

No. 1-13-2374

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 15886
)	
DAVID LEWIS,)	Honorable
)	Rickey Jones,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

ORDER

Held: Judgment entered on defendant's conviction for delivery of a controlled substance affirmed over defendant's claim of ineffective assistance of trial counsel.

¶ 1 Following a bench trial, defendant David Lewis was convicted of delivery of a controlled substance and sentenced as a Class X offender to six years' imprisonment. On appeal, defendant solely contends that his trial counsel rendered ineffective assistance because she did not present an entrapment defense after he admitted during his testimony that he delivered heroin.

¶ 2 At trial, Chicago police officer Arshell Dennis testified that about 11 a.m. on August 12, 2012, he was working undercover with a narcotics team, attempting to purchase drugs, when he

saw defendant standing at 1612 West 64th Street, conversing with another person. Officer Dennis parked his car in an adjacent McDonald's parking lot, walked up to defendant, who was now standing alone, and asked him if anyone out there was "working," which meant selling drugs. Defendant replied that they had just left, but offered to take Officer Dennis to them and asked if he had a vehicle. They walked to Officer Dennis' vehicle, got in, and defendant directed him to drive to 6657 South Marshfield Avenue. When they stopped at that location, defendant asked Officer Dennis how many he wanted, and he replied "two." Defendant then told Officer Dennis to give him the money, and he handed him \$30 in prerecorded funds. Defendant exited the car, walked south on Marshfield Avenue mid-way down the block, and entered a building.

¶ 3 About three minutes later, defendant reappeared on the street, motioned to Officer Dennis to pull his vehicle forward, and the officer complied and stopped at 6626 South Marshfield Avenue. Defendant got in the car and handed Officer Dennis two bags of suspect heroin. He then told the officer to drop him off in the 6500 block of Marshfield Avenue where he exited the car. Officer Dennis then radioed the other officers on the narcotics team that he had made a positive buy from defendant, and left the area. After defendant was detained by other officers, one of the team members notified Officer Dennis, and he drove by the alley at 6442 South Marshfield Avenue and identified defendant as the man who had sold him the drugs.

¶ 4 On cross-examination, Officer Dennis acknowledged that when he first approached defendant, he was not engaged in any illegal activity, and the officer did not witness any suspect narcotics transactions. He further testified that he viewed defendant for 10 to 15 seconds when he made his on-scene identification.

¶ 5 Chicago police officer Defonda Louie testified that he was the surveillance officer on the narcotics team, and observed Officer Dennis approach defendant on 64th Street and engage him in conversation. He then saw the men walk to the McDonald's parking lot and enter Officer

Dennis' vehicle. Officer Louie followed them to Marshfield Avenue, parked his car mid-way down the block from Officer Dennis' vehicle, and saw defendant exit that vehicle, walk south down the block, and enter a building. About five minutes later, defendant reappeared, walking north on Marshfield Avenue, and reentered Officer Dennis' vehicle. Officer Dennis then drove to the corner of 65th Street and Marshfield Avenue where defendant exited the car and walked down an alley. Officer Louie continued observing defendant, radioed his description and location to the other officers on the narcotics team, directed them to take defendant into custody, and observed them arrest him. Shortly thereafter, Officer Dennis returned to the area and positively identified defendant as the man who delivered narcotics to him. Officer Louie testified that he never lost sight of defendant from the time he exited Officer Dennis' vehicle to the time he was arrested.

¶ 6 On cross-examination, Officer Louie acknowledged that he never saw defendant with any drugs or money in his hands, nor did he see him engage in any suspect narcotics transactions with people on the street. He also acknowledged that he lost sight of defendant for a short period of time when he entered the building. Officer Louie further testified that to the best of his recollection, no drugs were recovered from defendant when he was arrested, and the prerecorded funds were never recovered.

¶ 7 The parties stipulated that forensic chemist Martinique Rutherford tested one of the two foil packets received by Officer Dennis and found it positive for 0.2 gram of heroin, and the total weight of the two foil packets was 0.4 gram. After the State rested its case, defense counsel moved for a directed finding, which the trial court denied.

¶ 8 Defendant testified that he was arrested at McDonald's on August 12, 2012, at exactly 9:35 a.m. He testified that he was sitting on a big rock in McDonald's parking lot eating an Egg

McMuffin and drinking a small coffee, and someone approached him from behind. Defense counsel asked what happened next, and defendant then testified:

"Okay. After that, he said man, where is everybody at? I looked around and I see guys all across the street. I said everybody like whom?

