2015 IL App (2d) 130605-U
No. 2-13-0605
Order filed June 30, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No.11-TR-69237
JAMES HARE,	)	Honorable Elizabeth K. Flood,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Schostok and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Defense counsel was ineffective for failing to move to quash defendant's arrest and suppress the fruits of a traffic stop; the record suggested no valid basis for the stop, the fruits of which established that defendant earlier had driven while his license was revoked.

¶ 2 After a bench trial, defendant, James Hare, was convicted of driving with a revoked license (DWLR) (625 ILCS 5/6-303 (West 2010)) and sentenced to 180 days in jail. On appeal, he argues that his trial counsel was ineffective for failing to move to quash his arrest and suppress evidence. We vacate and remand.

¶ 3 The certified bystander's report of the trial reveals the following. Hampshire police officer Dan Paradies testified on direct examination as follows. On November 20, 2011,[1] at about 11:45 p.m., he was sitting in his parked squad car on an access road perpendicular to Route 72 near Hampshire. Two cars approached from the east on Route 72. The lead car, a red Honda, was traveling 37 miles per hour in a 55-miles-per-hour zone. The "trail car" was a silver Toyota. Defendant was driving the Honda. Paradies pulled behind the Toyota, stopped it, and cited the driver for following too closely. He then drove to Runge Road and saw the Honda parked with nobody nearby. A check of its plates showed that it was registered to the driver of the Toyota.

¶ 4 Paradies testified that he then heard that a Toyota had been stopped on Route 72. When he arrived, he saw Officer Velez talking to defendant, a passenger. Paradies asked defendant whether he had been driving the Honda; defendant responded that he had but that the Honda had developed mechanical problems. Velez already had defendant's license. Defendant was taken into custody.

¶ 5 Defendant's driving abstract, admitted into evidence, showed that, on November 21, 2011, he had a revoked license.

¶ 6 Paradies testified on cross-examination as follows. It was dark at 11:45 p.m. on the evening in question, and his squad car's spotlight and headlight had been off at the time. The Honda and the Toyota were the only two cars that he saw on Route 72. He did not note or run the registration for the Honda. After he stopped the Toyota, he ran the car's plates, then learned

[1] According to the bystander's report, Paradies testified that the events at issue occurred on November 21, 2011, but the other witnesses gave the date as November 20, 2011. The discrepancy is of no consequence here.

that the driver was Luke Daum. After speaking with Daum, he cited him and returned to his squad car. The stop took about seven or eight minutes.

¶ 7 Paradies testified further that, after completing the stop of the Toyota, he turned onto Runge Road and saw a car parked off the roadway. The car's lights were not on, it did not appear to be running, and it was unoccupied. He saw nobody else in the area of the car. A check of the license plates showed that the car was registered to Daum. Shortly afterward, Paradies heard from Velez that Velez had stopped a Toyota on Route 72. Velez did not say why he had stopped the Toyota. Paradies had not seen defendant driving the Toyota, and he did not pull over any car driven by defendant that night. Arriving where Velez had stopped the Toyota, he saw three "other passengers" in it. Daum was not ticketed after being stopped by Velez.

¶ 8 The State rested. Daum testified as follows. At around 11 p.m. on the evening in question, he was driving his red Honda Civic home from Elgin. He had a valid driver's license at the time. Defendant and a woman named Luanne were his passengers. On the way home, near where Daum lived, the Honda broke down near Hampshire and became inoperable. The three people called Luanne's cousin for a ride to Daum's mother's workplace, so that they could get a ride from her. Luanne's cousin gave her and Daum a ride to Ms. Daum's workplace. Daum left defendant behind with the disabled Honda.

¶ 9 Daum testified further that, returning from his mother's workplace, he drove her Toyota back toward where the Honda had broken down. His mother and Luanne were with him. Daum planned to pick up defendant, then go home and make a call to request that the Honda be towed to his house. On the way, he was pulled over for "following too closely" and given a ticket. There were multiple other cars on the road. After the first stop of the Toyota ended, Daum picked up defendant, made a U-turn, and headed back to Route 72. He was pulled over a second

time. The officer told him that he stopped the Toyota because there was another person in the car who had not been in it earlier. Daum did not receive any citations this time.

¶ 10 Daum testified that, before his Honda broke down, he had been the one driving it. The Honda broke down before Daum started driving his mother's Toyota. At no point had defendant been driving the Honda while Daum followed it in the Toyota. Daum could not have followed defendant while defendant was driving the Honda, because the Honda broke down before Daum picked up the Toyota. The Honda had been inoperable since breaking down around 10 p.m.

