2016 IL App (1st) 133756-U

SECOND DIVISION
March 15, 2016

No. 13-3756

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13 CR 3998
	)	
MICHAEL CARTER,	)	
	)	Honorable Joseph M. Claps
Defendant-Appellant.	)	Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant is not entitled to relief for ineffective assistance of counsel. Defendant's representation did not fall below the objective standard of reasonableness and he suffered no prejudice. Additionally, there was sufficient evidence to prove that defendant had intent to deliver the narcotics in his possession.

¶ 2 Defendant Michael Carter was arrested and charged with various drug and weapon offenses following the execution of a search warrant at his home. Defendant contends that his trial counsel was ineffective for not trying to quash the search warrant and for stipulating to certain evidence that he believes would have otherwise been inadmissible. Defendant also argues that

the State failed to prove beyond a reasonable doubt that he had the intent to deliver the narcotics in his possession. We affirm.

¶ 3 BACKGROUND

¶ 4 On December 22, 2012, officers from the Chicago Police Department conducted a search under the authority of a warrant at 5056 West Erie Street in Chicago. The warrant was obtained three days earlier after a confidential informant went before a Cook County judge and provided information under oath. The informant relayed to the judge that he had been drinking beer with defendant at defendant's apartment within the last 48 hours and that defendant had shown him a semi-automatic handgun. Defendant also purportedly told the informant that the gun was used to protect his "blows," which the informant understood to mean heroin.

¶ 5 After entering the premises, the officers observed defendant and his 15 year old nephew. The officers handcuffed both individuals and had them sit on chairs in the dining room. The testifying officer, Vince Baldassano, asked defendant if there were any drugs or weapons in the apartment. Defendant responded that he had drugs, cocaine in particular, in his bedroom and defendant pointed to the room's location. The officers went into the bedroom and found a plate sitting on the dresser covered in white powder—suspect cocaine. Inside of a chest in the bedroom, the officers found small tinfoil packets containing what the officers believed to be heroin. The officers also found a box of live ammunition on another dresser. On top of that dresser, the officers also recovered several documents demonstrating defendant's residency at that location. During a more thorough search of the first dresser, the officers found additional miscellaneous bullets, a scale with narcotic residue, a grinder with narcotic residue and a yellow folder. In the yellow folder, the officers found what they believed to be a ledger with information

about drug transactions.

¶ 6 While the search was ongoing, but after at least some of the narcotics were recovered, Officer Baldassano read defendant his *Miranda* rights. Defendant then supposedly confessed that he personally uses cocaine and that he buys 20 to 30 grams of heroin a week that he sells. No firearms were recovered.

¶ 7 Defendant was not immediately arrested because he purportedly agreed to assist the police as a confidential informant. However, after defendant apparently failed to cooperate, he was arrested and charged with seven crimes including possession of narcotics with intent to deliver and certain weapons offenses for possessing ammunition while being a felon. Prior to trial, defendant moved to suppress the two inculpatory statements he made to the officers. The first, a pre-*Miranda* statement, that defendant had cocaine in his bedroom. The second, a post-*Miranda* statement, that he had cocaine for his personal use and that he buys heroin each week that he sells. The trial court suppressed the statements.

¶ 8 The case proceeded to trial with Officer Baldassano testifying to the above events. The State then requested, and was given, a continuance to present the contents of the yellow folder—the supposed ledger. Defendant, or more accurately his counsel, stipulated to the foundation for the ledger and it was taken into evidence. Defendant did not call any witnesses or present any evidence on his own behalf. The trial court merged various counts and entered a judgment of guilty on the possession of heroin with the intent to deliver count. The trial court acquitted defendant on all counts related to the ammunition. Defendant was sentenced as a Class X felony offender and was given a sentence of seven years in prison. Defendant appeals arguing: (1) that his trial counsel was ineffective; (2) that the State failed to prove the intent to deliver

element of the offense beyond a reasonable doubt; (3) that we should vacate his conviction for possession of cocaine which was merged into the heroin conviction; and (4) that the mittimus should be corrected.

¶ 9 ANALYSIS

¶ 10 Defendant argues that his trial counsel was ineffective because counsel failed to move to quash the warrant despite the warrant not being supported by probable cause. Defendant maintains that such a motion would have been successful because the search warrant was issued entirely on information gleaned from a "John Doe informant."

