2015 IL App (1st) 131215-U

FOURTH DIVISION
September 30, 2015

No. 1-13-1215

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. 07 CR 6970
	)	
KIMBERLY WOLF,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Gordon concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant's ineffective assistance of counsel claim for her trial counsel's failure to file a motion to suppress is meritless where she could not demonstrate that the unargued motion would have been successful.

¶ 2 Following a bench trial, the trial court found defendant Kimberly Wolf guilty of possession of cannabis with intent to deliver. The court sentenced her to 18 months' probation. On appeal, defendant contends that her trial counsel was ineffective for failing to file a motion to suppress the evidence and an incriminating statement where a successful motion would have

suppressed the State's only evidence against her. For the reasons that follow, we affirm the judgment of the circuit court and *sua sponte* order the clerk of the circuit court to correct defendant's sentencing order to reflect her sentence of 18 months' probation.

¶ 3 At trial, Sergeant Helwink-Masters of the Chicago police department testified that on March 9, 2007, she was part of a "saturation" team consisting of 10 officers whose object was to saturate Chicago's worst crime areas with police officers. At approximately 8:34 p.m., she supervised a team that executed a search warrant on a house located on the 500 block of North Laramie Avenue.

¶ 4 After Helwink-Masters and her team entered the two-story house, they proceeded to a second-floor bedroom where they found three individuals, including defendant and the subject of the search warrant. In the room, the police also recovered a gun and cocaine. The police then brought all three individuals into the living room and "secured" them all. Helwink-Masters then asked defendant "if there was any – any other contraband located in – anywhere in the apartment." Defendant told her that "she had a little weed on her" and handed Helwink-Masters a "plastic baggie that contained [18] smaller baggies with cannabis" inside. Helwink-Masters did not remember from where defendant removed the "baggie" but knew it was from somewhere on her body. The larger bag was shaped like a "small snowball," and the smaller bags were about "a quarter" in size. Based on Helwink-Masters' experience as a narcotics officer, she believed that defendant intended to sell the cannabis.

¶ 5 The police then arrested defendant and recovered $12 from her. However, the police did not find any drug paraphernalia on her. The police also arrested the other two individuals present

inside the house, Pierre Johnson for the gun and cocaine, and Vincent Mays for possessing cannabis on his person.

¶ 6 On cross-examination, Helwink-Masters admitted defendant was not the subject of the search warrant and to her knowledge, defendant did not live at the house. She also stated that defendant gave her the cannabis approximately two seconds after being secured in the living room and three to four minutes after her team entered the house.

¶ 7 The parties stipulated that the 18 baggies defendant gave police tested positive for cannabis and weighed 113 grams.

¶ 8 Defendant moved for a directed finding, but the trial court denied the motion.

¶ 9 Defendant testified that on March 9, 2007, she was playing videos games with Johnson and one of Johnson's friends in Johnson's bedroom. At some point that night, approximately three police officers entered the bedroom with "big guns" drawn and told all three of them to "get on the ground." The officers then brought all three individuals into the living room and handcuffed them. Once a female officer arrived, she searched defendant. Defendant denied possessing any drugs, telling the police that she had drugs or giving the police any drugs.

¶ 10 On cross-examination, defendant stated she met Johnson the week prior to her arrest when she was walking on the street and Johnson began talking to her. The night that the police arrested her was the first time she had visited Johnson's house. She denied seeing cocaine or a gun on the floor in Johnson's bedroom.

¶ 11 After argument, the trial court found defendant guilty of possession of cannabis with intent to deliver. The trial court based its finding on the various witnesses' credibility, stating it

had "no reason to doubt the credibility of [Helwink-Masters]," and overall, the evidence was "overwhelming." The trial court subsequently sentenced defendant to 18 months' probation.

¶ 12 On appeal, defendant contends she received ineffective assistance of counsel because her trial counsel failed to file a motion to suppress her statement to Helwink-Masters that she had cannabis in her possession and the 18 baggies of cannabis with which she provided Helwink-Masters and a successful motion would have suppressed the State's only evidence against her. The State argues that her trial counsel's assistance was not ineffective because filing a motion to suppress would have been futile.

