotics addict is subject to suspicion due to the fact that habitual users of narcotics become notorious liars"). The defendant's reliance on *Lewis* is misplaced since J/Doe averred that he sold heroin, not that he himself used heroin.

¶ 24 The defendant's reliance on *United States v. Bell*, 585 F.3d 1045 (7th Cir. 2009) is equally misplaced. The court of appeals found an insufficient basis for the issuance of a search warrant: the affidavit lacked detail as to the amount or the identity of the substances; the affidavit did not provide any information about the defendant's relationship with the informant, who according to the court "could have been a rival drug dealer, an angry customer, or had some other beef with the defendant." *Bell*, 585 F.3d at 1050. Moreover, the informant did not appear before the issuing judge, which would have given the judge an opportunity to assess his credibility. *Bell*, 585 F.3d at 1050. In the present case, J/Doe had known the defendant for 15 years, positively identified a photograph of the defendant, explained that he obtained heroin from the defendant which he then sold to others, and appeared under oath before the court issuing the warrant.

¶ 25 The defendant points out that in *United States v. Peck*, 317 F.3d 754 (7th Cir. 2003), the court of appeals found that the informant's appearance before the magistrate and taking the oath that her statements were true, but who did not testify, was insufficient to overcome the deficiencies in the warrant application. *Peck*, 317 F.3d at 757. The deficiencies in the warrant were the minimal amount of detail, such as where the drugs were located in the

defendant's house, the total amount of drugs in the defendant's possession and the frequency with which the defendant sold drugs. There was also a lack of independent police corroboration; the only effort by the police to corroborate the informant's statements was to check the defendant's record which showed a prior arrest for drug possession. Despite the fact the informant stated she was the defendant's girlfriend, she provided no other information about him except that he was a black male. The informant knew the substances were illicit drugs only through her " 'personal experiences ' " without explaining why she recognized the substances as drugs. *Peck*, 317 F.3d at 756-57.

¶ 26 The deficiencies in the complaint for a search warrant in *Peck* were not present in the complaint for search warrant in the present case. The defendant points out that there was no independent police corroboration of the fact that the defendant was a convicted felon because Officer Mingari discovered that fact on his own search of the police database. However, no one factor in considering an informant's reliability is determinative, and weaknesses in one factor may be compensated for by a strong showing in another factor. *Peck*, 317 F.3d at 756.

¶ 27 Finally, we reject the defendant's reliance on *Florida v. J.L.*, 529 U.S. 266 (2000), and *People v. Brown*, 343 Ill. App. 3d 617 (2003). In *Kornegay*, this court agreed with the State that *J.L.* and *Brown* are inapposite because, unlike the case before it, the informants in those two cases did not appear before a magistrate, the informants did not describe the basis for their knowledge, and the officers did not obtain search warrants. Moreover, the informants in those two cases were truly anonymous. *Kornegay*, 2014 IL App (1st) 122573, ¶¶ 28-29. For the same reasons, *J.L.* and *Brown* are inapposite to the present case.

¶ 28 Finally, the defendant's reliance on *Navarette v. California*, ___ U.S. ___, 134 S. Ct. 1683 (2014) is misplaced. The defendant relies on Justice Scalia's dissent, not the majority

opinion. Recognizing it was a close case, the majority of the court found that under the totality of the circumstances, an unidentified 911 caller stating that she had been run off the road by another vehicle was sufficiently reliable to provide the police with reasonable suspicion to stop the defendants' truck, which matched the caller's description. *Navarette*, 134 S. Ct. at 1692.

¶ 29 We conclude that the totality of the facts and circumstances set forth in the complaint for a search warrant in this case satisfies the probable cause requirement for the issuance of the search warrant. Since a motion to quash the search warrant and suppress the evidence was not meritorious, the omission of the motion did not prejudice the defendant, and his ineffective assistance of counsel claim fails.

¶ 30 We affirm the defendant's conviction and sentence.

¶ 31 Affirmed.