He said, you know, the guys with the stuff. I said what stuff? What are you talking about? He said dope, man, I need dope.

I said yeah, man, I get high. I'm dope sick. Ain't nobody around here. Ask them guys across the street, but I don't mess with that. I am dope sick myself. I'm a heroin user myself.

So he said do you know where we can get some at? My first question was to him – I said I haven't seen you around here before, man. I don't know you.

He said man, I ain't the police, man. Man, I ain't got time to waste my time. I am a construction worker. I hurt my back.

He's got dust all over him. He's got a cane. He said he hurt his back on construction, and he is looking for some dope.

I said man, I don't know about this because I don't even know you. He said man, dig this, I will buy you a bag."

¶ 9 Defendant further testified that Officer Dennis told him that he wanted to buy three bags of drugs and would give him one bag, and he then left the parking lot with the officer. They drove to 66th and Marshfield Avenue, and after Officer Dennis parked his car on the side of the street, he handed defendant \$30 for the heroin, and they both exited the car and walked down the street with defendant leading the way. Counsel again asked what happened next, and defendant testified:

"We proceeded to walk down the street. The guys that sell the stuff, they were standing right there at this house. They were all in the gangway.

I said there you go right there. That is who's got it. So I guess he got three bags. He gave me one.

No, wait. We walked back. As a matter of fact, that didn't even happen like that. I went into the house and came out the back. That is how it happened. I came out of the back. That is how it happened.

Your Honor, I have to admit something to you. Excuse me, your Honor. I made the statement up because I was scared. I had never dealt with nobody in my life. I didn't know. So I was scared about the repercussions of this whole case.

Now I am going to tell you the truth of the whole matter which is not being told. I am telling the truth part now. I did purchase the drugs for the officer, but he was still out of the car with me. I went in to the house, got the three bags, and went out the back door.

I proceeded northbound down the alley to Marquette Boulevard which I am facing the back of Marquette. I go through the gangway and come out in the middle block between Marshfield and Paulina. I turn right on Marquette, walk all the way down.

He is on the corner of 66th. I did like this, pointed to go that way. He went to the middle of the block of 66th and Marshfield. I got in the car. I handed him three \$10 bags of heroin.

He gave me one. I said man, you saved my life. Thank you, man. I didn't want to feel like doing nothing wrong today to get no drugs.

He said man, you looked out for me, you copped for me. Cool. I will see you again. I said thanks again, you saved my life.

He dropped me off on the corner of 65th and Marshfield. I walked, and they all vamped on me, asked what had I done. They said I sold dope to undercover police. That was it. That was all.

They kept asking me different questions. Where is the dope? Where is the money? Where is this? I didn't have anything. They are looking at each other like what is going on who's got it."

¶ 10 Defense counsel then asked defendant if he had any dope on him when he was arrested, and he replied, "[n]o, ma'am, didn't have no money." Counsel asked defendant what happened to the one bag of drugs Officer Dennis gave him, and he replied that it was under his tongue and he spit it out of his mouth when the officers brought him down to the ground during the arrest.

¶ 11 Counsel tendered defendant for cross-examination, and the trial court then directed defendant to step down from the witness stand and return to his seat next to counsel. The court then instructed counsel to call her next witness, and the defense rested.

¶ 12 Immediately thereafter, counsel argued "[y]our Honor, you have heard the evidence. We would simply argue that the identification of my client was very fast. He testified for himself. We would say that the State has not proven their case beyond a reasonable doubt." The State pointed out that defendant admitted on the stand that he delivered the narcotics to the officer and asked the court to find him guilty. The trial court then found defendant guilty beyond a reasonable doubt.

¶ 13 On appeal, defendant solely contends that trial counsel rendered ineffective assistance because she did not present an entrapment defense after he admitted during his testimony that he delivered heroin, and thus, failed to subject the State's case to meaningful adversarial testing. Defendant claims that even if his admission surprised counsel, she still should have argued entrapment, and was ineffective for failing to do so.

¶ 14 The State responds that counsel was not ineffective where she pursued a reasonable trial strategy which must be given deference, was surprised by defendant's sudden confession, and at that point, had no way to determine what was the truth. The State also argues that defendant was not prejudiced by counsel's strategy because an entrapment defense would have been unsuccessful where the evidence established that he was predisposed to commit the crime. The State points out that counsel did not disclose an entrapment defense prior to trial, and thus, was precluded from pursuing it as a new defense mid-trial. In addition, the State argues that counsel did subject the case to meaningful adversarial testing where she presented a theory of defense based on misidentification, cross-examined the State's witnesses, and never conceded defendant's guilt. The State acknowledges that defendant's testimony weakened the defense, but argues that a weak defense does not constitute ineffective assistance of counsel.

