FIRST DIVISION
December 31, 2015

No. 1-14-0904

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 5332
	)	
ALFONSO BUTLER,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Connors concurred in the judgment.
Justice Cunningham specially concurred in the judgment.

O R D E R

¶1 *Held:* Defendant failed to establish he was prejudiced by trial counsel's alleged failure to pursue a viable defense due to her failure to familiarize herself prior to trial with defendant's statement contained in the case incident report; and the $250 "DNA ID system" fee was improperly assessed.

¶2 Following a bench trial, defendant Alfonso Butler was found guilty of possession of a controlled substance and possession of cannabis and sentenced to concurrent terms of 30 months' imprisonment. On appeal, defendant contends his trial counsel was ineffective for pursuing a non-viable defense, and that he was improperly assessed a $250 "DNA ID system" fee.

¶3 Defendant was charged by information with possession of a controlled substance for allegedly possessing 6.7 grams of crack cocaine (720 ILCS 570/402(c) (West 2012)), possession of cannabis for allegedly possessing 43.4 grams of cannabis (720 ILCS 550/4(d) (West 2012)), and two counts of possession with the intent to deliver for each of the above substances (720 ILCS 570/401(c)(2) (West 2012); 720 ILCS 550/5(d) (West 2012)).

¶4 The day the case was set for trial, defense counsel filed a motion to quash arrest and suppress evidence on the basis that the arresting officers violated the scope of a search warrant obtained to search defendant's person and residence when they searched and obtained illegal contraband from an enclosed back porch and stairway leading to the attic.

¶5 During the pretrial motion, Chicago police officer Barsch testified that he obtained a warrant to search the defendant's person and residence located at 5350 South Aberdeen, second floor. On February 9, 2013, after gaining entrance into the second floor apartment, defendant and his brother, Tracy Butler, were detained in the living room while officers performed a search of the premises. In the rear bedroom, the officer recovered "two chunks of suspect cannabis," two plastic bags containing suspect cannabis, $1,124, and a Social Security Administration receipt addressed to defendant at that address. Defendant was placed into custody and given *Miranda* warnings, and the search of the property continued to the enclosed rear porch. From the porch, Officer Barsch recovered multiple plastic bags containing suspect cannabis. The recovered items were in plain view directly outside the back door of the second floor apartment. The officers then entered a stairwell accessible from within the enclosed porch area, where Officer Vahl recovered additional suspect cannabis and crack cocaine.

¶6 On cross-examination, Officer Barsch testified that Officer Kakos was assigned to secure the rear of the property upon the officers' entrance into the residence. After Officer Barsch

recovered the contraband from the rear bedroom, Officer Kakos informed him that he saw defendant at the rear window of the back porch.

¶7 Officer Vahl testified that upon ascending the stairway that led to the attic from the enclosed porch area, he recovered several items from underneath one of the stairs, including a black plastic bag containing a jar that held a condom filled with suspect crack cocaine, and several additional bags of suspect cannabis.

¶8 Tracy Butler testified that he resides at 5350 South Aberdeen. On February 9, 2013, at approximately 9 a.m., he and his brother were detained by police officers, who then began to search the residence. As the officers continued their search on the back porch, Butler heard someone yell "jackpot," and observed officers re-enter the apartment holding "something in a bag and also *** in a box." After the officers left the residence, Butler observed the back porch had been "torn apart," explaining that the door to the first set of stairs leading from the back porch to the attic door had been pried open and that the second set of stairs leading up to the open area of the attic had been "torn apart."

¶9 On cross-examination, Butler confirmed that the apartment searched by police officers is his apartment and that his brother, defendant, was living with him at this residence. He also confirmed that both he and his brother stored items on the enclosed back porch, and that no one was living in the attic at the time the search warrant was executed. On redirect examination, Butler stated that he shares access to the back porch and attic with his neighbor living on the first floor. Butler also denied having access to the attic because the door was locked with a lock that neither he nor defendant owned.

¶10 After hearing all the evidence, the trial court denied defendant's motion to quash arrest and suppress evidence, finding the enclosed back porch was an extension of defendant's

residence. The court stated that "common sense would dictate" the residents of the second floor used the porch area and attached stairway for ingress and egress, and as an additional area to store property. It also determined that shared access to the back porch and attic goes to the weight of the evidence, not the propriety of the search itself. The case then proceeded to a bench trial.

¶11 At trial, Officer Kakos testified that he was positioned in the back yard of defendant's residence along with his partner, Officer Carey, during the execution of the search warrant at defendant's residence. He confirmed that he observed defendant by the window on the rear enclosed porch, but did not see defendant "crouch down" or whether defendant had anything in his hands.

¶12 Officer Barsch's testimony at trial remained substantially identical to his testimony during the hearing on defendant's pretrial motion. He further explained that he performed a search of the rear porch after confirming with Officer Kakos that he saw defendant by the porch's window. He also stated that in order to gain entrance into defendant's residence, they forced open the door to the first floor and ascended the stairway leading to defendant's second floor apartment. The Social Security Administration receipts obtained in the rear bedroom of defendant's residence were dated September 18, 2012.

