2015 IL App (1st) 130350-U

FIFTH DIVISION
May 8, 2015

No. 1-13-0350

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 5333
	)	
LYNN BOLTON,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justice McBride and Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Due to the inadequacy of the record, the issue of whether counsel was ineffective for failing to file a motion to suppress evidence cannot be considered on direct appeal. The judgment of the trial court is affirmed.

¶ 2 Following a bench trial, defendant Lynn Bolton was convicted of possession of a controlled substance and sentenced to two years' probation. On appeal, defendant contends that where a police officer's search of the mailbox at his residence was unreasonable under the Fourth

Amendment, defense counsel was ineffective for not filing a motion to suppress the evidence of cocaine that was recovered from the mailbox.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the events of January 26, 2012. At trial, Chicago police officer Noel Esquivel testified that on that date at approximately 11:30 p.m., he and his partner were driving an unmarked police vehicle on West Maypole Avenue, a known narcotics area. The officers proceeded to 3316 West Maypole Avenue based on information Esquivel received from an anonymous concerned citizen. When he arrived at the address Esquivel observed defendant, who matched the description the police had previously received, standing in front of the residence at that address.

¶ 5 Officer Esquivel testified that he exited his vehicle and approached defendant for a field interview. When he was about 5 to 10 feet from defendant, defendant reached into his right front coat pocket, removed a plastic bag, and placed or tossed it in a mailbox attached to the wrought iron fence. Officer Esquivel removed a flashlight from his vest and looked inside the mailbox. The only item in the mailbox was the plastic bag, which contained smaller Ziploc bags of white crack cocaine. Officer Esquivel estimated that the larger bag was about 12 by 3 inches in size. Officer Esquivel testified that he then went inside the gate, opened the mailbox, reached inside, and recovered the bag. His partner arrested defendant. At the police station, $10 was recovered from defendant during a custodial search.

¶ 6 Chicago police officer Michael Smolek testified that on the day in question, he and his team were informed by anonymous concerned citizens that there was a heavy-set black man in a red coat and blue pants selling drugs at 3316 West Maypole Avenue. At approximately 11:30

p.m., Officer Smolek and his partner drove to that address based on the information they had received. Defendant, who was heavy set and wearing a red coat and blue pants, was standing at that address. Officer Smolek testified that his partner approached defendant first. When Officer Smolek thereafter reached defendant, his partner directed him to detain defendant. His partner looked inside the mailbox with a flashlight and then went inside the gate and recovered a plastic bag containing suspect crack cocaine from the mailbox. At that time, Officer Smolek placed defendant into custody. On cross-examination, Officer Smolek acknowledged that he did not see defendant reach into his pocket or put anything in the mailbox.

¶ 7 The parties stipulated that the inventory in this case was one large bag containing 16 smaller bags. The contents of those bags weighed approximately 2.6 grams and tested positive for 1.3 grams of cocaine.

¶ 8 Defendant testified that on the date in question, he lived with his mother at 3316 West Maypole Avenue. He left the house around 11:30 p.m. to meet a friend who was across the street and go to the store. Defendant was wearing a red jacket and blue jeans. When he reached the curb, he saw a police car coming fast up the street, as well as a second police car from another direction. "A lot" of people were outside. When the police officers stopped and exited their vehicles,[1] they took defendant's friends from across the street, brought them to the front of defendant's mother's house, handcuffed defendant and his friends to the gate, and searched "all around" the house. Defendant testified that there was a mailbox attached to the metal gate or fence in front of the house, but denied putting anything in the mailbox. He also denied being near

[1] On cross-examination, Officer Esquivel testified that multiple officers arrived at the scene in two vehicles; however, only Officers Esquivel and Smolek testified at trial.

the mailbox when the police officers pulled up, having drugs in his pocket, or possessing drugs on that day. When asked whether the mailbox was on the inside or outside of the fence, defendant answered, "It's like -- it's on the fence, but it's like a little slide. I mean, it's connected. The only way you could open it is to go on the inside of the gate."