¶ 15 In reply, defendant argues that the issue is not whether he would have prevailed on an entrapment defense, but whether counsel could have provided meaningful representation in light of his admission. Defendant claims that counsel knowingly elicited his confession, rendering entrapment the only avenue of defense, and even if it would have been a discovery violation, counsel was still obligated to pursue it.

¶ 16 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Graham*, 206 Ill. 2d 465, 476 (2003). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that (1) counsel's representation was deficient, and (2) as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Graham*, 206

Ill. 2d at 476. If defendant cannot prove that he was prejudiced, this court need not determine whether counsel's performance was deficient. *Id.*

"In considering whether counsel's performance was deficient, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." ' " *People v. Patterson*, 217 Ill. 2d 407, 441 (2005), quoting *Strickland*, 466 U.S. at 689. In general, conduct related to trial strategy will not support a claim of ineffective assistance unless counsel failed to pursue any meaningful adversarial testing. *Patterson*, 217 Ill. 2d at 441. "Generally, counsel's choice of an appropriate defense is a matter of trial strategy or tactics not reviewable under the *Strickland* test, unless that choice is based upon a misapprehension of the law." *People v. Garmon*, 394 Ill. App. 3d 977, 987 (2009).

¶ 17 To raise entrapment as an affirmative defense, defendant must necessarily admit that he committed the crime. *People v. Bonner*, 385 Ill. App. 3d 141, 145 (2008). " '[I]t is well established that one may not deny the commission of an offense and at the same time claim entrapment.' " *Garmon*, 394 Ill. App. 3d at 987, quoting *People v. Arriaga*, 92 Ill. App. 3d 951, 954 (1981).

¶ 18 In this case, the record reveals that the theory of defense presented by counsel was that defendant did not commit the offense of delivery of a controlled substance, and that the officers had misidentified him as the offender. During cross-examination, Officer Dennis acknowledged that he did not observe defendant engage in any suspect narcotics transactions, or any other illegal activity, when he first approached him. Officer Dennis stated that he viewed defendant for 10 to 15 seconds when he made his on-scene identification. During cross-examination of Officer Louie, the officer acknowledged that he never saw defendant with any drugs or money in his

hands, nor did he see him engage in any suspect narcotics transactions. Officer Louie also acknowledged that he lost sight of defendant for a short period of time, that the prerecorded funds were never recovered, and that no drugs were recovered from defendant when he was arrested.

¶ 19 The record further shows that defendant's initial testimony supported the theory that he did not deliver the heroin to Officer Dennis. Defendant testified that Officer Dennis approached him looking to buy drugs, but defendant was reluctant to help him because he did not know him. Defendant testified that Officer Dennis offered to give him one bag of drugs in exchange for his help, and defendant then led the officer to a location where he could purchase the drugs from a dealer. Defendant testified "[t]he guys that sell the stuff, they were standing right there at this house. They were all in the gangway. I said there you go right there. That is who's got it. So I guess he got three bags. He gave me one." Defendant's testimony thus showed that he pointed out the dealers standing in the gangway, and Officer Dennis then purchased the drugs directly from them. It was not until after this testimony that defendant changed his story and *sua sponte* admitted to the trial court that he delivered the drugs to Officer Dennis.

¶ 20 The record also shows that, following defendant's admission, counsel asked him what happened to the one bag of drugs he claimed Officer Dennis had given him, knowing that she had Officer Louie acknowledge that defendant was not in possession of any drugs when he was arrested. Defendant then claimed that he had spit it out of his mouth during the arrest, and counsel ended her examination. At this point, after maintaining throughout the trial that defendant did not commit the offense, a sudden change to a defense of entrapment would have provided no greater likelihood of success than the challenge originally made given the evidence presented. *Garmon*, 394 Ill. App. 3d at 988-89. Accordingly, we reject defendant's claim on this ground.

¶ 21 In addition, we reject defendant's claim that counsel failed to subject the State's case to meaningful adversarial testing. The record shows that counsel presented a theory of defense based on misidentification, cross-examined the State's witnesses, having both officers acknowledge that they did not see defendant engage in any suspect narcotics transactions, presented evidence, and never conceded defendant's guilt, even after his admission. Based on this record, we conclude that defendant has failed to establish that he received ineffective assistance of counsel. *Graham*, 206 Ill. 2d at 476-79.

¶ 21 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.