FOURTH DIVISION
October 15, 2015

No. 1-13-2298

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. 13 CR 4912
	)	
NORRIS WINSTON,	)	Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Affirmed judgment over defendant's contention that his trial counsel was ineffective for failing to file a motion to suppress evidence.

¶ 2 Following a bench trial, defendant Norris Winston was convicted of possession of a controlled substance and sentenced to two years' probation and 30 hours of community service.

On appeal, he contends that his trial counsel was ineffective for failing to file a motion to suppress his incriminating statements to police.

¶ 3 At trial, Chicago police officer Reginald Earl Dukes, Jr. testified that on February 14, 2013, he started his shift at 8 a.m., and two hours later, he and his partner, Officer Daniel Nunez, conducted a "round-up" of one of the offenders involved in a prior narcotics investigation. The officer explained that a round-up occurs where an investigation has been conducted and the offenders, who were not originally taken into custody, are arrested. At 10:10 a.m. he arrested defendant as part of a round-up at 11010 South Indiana Avenue, and conducted a protective pat-down search for weapons. Officer Dukes went through defendant's jacket, raised it up, felt around his waistband and pants leg, and found none. He then handcuffed defendant with his hands behind him, and placed him in the back seat of the squad car.

¶ 4 Officer Dukes testified that he searched his squad car at the beginning of his shift, and found no contraband in it. He did not recall if he arrested and placed anyone else in his squad car prior to arresting defendant, but believed defendant was the first person he placed in the squad car that day. Officer Dukes testified that after an arrestee is removed from his vehicle, he and his partner search the car, and that they conduct this search after every arrest.

¶ 5 When defendant was removed from the car, Officer Nunez searched the back seat and found a clear plastic bag containing 13 clear rolled zip-locked bags with white powder which the officer believed was suspect narcotics. Officer Nunez then handed them to Officer Dukes, and defendant stated that he had the narcotics in the "rear of his pants."

¶ 6 Officer Nunez testified that Officer Dukes drove the squad car to the police station and he sat in the front passenger seat. Along the way, Officer Nunez pivoted to a 45-degree angle to observe defendant who was in the back seat of the squad car, and observed him moving his hands and leaning forward. When Officer Nunez asked defendant what he was doing, he replied, "nothing, nothing, nothing," and stopped moving his hands a couple of minutes later. Defendant was removed from the car at the station, and Officer Nunez lifted the back seat cushion and observed a clear plastic bag with 13 objects containing suspect heroin.

¶ 7 Officer Nunez testified that he asked defendant, "what is this," and defendant shrugged, and replied, "you know." Officer Nunez then asked defendant where he got it from, and he said, "from the rear of my pants." Defense counsel objected to this line of questioning, but was overruled. During cross-examination, counsel asked Officer Nunez if he Mirandized defendant prior to questioning him, and the officer said, "I did not."

¶ 8 The parties stipulated that 9 of the 13 recovered bags weighed 3.1 grams, and the contents tested positive for the presence of heroin.

¶ 9 At the close of evidence, the court found defendant guilty of the lesser included offense of possession of a controlled substance. In doing so, the court stated that there was proof beyond a reasonable doubt of defendant's possession of a controlled substance, but not his intent to deliver.

¶ 10 Counsel filed a motion for a new trial, alleging, in relevant part, that defendant was not Mirandized prior to his statements to Officer Nunez, and that the statements were improperly admitted over her objection. The trial court denied the motion.

¶ 11 On appeal, defendant contends that he received ineffective assistance of trial counsel. He contends that trial counsel should have filed a motion to suppress his incriminating statements because police officers questioned him without giving him his *Miranda* warnings.

¶ 12 Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that his attorney's performance fell below an objective standard of reasonableness, and but for that deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Although the *Strickland* test is a two-prong test, our analysis may proceed in any order. *People v. Kirklin*, 2015 IL App (1st) 131420, ¶109. Since defendant must satisfy both prongs of *Strickland* to prevail, the claim may be dismissed if either prong is missing. *Kirklin*, 2015 IL App (1st) 131420, ¶109. Thus, if a court finds that defendant was not prejudiced by the alleged error, it may dismiss on that basis alone without further analysis. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005); *Kirklin*, 2015 IL App (1st) 131420, ¶109.

¶ 13 Where, as here, an ineffective assistance claim is based on counsel's failure to file a suppression motion, to establish the prejudice prong under *Strickland*, defendant must first demonstrate that the motion is meritorious and second, that a reasonable probability exists that the outcome of the trial would have been different if the evidence had been suppressed. *People v. Henderson*, 2013 IL 114040, ¶15; *People v. Harris*, 182 Ill. 2d 114, 146 (1998). For the reasons that follow, we find no prejudice.

¶ 14 Defendant claims that the police officers questioned him without Mirandizing him. In *Miranda v. Arizona*, 384 U.S. 436, 444, 467 (1966), the Supreme Court found that the fifth

amendment privilege against self-incrimination extended outside of criminal court proceedings, and concluded that the State may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Those safeguards include warning a suspect that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, *i.e.*, *Miranda* warnings. *Miranda*, 384 U.S. at 444.