¶ 13 Before addressing the merits of defendant's contention, we must acknowledge that we addressed a similar claim for ineffective assistance of counsel for failing to file a motion to suppress in *People v. Evans*, 2015 IL App (1st) 130991, ¶ 32. In *Evans*, however, we declined to review defendant's contention because such claims are "almost never appropriate on direct appeal because absent a motion to suppress, it is highly unlikely that the State would garner its resources to prove the propriety of the officers' actions." *Id.* ¶ 34 quoting *People v. Durgan*, 346 Ill. App. 3d 1121, 1142-43 (2004). As such, we stated the defendant's claim was better suited for review under the Post-Conviction Hearing Act (the "Act") (725 ILCS 5/122-1 *et seq.* (West 2012)). *Evans*, 2015 IL App (1st) 130991, ¶ 34.

¶ 14 However, in the present case, because the trial court sentenced defendant to 18 months' probation on February 27, 2013, she should have already completed her probation. Accordingly, defendant would not have standing to seek recourse under the Act. See *People v. Carrera*, 239 Ill. 2d 241, 257 (2010) ("The constraints of defendant's liberty due to his criminal conviction

expired with defendant's successful completion of his probation, so that defendant is no longer eligible to seek relief under the Act."). We do note that defendant could have commenced a proceeding under the Act while her direct appeal was pending in order to preserve her standing under the Act. See 725 ILCS 5/122-1(c) (West 2010); *People v. Harris*, 224 Ill. 2d 115, 126 (2007) ("There is no provision in the Act barring a postconviction case from proceeding at the same time as a direct appeal."). Moreover, because we find sufficient facts of record, we will address the merits of defendant's claim.

¶ 15 We evaluate claims for ineffective assistance of counsel under the two-prong approach set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Givens*, 237 Ill. 2d 311, 330-31 (2010). Under *Strickland*, the defendant must show that "counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Henderson*, 2013 IL 114040, ¶ 11. A failure to establish either *Strickland* prong precludes a finding of ineffective assistance of counsel. *Id.*

¶ 16 When examining whether a trial counsel's performance was objectively unreasonable for failing to file a motion to suppress, we give the trial counsel great deference because such a decision is one of trial strategy. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). There is a "strong presumption" that the challenged decision was the product of "sound trial strategy." *People v. Richardson*, 189 Ill. 2d 401, 411 (2000); see also *People v. Fuller*, 205 Ill. 2d 308, 331 (2002) ("Counsel's strategic choices are virtually unchallengeable."); *Martinez*, 348 Ill. App. 3d at 537 ("As a general rule, matters of trial strategy, such as whether to file a motion to suppress,

are immune from claims of ineffective assistance of counsel."). Although another attorney may have chosen a different trial strategy, that fact alone does not establish ineffective assistance of counsel. *Fuller*, 205 Ill. 2d at 331. If filing a motion to suppress would have been futile, it is axiomatic that failing to file such a motion would not constitute ineffective assistance of counsel. *Givens*, 237 Ill. 2d at 331.

¶ 17 In the context of demonstrating prejudice for a trial counsel's failure to file a motion to suppress, the defendant must show "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." *Henderson*, 2013 IL 114040, ¶ 15. "Meritorious" means that the unargued motion "would have succeeded." *Id.* ¶ 12. A reasonable probability that the trial outcome would have been different occurs when the "probability is sufficient to undermine confidence in the outcome." *People v. Simpson*, 2015 IL 116512, ¶ 35. If the ineffectiveness claim "can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). Accordingly, we will begin by addressing the prejudice prong of *Strickland*.

¶ 18 As discussed, the prejudice prong requires a two-step approach: (1) would the motion to suppress have been "meritorious" and (2) was there a "reasonable probability" that the trial outcome would have been different. *Henderson*, 2013 IL 114040, ¶ 15. We will review the "reasonable probability" element first.