¶ 9 The trial court found defendant guilty of possession of a controlled substance. The court stated that it did not find defendant to be credible. The court subsequently sentenced defendant to two years of probation.

¶ 10 On appeal, defendant contends that defense counsel was ineffective for not filing a motion to suppress the recovered cocaine on the basis that Officer Esquivel's search of the mailbox was unreasonable under the Fourth Amendment. Defendant argues that if Officer Esquivel had to open the mailbox slot to view its contents, his conduct was an unwarranted and unlicensed physical intrusion into an item in the protected curtilage of the house and a violation of defendant's reasonable expectation of privacy in his mailbox. In the alternative, defendant argues that if the mailbox slot was uncovered, the search was unreasonable because the mailbox's contents would not have been easily visible to a passerby and no respectful citizen would have looked into the slot. Defendant maintains that a motion to suppress would have been meritorious, and since he would have been acquitted had the cocaine been suppressed, he was prejudiced by counsel's failure to file such a motion.

¶ 11 Claims of ineffective assistance of counsel are evaluated under the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, a defendant must demonstrate (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that a reasonable probability exists that but for counsel's unprofessional errors, the result

of the proceeding would be different. *People v. Henderson*, 2013 IL 114040, ¶ 11. The failure to establish either prong of the test defeats a claim of ineffectiveness. *Id*. Where a claim of ineffectiveness is based on an attorney's failure to file a motion to suppress, in order to establish the prejudice prong of *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. *Id*. at ¶ 15. Because the decision whether to file a motion to suppress is considered a matter of trial strategy, counsel's decision is given great deference and is generally immune from claims of ineffective assistance. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004).

¶ 12 In the instant case, the record is insufficient to support either a claim of ineffective assistance of counsel or a finding that trial counsel's decision not to file a motion to suppress was a matter of trial strategy. Based on the record before us, we cannot say whether a motion to suppress would have had a reasonable probability of success. As defendant acknowledges, the evidence presented at trial did not include a physical description of the mailbox or explain how Officer Esquivel was able to look into it. In his brief, defendant suggests that there may have been a slot on the front of the mailbox. He argues that if this hypothetical slot was covered, then Officer Esquivel must have pushed open some sort of door to look inside the mailbox, or, if the hypothetical slot was uncovered, then the officer "likely" would have had to lean over to look into it. These theories are rife with speculation. Without actual evidence describing Officer Esquivel's actions, we cannot evaluate whether he violated the Fourth Amendment by looking into the mailbox or whether counsel was ineffective for not filing a motion to suppress the evidence of the cocaine the officer recovered from the mailbox.

¶ 13 In cases where a claim of ineffectiveness is based on the failure to file a motion to suppress, the record will often be incomplete or inadequate to evaluate the claim because the record was not created for that purpose. *Henderson*, 2013 IL 114040, ¶ 22. Our supreme court has held that where the record is insufficient because it has not been precisely developed for the object of litigating a specific claim of ineffectiveness of counsel, the claim should be brought on collateral review rather than on direct appeal. *People v. Ligon*, 239 Ill. 2d 94, 105 (2010); *People v. Bew*, 228 Ill. 2d 122, 134-35 (2008), citing *Massaro v. United States*, 538 U.S. 500, 504-05, 506 (2003). "The benefit of raising an ineffective assistance claim in a collateral proceeding is that the defendant has a full opportunity to present evidence establishing ineffective assistance, the State has a full opportunity to present evidence to the contrary, the trial court has an opportunity to make credibility determinations, and the appellate court, if need be, has the benefit of a factual record bearing precisely on the issue." *People v. Clark*, 406 Ill. App. 3d 622, 640-41 (2010), citing *Bew*, 228 Ill. 2d at 134.

¶ 14 Here, the evidentiary basis for defendant's claim of ineffective assistance of counsel is largely *dehors* the record, and therefore cannot be considered. *Ligon*, 239 Ill. 2d at 105-06, citing *People v. Whitehead*, 169 Ill. 2d 355, 372 (1996). Based on the record before us, we cannot conclude that counsel rendered ineffective assistance.

¶ 15 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 16 Affirmed.