¶13 Officer Vahl's testimony at trial was also substantially equivalent to his testimony during the hearing on defendant's pretrial motion. He testified that his search eventually led him to the back porch of defendant's residence where he observed a loose step on the staircase leading up to the attic. He opened the kicker panel of the step with his hands and recovered suspect crack cocaine and cannabis underneath. He then re-entered the apartment and notified defendant of the recovered narcotics, and gave defendant *Miranda* warnings. Officer Vahl testified that defendant

indicated he understood his rights as read to him, and agreed to speak with the officer, which led to the following exchange between defense counsel and the State's Attorney:

"Assistant State's Attorney [ASA]: And what did the defendant tell you during that conversation?

[DEFENSE COUNSEL]: Objection. Can we have a moment? I don't have any reports that have a conversation.

[ASA]: The case report.

[DEFENSE COUNSEL]: Case incident report.

[ASA]: Yep.

[DEFENSE COUNSEL]: Withdraw the objection."

Officer Vahl subsequently testified that defendant stated he obtained the narcotics from "a man on the east side," that he "had approximately three ounces of weed, and that he also had the suspect crack cocaine for approximately three weeks, but was unable to get rid of it."

¶14 Forensic chemist Jamie Hess testified that she analyzed several items obtained as a result of the search of defendant's home and concluded they contained 2.8-, 7.4-, 1.8-, and 31.4 grams of cannabis, respectively. Hess also analyzed a "chunky substance," which tested positive for the presence of cocaine and weighed 6.7 grams.

¶15 Defendant's motion for directed finding was denied. Butler then testified on behalf of the defense, essentially repeating his testimony from the pretrial motion hearing. Butler stated that the officers recovered what "appeared to be marijuana" from his brother's bedroom, and explained that his first floor neighbor, who lives with several other people, also had access to the back porch and attic. Butler also confirmed the landlord had access to the attic, but stated that he and defendant did not. He also testified that there is a locked door separating the enclosed porch

from the back yard, to which only Butler had access. Defendant, however, had access and was able to lock the back door of their residence.

¶16 During closing arguments, defense counsel argued, *inter alia*, that the State failed to meet its burden of proof on the delivery charges because no evidence or testimony was presented regarding the presence of "buyers," and officers did not observe anyone enter or leave the residence in an attempt to purchase narcotics or observe any transfer of money. Counsel also argued that the State failed to prove that defendant possessed the narcotics recovered from the back porch and stairwell area because he did not have exclusive access to these areas and defendant was never observed placing items or making movements that would suggest he was placing items in this area.

¶17 The trial court ultimately found defendant guilty of possession of a controlled substance and possession of cannabis in an amount more than 30 grams but less than 500 grams, and not guilty of delivery of both substances. In so finding, the trial court concluded that based upon a totality of the evidence, including defendant's admission, the State proved beyond a reasonable doubt that defendant possessed cocaine and cannabis, but found reasonable doubt that defendant had an intent to deliver. Defendant was subsequently sentenced as previously described and assessed $1,249 in fines and fees, including a $250 "DNA ID system" fee. Defendant now appeals his convictions and requests a new trial on the basis that his trial counsel was ineffective.

¶18 Specifically, defendant contends that his counsel was ineffective because she failed to familiarize herself with the case investigation report prior to trial which led her to pursue a non-viable constructive possession theory of defense. Defendant further argues that this error "prejudiced [defendant] where [defense counsel] proceeded with a defense that was undermined

by the alleged admission contained in the report." The State generally responds that defendant has failed to demonstrate prejudice.

¶19 Claims of ineffective assistance of counsel are judged under the familiar standards of *Strickland v. Washington,* 466 U.S. 668 (1984). See *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). According to *Strickland*, to prevail on a claim of ineffectiveness, a defendant must establish that defense counsel rendered performance that fell below an objective standard of reasonableness and that he was prejudiced by such deficiency. *Strickland*, 466 U.S. at 688; *Albanese,* 104 Ill. 2d at 524. Prejudice means a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Simpson,* 2015 IL 116512, ¶ 35. If the claim may be disposed of on grounds that defendant suffered no prejudice, a court need not determine whether counsel's performance was deficient. *People v. Graham,* 206 Ill. 2d 465, 476 (2003).

¶20 Here, defendant was faced with the uncontradicted and overwhelming testimony from police officers that he was in possession of cannabis and cocaine. See 720 ILCS 570/402(c); 720 ILCS 550/4(d). The trial court found the officers were compelling and credible witnesses and the record demonstrates their testimony was consistent throughout the proceedings. The court also found Officer Vahl's testimony regarding defendant's admission credible and the record establishes this testimony was unrebutted. Therefore, in light of the overwhelming evidence of defendant's guilt, we are unconvinced that had counsel been aware of his admission statement prior to trial, defendant would have been found not guilty of possession of cannabis and cocaine. See *Simpson*, 2015 IL 116512,¶35.

¶21 Defendant has also failed to identify any possible change in trial strategy or counsel's performance that would have constituted a defense to the overwhelming evidence at trial.