¶ 19 Defendant argues that without the evidence of the cannabis and her self-incriminating statement, the State's case would have been so weak that her "case might not even have gone to

trial." The State does not dispute this assertion. It is evident that without the cannabis found in defendant's possession, the State could not present a case against her. Therefore, we are persuaded that had defendant's trial counsel filed a *successful* motion to suppress, a reasonable probability existed that the trial outcome would have been different. See *Henderson*, 2013 IL 114040, ¶ 15.

¶ 20 Next we address the first element of *Strickland's* prejudice determination: whether the unargued motion to suppress would have been meritorious, or rather would the motion have been successful. *Id.* ¶¶ 12, 15. The State argues that defendant's detention was a lawful detention of an occupant of a home subject to the execution of a search warrant pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981). Defendant argues that her detention exceeded the permissible scope of any *Summers* detention and instead, she was in custody without probable cause particularized to her.

¶ 21 In *Summers*, police officers were approaching a house to execute a search warrant for narcotics when the defendant appeared on the front steps of the house. *Id.* at 693. The defendant helped the police enter the house and then was detained while the officers executed the search warrant. *Id.* In determining whether the detention of the defendant during the search of the house was an unreasonable seizure of him, the United States Supreme Court assumed that the defendant's "pre-arrest 'seizure' " was not supported by probable cause. *Id.* at 696. The court concluded that some seizures "constitute such limited intrusions on the personal security of those detained" that they need not be based on probable cause, as long as the "police have an articulable basis for suspecting criminal activity." *Id.* at 699. The court highlighted three

important law enforcement justifications in allowing such limited detentions. First, the police have an interest in preventing the flight of an individual in case incriminating evidence is found at the house. *Id.* at 702. Second, the police have an interest in "minimizing the risk of harm to the officers." *Id.* Finally, such detentions facilitate the "orderly completion of the search." *Id.* at 703.

¶ 22 The court then held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705. Subsequently, in *People v. Conner*, 358 Ill. App. 3d 945, 959 (2005), this court held that the term "occupants" applied to nonresidents of the house subject to the search warrant.

¶ 23 In the present case, we find that the detention of defendant in a house where she was a guest was a lawful detention. Sergeant Helwink-Masters testified that her team had a search warrant for the address where defendant was found. When the officers entered the residence, they saw defendant along with two other individuals, including the subject of the warrant in a bedroom. In the same room, the police found a gun and cocaine. All three individuals were detained in the residence's living room using handcuffs, according to defendant, while the officers conducted the search of the residence, which is permissible during a *Summers* detention. See *Muehler v. Mena*, 544 U.S. 93, 102 (2005); *Conner*, 358 Ill. App. 3d at 960. Accordingly, the police had an articulable basis for suspecting criminal activity, and the detention of defendant was lawful pursuant to *Summers*. See *Muehler*, 544 U.S. at 93-94 (upholding the validity of a *Summers* detention of individuals found in a house subject to a search warrant who were placed

in handcuffs and secured in a garage while the premises were searched because the police's power for such detentions is "categorical").

¶ 24 Additionally, we find that the question posed by Helwink-Masters of whether "there was any – any other contraband located in – anywhere in the apartment" was a proper question incident to a *Summers* detention because the question was directed to the apartment subject to the search warrant and not to investigate defendant. While not a binding authority on this court, we find *United States v. Calloway*, 298 F. Supp. 2d 39 (D.D.C. 2003), instructive because of the factual similarities with the present case.

¶ 25 In *Calloway*, police had a warrant to search a residence for a gun allegedly used by the defendant's cousin to threaten the life of another person. *Id.* at 41. The police had already arrested the defendant's cousin, but did not recover the weapon. *Id.* When police entered the residence, they found defendant in his bed and at gunpoint placed him in plastic " ' flex cuffs.' " *Id.* at 42. Later, while still secured in the bedroom, an officer explained to the defendant that he had a warrant to search the house and asked him whether "there [was] anything in here we should know about before we tear your grandmother's house apart?" *Id.* at 43. The defendant responded by telling officers that there was a gun underneath his mattress and then later volunteered that everything found in the bedroom was his. *Id.* The defendant then filed a motion to suppress arguing, *inter alia*, that his statements were the result of custodial interrogation. *Id.* at 43-44.