¶ 15 In this case, defendant was transported to the police station, and when he was removed from the squad car, the officers found narcotics under the back seat cushion. Officer Nunez asked defendant where he got the narcotics from, and he replied that they were from his back pants pocket. The record further shows that, on cross-examination, defense counsel asked Officer Nunez, "[y]ou had not Mirandised [*sic.*] my client, had you," and he replied, "*I* did not." (Emphasis added.) Officer Dukes, however, was not asked this, and did not testify regarding whether he Mirandized defendant prior to his inculpatory statement. We further observe that the common law record filed on appeal contains the police report authored by Officer Dukes in which he stated that defendant "was taken into custody, advised of his rights, and transported to Area south to be processed accordingly." Therefore, based on the record before us, we are unable to conclude that defendant's unargued motion to suppress statements claiming that he was not advised of his *Miranda* rights would have been granted. *Henderson*, 2013 IL 114040, ¶¶20-22.

¶ 16 Notwithstanding our conclusion about the merit of the unargued motion to suppress statements, defendant has not and cannot establish the second prejudice requirement, *i.e.*, that the

result of the trial would have been different had the evidence been suppressed. *Henderson*, 2013 IL 114040, ¶15.

¶ 17 Defendant contends that his statements to police were incredibly incriminating, and the only non-circumstantial evidence connecting him to the narcotics. Without these statements, defendant posits, "the possibility that the heroin discovered under the seat cushion could have belonged to another arrestee would, in all probability, raise a reasonable doubt as to [his] guilt."

¶ 18 In this case, defendant was not found in actual possession of the narcotics, and the State was thus required to prove his constructive possession of them. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). Evidence of constructive possession is often proved entirely by circumstantial evidence (*People v. Faulkner*, 2015 IL App (1st) 132884, ¶29), and in determining whether constructive possession has been shown, the trier of fact is entitled to rely on reasonable inferences of knowledge and possession, absent other facts and circumstances which might create a reasonable doubt as to defendant's guilt (*People v. Bui*, 381 Ill. App. 3d 397, 419 (2008)).

¶ 19 The evidence adduced by the State at trial showed that the officers conducted a round-up pursuant to a prior narcotics investigation, and defendant was among those to be detained. Although Officer Dukes could not recall if defendant was the first arrestee placed in his squad car that day, he believed that he was, and in any event, he testified that he and his partner search their squad car after each arrestee is removed from the car. Further evidence was presented that while defendant was being transported in the squad car, Officer Nunez observed him moving his hands behind his back for a couple of minutes, and when defendant was removed from the car at

the station, Officer Nunez lifted the back seat cushion of the car, and found a bag of suspect heroin. This evidence and reasonable inferences therefrom, viewed in the light most favorable to the prosecution, was sufficient to establish defendant's constructive possession of the narcotics discovered in the squad car (*McCarter*, 339 Ill. App. 3d at 879), and, accordingly, we find that defendant cannot demonstrate prejudice resulting from counsel's failure to file a motion to suppress where the outcome of the trial would not have been different absent his incriminating responses to the officer's inquiries (*People v. Blankley*, 319 Ill. App. 3d 996, 1005 (2001)).

¶ 20 Defendant, however, contends that this evidence is undermined by the fact that when police searched him prior to placing him in the squad car, they did not find any narcotics on his person. We observe that Officer Dukes testified that he conducted a protective pat-down of defendant for the purpose of finding any weapons on defendant, and, as described, the search did not include the rear of defendant's pants. Accordingly, we conclude that this factor did not undermine the substantial circumstantial evidence of his guilt.

¶ 21 Notwithstanding, defendant contends that prejudice is found where a motion to suppress would have been counsel's strongest and, most likely, wisest course of action, citing *People v. Miller*, 2013 IL App (1st) 110879, ¶84. In *Miller*, defendant was convicted of aggravated possession of a stolen vehicle on evidence that he was stopped by police after a chase, and after being placed in custody and prior to being given *Miranda* warnings, the officer asked defendant if the car was stolen and he said, "yes." *Miller*, 2013 IL App (1st) 110879, ¶75. At trial, defendant called two witnesses, one of whom was the husband of the owner of the car who testified that he sold the car to a man named, "Joe," a few days before his wife reported it stolen.

Miller, 2013 IL App (1st) 110879, ¶¶22-23. Another defense witness testified that he went by the nickname, "Joe," and had purchased the vehicle in question for defendant, but did not provide the buyer with a bill of sale and he, "Joe," did not receive the title or the keys to it. *Miller*, 2013 IL App (1st) 110879, ¶¶26-27. This court found the evidence in the case to be closely balanced, noted that defendant's statement to police was the only direct evidence of his knowledge that the vehicle was stolen, and, accordingly, found that defendant was prejudiced by the admission of his statement at trial. *Miller*, 2013 IL App (1st) 110879, ¶¶82, 85.

¶ 22 Here, unlike *Miller*, the evidence was not closely balanced, and given the strength of the circumstantial evidence of defendant's possession of the narcotics, we find no reasonable likelihood that the outcome of the trial would have been different absent his incriminating statements to police. *Blankley*, 319 Ill. App. 3d at 1005. The evidence of his arrest, placement and movement in the squad car where the narcotics were discovered when he existed, and the reasonable inferences arising therefrom established defendant's constructive possession beyond a reasonable doubt. In reaching that conclusion, we find no reasonable doubt arising from the fact that Officer Dukes could not recall if defendant was the first arrestee in the squad car that morning, given the testimony that the officers check their car after each arrest. Accordingly, we find that defendant failed to show prejudice, and thus, his ineffective assistance claim fails. *People v. Munson*, 171 Ill. 2d 158, 184 (1996).

¶ 23 We, therefore, affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.