Instead, he argues that because "trial counsel's lack of awareness of the admission caused her to fail to deal with it at all *** had she been aware of the statement and the facts surrounding it," she could have "moved to suppress [the statement]" or alternatively, "to discredit it." Although this expands on defendant's deficient performance argument, it fails to allege or explain how the outcome at trial would have been different, which is fatal to defendant's claim on appeal. See *Simpson*, 2015 IL 116512,¶35; see also *People v. Williams*, 192 Ill. 2d 548, 568 (2000).

¶22 Therefore, in light of the overwhelming evidence of defendant's guilt and his failure to demonstrate, or even allege, prejudice on appeal, defendant has failed to meet the requirements to prevail on his claim of ineffective assistance of counsel. See *Simpson*, 2015 IL 116512,¶35 (prejudice means a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different). Accordingly, we decline to reverse defendant's conviction or remand the cause for a new trial.

¶23 Having upheld defendant's current conviction, we now turn to address his contention that his fines and fees were improperly assessed. Defendant argues, and the State concedes, that the trial court improperly applied a $250 "DNA ID system" fee.

¶24 The parties argue that when a fine imposed does not conform to a statutory requirement, the fine is void and such issue may not be forfeited. See *People v. Milsap*, 2012 IL App (4th) 110668,¶26. In light of *People v. Castleberry*, 2015 IL 116916,¶19, this rule no longer applies. On appeal, however, the reviewing court may modify the fines and fees order without remanding the case back to the circuit court. Ill. S. Ct. R 615(b)(1) (eff. Aug. 27, 1999) ("[o]n appeal the reviewing court may *** modify the judgment or order from which the appeal is taken"); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("[r]emandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary corrections").

The propriety of court-ordered fines and fees is reviewed *de novo*. *People v. Elcock*, 396 Ill. App. 3d 524, 538 (2009).

¶25 The "DNA ID system" fee may not be imposed if defendant's DNA has already been taken. *People v. Marshall*, 242 Ill. 2d 285, 302 (2011). Where defendant has been convicted of prior felonies after 1998, we presume this mandatory requirement was imposed following at least one of defendant's prior convictions. See *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. According to the adult probation investigative report, defendant was convicted of three felonies after 1998 prior to the instant offense. Accordingly, we hereby vacate the $250 "DNA ID system" fee and direct the circuit clerk to amend the fines and fees order to reflect the corrected total of $999.

¶26 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in part and vacated in part.

¶27 Affirmed in part and vacated in part.

¶28 JUSTICE CUNNINGHAM, specially concurring:

¶29 While I concur with the holding in this case, given the evidence which established the defendant's guilt beyond a reasonable doubt, I am compelled to comment on the seminal issue raised by the defendant. Specifically, the defendant makes a credible argument that his defense counsel had failed to read the case report provided to her by the State, prior to trial. In other words, she was totally unfamiliar with the fact that her client had made an admission regarding possession of the drugs. I cannot think of a fact that is more central to the case. Thus, it is incomprehensible that a lawyer would proceed to trial without crucial knowledge surrounding

the central issue in the case which she is defending, especially when that knowledge was in a report which she had in her possession—but clearly had not read.

¶30 It is important to highlight the unacceptability of this behavior by defense counsel, lest it appear that this court is concerned only with the outcome and thereby condones the behavior of defense counsel. While counsel's ignorance of the facts of her case clearly did not make a difference in the ultimate outcome, this court cannot be seen as condoning or overlooking this type of behavior simply because the defendant was ultimately found guilty based on the evidence, notwithstanding his defense counsel's less than acceptable performance.

¶31 The following exchange between counsel and the prosecutor during the trial, makes it embarrassingly clear that she was clueless about her client's admission:

> "Q: And then did you have a conversation with the defendant?
>
> A: Yes.
>
> Q: What did the defendant tell you during that conversation?
>
> Defense counsel: Objection. Can we have a moment? I don't have any reports that have a conversation.
>
> State: The case report.
>
> Defense counsel: Case incident report?
>
> State: Yep.
>
> Defendant's counsel: Withdraw the objection."

The report contained the information regarding the defendant's admission.

¶32 Additionally, the defendant points out that the record is replete with other examples of his defense counsel's unfamiliarity with his case and her resulting lack of preparation. I cannot disagree.

¶33 It is clear from the totality of the evidence that the defendant was convicted based on the evidence of his guilt and not his defense counsel's substandard performance. In other words, in spite of his counsel, the defendant suffered no prejudice as a result of her lack of familiarity with the facts of his case. However, to simply affirm the defendant's conviction without acknowledging the patently substandard representation, in my view is tantamount to tacit approval. As a court of review, I believe we are duty bound to affirmatively recognize a defendant's right to be represented by competent counsel who at least makes an effort to be familiar with the facts of the case. Sadly, in this case, defense counsel demonstrated a lack of familiarity of the crucial issue in the case. By highlighting counsel's lack of familiarity with the facts of the case perhaps she will be encouraged to avoid such behavior in the future. While there was no prejudice to the defendant in this case that may not be the case if this happens in another case. Accordingly, I condemn counsel's behavior in the strongest terms.