¶ 26 The United States District Court for the District of Columbia found that the defendant was not in custody, and instead was lawfully detained pursuant to *Summers*. *Id.* at 48-49. The

court also held that the officer's question was a lawful extension of *Summers* because "it was not specifically focused on either the possessions of, or prior conduct by, the defendant." *Id.* at 49. Furthermore, "the officers' attention was focused on securing the residence and finding the weapon used in the assault involving [the defendant's cousin], and was not substantially focused on the defendant." *Id.*; see also *Mumford v. People*, 270 P. 3d 953 (Colo. 2012) (finding where a defendant's house was subject to the execution of a search warrant due to his friend's illegal drug activity in the house and a police officer asked the defendant "if there was anything in the house that [the officer] needed to know about," the defendant was not in custody, instead was lawfully detained pursuant to *Summers*, and accordingly, the officer's question was not unlawful).

¶ 27 The present case presents an analogous fact pattern to *Calloway*. The police had a warrant to search a house on the 500 block of North Laramie Avenue. Defendant was not the subject of the search warrant as evidenced by Sergeant Helwink-Masters' testimony. Upon entering the house, the police found defendant along with the subject of the search warrant in a bedroom. In the same room, the police recovered a gun and cocaine. Helwink-Masters also testified that she learned defendant was not a resident of the apartment subject to the warrant. When Helwink-Masters asked defendant about contraband located anywhere else in the apartment, this question was focused specifically on the prior conduct by, or the possessions of, the subject of the search warrant, not defendant. See *Calloway*, 298 F. Supp. 2d at 49. Moreover, defendant's response to the question was non-responsive, as Helwink-Masters' question focused on the apartment, not defendant personally. Accordingly, we find that the question posed to defendant was proper incident to a lawful *Summers* detention.

¶ 28 Nevertheless, in support of her argument that she was not lawfully detained pursuant to *Summers* and instead, in custody, defendant relies on *People v. Elliot*, 314 Ill. App. 3d 187 (2000). In *Elliot*, approximately 10 police officers entered an alleged "crack house" by force during the evening to execute a search warrant. *Id.* at 188-89. After police officers discovered the defendant using the toilet, two officers secured her in a living room by herself. *Id.* at 188. While in the living room, an officer asked the defendant if she had "any drugs on [her]?" *Id.* The defendant did not live in the apartment nor was she the target of the search warrant. *Id.* at 189. Meanwhile, eight other individuals were secured outside the apartment. *Id.*

¶ 29 Prior to trial, the defendant filed a motion to suppress, but the circuit court denied the motion. *Id.* On appeal, the defendant argued that the circuit court improperly denied her motion to suppress the evidence because she was subject to custodial interrogation without adequate justification. *Id.* at 188, 190. In determining that *Summers* did not apply to the facts of the case, the reviewing court based its finding on two rationales: (1) *Summers'* definition of occupants only applied to residents of the house (*id.* at 192), and (2) *Summers* did not permit a seizure of an individual " 'likely to induce self-incrimination.' " *Id.* quoting *Summers* 452 U.S. at 702 n.15. Accordingly, in *Elliot*, the reviewing court determined *Summers* was inapplicable and rather, the defendant was subject to custodial interrogation absent adequate justification. *Id.* at 192.

¶ 30 However, defendant's reliance on *Elliot* is misplaced. First, *Elliot* stated that nonresidents may not be detained pursuant to *Summers*, a contention this court has squarely rejected. See *Conner*, 358 Ill. App. 3d at 958 (stating "we find it was reasonable for the police to protect themselves and assure that the search proceeded smoothly by detaining defendant, a nonresident,

during the execution of a search warrant"). Second, as we have already discussed, Helwink-Masters' question to defendant was proper incident to *Summers* and was directed at the prior conduct by, or the possessions of, the subject of the search warrant, not defendant. Accordingly, we do not find *Elliot* alters our conclusion that defendant was lawfully detained pursuant to *Summers* and asked a question properly incident to *Summers*.