¶ 11 To be entitled to relief for ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and that he suffered prejudice as a result. *People v. Scott*, 2015 IL App (1st) 131503, ¶ 27. The failure to satisfy both prongs precludes a finding of ineffective assistance. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000). A defendant is entitled to competent, not perfect, representation and mistakes in trial strategy or judgment do not necessarily result in ineffective assistance. *People v. Calhoun*, 404 Ill. App. 3d 362, 383 (2010).

¶ 12 Defendant contends that the complaint for the search warrant contains no information that would allow the judge to determine if the informant was reliable. But that is not necessarily required and is certainly less important where the informant appeared before the issuing judge. Here, the informant was presented before the judge and, under oath, signed the complaint for the warrant. Typically, when the affiant appears before the judge, a showing of reliability is not required at all. *People v. Kornegay*, 2014 IL App (1st) 122573, ¶ 26. However, we have recognized that where the warrant does not indicate that the judge actually questioned the affiant,

the affiant's presence, while an indication of reliability, is not dispositive. *People v. Smith*, 372 Ill. App. 3d 179, 184 (2007). But even so, defendant points to nothing that demonstrates any actual unreliability in the warrant application. Instead he simply argues that the fact that the information came from an undisclosed source demonstrates its lack of reliability. That is not the case and defendant's argument fails to overcome the indicia of reliability attached to affirmations made by a witness under oath before a judge. Moreover, the complaint for the search warrant indicates that the informant was made available for questioning before the judge, we just do not know whether the judge asked any questions or simply did not have any qualms about the informant's reliability.

¶ 13 "Most important" to defendant's argument is that there is nothing in the complaint for the search warrant that indicates that the police did any independent investigation to determine if the information from the informant was true. But the officers presented the informant to the judge and it was the judge's duty to determine if the witness was credible and whether the information rose to the level of probable cause. Moreover, the complaint for the search warrant did contain corroborating information. The officers obtained a picture of defendant that they already had in their system based on the name and description provided by the informant. The officers had the informant identify defendant by his picture and they confirmed his identity. The officers also determined that the address identified by the informant was the same that defendant had listed as his place of residence during at least 14 previous arrests. The informant was able to identify the exact location of the residence from a photograph as well. The complaint also notes that the informant had known defendant for over five years.

¶ 14 Defendant also asserts that the information provided by the informant was "baseless," in

part because the weapon described in the complaint for the search warrant was never found. The ultimate recovery of the targeted evidence obviously has no bearing on whether there was probable cause at the time the warrant was issued. But defendant's assertion also discounts the fact that defendant apparently told the informant that the gun was used to protect his stash of heroin—a stash that was actually found.

¶ 15 Trial counsel did file a motion to suppress in the case and was successful in suppressing the inculpatory statements defendant made to the officers. That was the evidentiary strategy counsel pursued. Counsel was cognizant of trying to suppress whatever evidence could be successfully suppressed. Counsel was not ineffective for failing to file a motion to quash the search warrant—it would have been futile. Thus, defendant cannot meet the first requirement for succeeding on an ineffective assistance claim because counsel's performance did not fall below an objective standard of reasonableness. Of course there can be no prejudice when the motion would have never succeeded, so defendant cannot prevail on the second prong either.

¶ 16 Defendant's second claim of ineffective assistance is based on trial counsel's decision to stipulate to the contents of the yellow folder that contained a drug selling ledger. Defendant argues that there was no evidence that defendant was the one who wrote the notes and argues that the State, due to counsel's unwise stipulation, was able to use hearsay to prove the truth of the matter asserted—intent to deliver.

¶ 17 To support his argument that counsel should have objected to the admission of the folder's contents, defendant argues that there was no foundation for its admission. But defendant expressly stipulated to its foundation so the State never went about attempting to lay one. Also, the stipulation itself notes that two officers were prepared to testify that they found and seized the

folder and its contents. Defendant does not explain how those officers would have been unable to lay the foundation for the exhibit's admission.