¶ 31 Additionally, defendant points to *People v. Chestnut*, 398 Ill. App. 3d 1043 (2010), for added support that defendant was subject to custodial interrogation. In *Chestnut*, two police officers were positioned outside a house in case individuals inside attempted to flee during the execution of a search warrant for evidence of drug activity. *Id.* at 1044. At least one of the officers was not in uniform, and nothing indicated there was a police presence at the house. *Id.* While the officers were in an enclosed porch outside the house, the defendant rang the doorbell. *Id.* at 1045. One of the officers opened the porch door, and the defendant walked past him onto the porch. *Id.* While on the porch, one of the officers told the defendant that they were police officers conducting a drug investigation. *Id.* Subsequently, the defendant began to act "nervous." (Internal quotation marks omitted.) *Id.* Furthermore, the defendant began to look around and unzipped his coat, actions that led one of the officers to believe that the defendant might attempt to run. *Id.* The officers also positioned themselves between the defendant and the porch door. *Id.* at 1054. One of the officers then asked the defendant if "he possessed any illegal drugs or narcotics?" *Id.* at 1045. The defendant responded "no," and one of the officers asked for consent to search the defendant, which the defendant granted. *Id.* During the search of the defendant, the officer found drugs. *Id.* at 1046.

¶ 32 Prior to trial, the defendant filed a motion to quash his arrest and suppress evidence, which the circuit court granted. *Id.* at 1044. The State appealed, arguing, *inter alia*, that the court erred when it granted the defendant's motion because he was lawfully detained pursuant to *Summers* when he entered an area where police were executing a search warrant. *Id.* at 1044, 1052. In addressing the applicability of *Summers*, the reviewing court noted that the defendant could be lawfully detained pursuant to *Summers*, but the officers "acted outside the scope of *Summers* in asking incriminating questions without reasonable suspicion" that the defendant was engaged in criminal conduct. *Id.* at 1053. The court determined that that there was no reasonable suspicion that the defendant was engaged in criminal conduct because the officers' basis for suspicion was "mainly based *** on defendant's presence in a drug house" which he walked up to during the execution of a search warrant. *Id.* at 1051-52. Instead, the court found defendant was in custody because his "freedom of movement was restricted due to the close confines of the porch area" and accordingly, the question posed to him about his possession of illegal drugs constituted a custodial interrogation. *Id.* at 1054.

¶ 33 However, defendant's dependence on *Chestnut* is misguided. *Chestnut* concerned an investigation specific to the defendant who appeared at a house during the execution of a search warrant. Conversely, the present case concerned securing a residence subject to the execution of a search warrant where defendant was already present. Moreover, defendant was found in a room along with the subject of the search warrant, drugs and a gun. Accordingly, we find *Chestnut* to be inapposite in our analysis.

¶ 34 Because we have determined that the police lawfully detained defendant pursuant to *Summers* and asked a proper question incident to *Summers*, we find that defendant's motion to suppress would not have been meritorious. See *Henderson*, 2013 IL 114040, ¶¶ 12, 15. Therefore, defendant cannot show the prejudice required to demonstrate ineffective assistance of counsel. *Id.* Accordingly, defendant's claim for ineffective assistance of counsel is meritless. Consequently, we need not address defendant's remaining arguments.

¶ 35 Finally, we now address, *sua sponte*, an error in the trial court's sentencing order. The sentencing order stated that defendant was sentenced to two years' probation. However, according to the report of proceedings, the trial court sentenced defendant to "18 months felony probation." Where the sentence pronounced by the court, as reflected in the report of proceedings, conflicts with the sentencing order, as reflected in the common law record, the report of proceedings will control, and the sentencing order must be corrected. *People v. Peeples*, 155 Ill. 2d 422, 496 (1993). Accordingly, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), and our power to correct a sentencing order without remand (see *People v. Heinz*, 407 Ill. App. 3d 1016, 1024 (2011)), we order the clerk of the circuit court to correct defendant's sentencing order to reflect a sentence of 18 months' probation.

¶ 36 For the reasons stated above, we affirm the judgment of the circuit court of Cook County in all other respects.

¶ 37 Judgment affirmed; sentencing order corrected.