¶ 18 Defendant's contention that the document was inadmissible because there was no evidence of authorship is also unavailing. The State was prepared to call witnesses that likely would have authenticated the document, but it never proceeded to do so because the stipulation obviated that necessity. Defendant has not put forth any persuasive argument regarding how the State would have, in fact, been unable to lay a foundation for the document. Moreover, the admissibility of that exhibit did not hinge on whether defendant wrote it. It could have been written by anyone and given to defendant to be used in the act of selling drugs. The fact that the ledger was found alongside drugs, during a search for drugs makes it relevant and, in the absence of some mitigating circumstance that has not been demonstrated here, admissible. The document speaks for itself as a guide that could be used to aid in the selling of drugs, and it was found along with various drugs and materials used in furtherance of dealing drugs. All of defendant's objections might go to the weight of the evidence, but, from the arguments we have before us, would have no bearing on its admissibility.

¶ 19 The other reason defendant maintains he was prejudiced by the stipulation is that the note's content was hearsay, but the State was able to use it as substantive evidence to prove intent to deliver. Again, the State used the evidence in this way because there was already a stipulation. Trial counsel did in fact try to keep the ledger out of evidence by objecting to a continuance. But counsel did not have, and defendant still has not presented, any affirmative basis for keeping the ledger out of evidence. Additionally, and as will be explained in more detail below, any objection to the admission of the ledger on ineffective assistance grounds is doomed because there is

abundant evidence proving intent to deliver beyond a reasonable doubt so the requisite prejudice could never be demonstrated.

¶ 20 That brings us to defendant's argument that the State failed to prove intent to deliver beyond a reasonable doubt. Whether the State has presented sufficient evidence to sustain a conviction is reviewed by determining whether the evidence presented at trial, when viewed in the light most favorable to the State, would allow any rational trier of fact to find that the State had proved every element of the offense beyond a reasonable doubt. *People v. Moody*, 2015 IL App (1st) 130071, ¶ 22. It is the function of the trier of fact to determine the inferences to be drawn from the evidence, assess the credibility of the witnesses, decide the weight to be given their testimony, and resolve any evidentiary conflicts. *Id*. A criminal conviction will not be set aside on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt. *People v. Maggette*, 195 Ill. 2d 336, 353 (2001).

¶ 21 Defendant argues that the only evidence supporting the element of intent to sell drugs was the ledger and, even considering that, there was insufficient evidence for defendant to be convicted of the offense. But that is a mischaracterization of the evidence. The record reveals that the officers also recovered a scale with narcotic residue and a grinder with narcotic reside. Both items were found in close proximity to the drugs. The heroin that was recovered was in individual tinfoil packages, ready for distribution. Then, when the ledger is considered among these other items—all found near each other—there is certainly evidence from which a reasonable fact finder could find intent to deliver beyond a reasonable doubt. Direct evidence of intent to deliver a controlled substance is rare so such intent must usually be proven by circumstantial evidence.

People v. Johnson, 2013 IL App (4th) 120162, ¶ 28. Whether defendant had the intent to deliver is a question for the finder of fact, and that question was answered in the affirmative.

¶ 22 Defendant also argues that his conviction for possession of cocaine should be vacated and that it was improper to merge the possession of cocaine conviction with the heroin conviction. It is true that those convictions should not be merged, but if anything the merger inured to defendant's benefit. Regardless, the only conviction reflected on the mittimus is for possession of heroin with intent to deliver, 720 ILCS 570/401(c)(1). There is nothing to be done.

¶ 23 Defendant's final argument is that the mittimus must be corrected because it currently lists an offense for which he was not convicted. The mittimus states "mfg/del 1<15 gr heroin/analog." Defendant contends that the language should be corrected to indicate that he was only convicted for the offense of having *the intent* to manufacture or deliver heroin, not that he was convicted of actually doing so. But the mittimus has the correct statutory citation. And, under the statute, possessing drugs with intent to deliver is considered the same violation as delivering them. Both crimes are covered by the statute titled "Manufacture or delivery unauthorized by [the] Act." The statute says that "it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance." 720 ILCS 570/401 (West 2012). Therefore, defendant is not entitled to the relief he seeks.

¶ 24 CONCLUSION

¶ 25 Accordingly, we affirm.

¶ 26 Affirmed.