¶ 11 Defendant testified as follows. On the evening in question, he was riding home from Elgin in Daum's red Honda; Daum was driving and Luanne was the other passenger. Around 10 p.m., the Honda broke down near Hampshire. Defendant had not driven it at all that evening. Luanne's cousin arrived and drove her and Daum away to pick up Daum's mother's Toyota. Defendant waited by the Honda. Daum called him and told him that he and Luanne were on their way to pick him up, so he began walking away from the Honda and toward Route 72 to meet them. He then heard from Daum and Luanne that they had been pulled over on Route 72. Daum eventually drove to defendant's location and picked him up. The Toyota, with Daum driving and defendant, Luanne, and Daum's mother as passengers, was pulled over. Defendant spoke with the officer who had pulled Daum over, but he did not tell him that he had been driving the Honda. Defendant never drove the Honda that night.

¶ 12 The trial court found Paradies credible and did not find Daum and defendant credible. The court explained that defendant's sequence of events did not make sense. The court found him guilty of DWLR, denied his posttrial motion, and sentenced him as noted. He timely appealed.

¶ 13 On appeal, defendant contends that his trial counsel was ineffective for failing to move to suppress his admission to Paradies that he had been driving the red Honda. Defendant argues that it is reasonably probable that, had counsel moved to suppress the admission as the fruit of an illegal traffic stop, the trial court would have granted the motion. Defendant asserts that the only evidence of why Velez stopped the Toyota the second time was Daum's testimony that Velez said that he did so because there was a passenger (defendant) who had not been there the first time. Defendant reasons that this new fact did not create a reasonable suspicion that Daum (or anyone else) had committed an offense, other than that for which Daum had already been ticketed. The State responds tersely that, because the trial court resolved the factual issues in favor of the State, this court should not credit Daum's testimony about what Velez told him. For the following reasons, we agree with defendant.

¶ 14 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that (1) trial counsel's performance was objectively unreasonable; and (2) it is reasonably probable that, but for trial counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). Although whether to file a motion to suppress is ordinarily a matter of trial strategy, the presumption that counsel performed reasonably is rebuttable. See, *e.g.*, *People v. Miller*, 2013 IL App (1st) 110879, ¶ 74.

¶ 15 Defendant contends that trial counsel should have moved to suppress defendant's admission to Paradies that he had been driving the Honda. He reasons that the admission was the product of Velez's stop of the Toyota; that a traffic stop must be supported by a reasonable suspicion that the suspect has committed, is committing, or is about to commit a crime (*People v. Culbertson*, 305 Ill. App. 3d 1015, 1023 (1999)); and that there was no evidence that Velez

reasonably suspected anybody in the Toyota of criminal activity. Defendant notes that the sole evidence of why Velez stopped the Toyota was Daum's testimony that Velez told him that there was a new passenger. Defendant reasons that, since picking up a passenger is not a criminal offense, counsel should have moved to suppress the fruits of the stop, including defendant's admission that he had been driving the Honda earlier.

¶ 16 The State concedes that defendant's admission was the fruit of the stop, and it does not suggest any proper basis for the stop. The State cites the general rule that we must defer to the trial court's findings of fact unless they are against the manifest weight of the evidence (see *People v. Gherna*, 203 Ill. 2d 165, 175 (2003)). This general rule is not of great help here.

¶ 17 First, the issue on appeal is whether trial counsel was ineffective for declining to move to suppress the fruits of the stop. Second, as defendant notes, even accepting the trial court's resolution of the factual issues, the validity of the stop is still open to doubt. The problem is not merely that Daum's testimony about Velez's explanation of the stop was neither contradicted, impeached, nor inherently incredible, and thus could not be ignored by the fact finder (see *People ex rel. Brown v. Baker*, 88 Ill. 2d 81, 85 (1981)). A further problem is whether there was *any* evidence that Velez had the reasonable suspicion that was needed for the stop. None came out at trial.

¶ 18 Had trial counsel moved to suppress the evidence seized as a result of the stop, all defendant would have had to do was elicit evidence that Daum was doing nothing unusual at the time of the stop, and the State would have been given the burden of proving that the stop was proper. See *People v. Liekis*, 2012 IL App (2d) 100774, ¶ 20. On this record, we have Daum's uncontradicted testimony that Velez did not cite him for any offense. Even if we could discredit Daum's testimony in this regard, we would be left with no evidence that Velez had a proper basis

for the stop. Thus, defendant's claim of ineffective assistance cannot be defeated merely by the trial court's factual findings (and the credibility determinations that underlay those findings).

¶ 19 The facts as the trial court might have found them do militate to a degree against defendant's claim. Although Paradies testified that defendant admitted to him that he had been driving the Honda, Paradies also testified that he had seen defendant driving the Honda. Thus, there was another basis to find that defendant had been driving the Honda at some point. Both of these bases were disputed, but the trial court credited Paradies over defendants' witnesses. Thus, even absent defendant's admission, there was a basis on which to find one of the elements of DWLR.

¶ 20 Further, in deciding whether there was a reasonable suspicion, a court must consider all of the information received by the officers who were acting in concert, including that information not known to the officer who made the stop. *People v. Ewing*, 377 Ill. App. 3d 585, 593 (2007); *People v. Fenner*, 191 Ill. App. 3d 801, 806 (1989). Thus, on the present record, we can say that, when Velez stopped the Toyota, the officers' collective information included the fact that defendant had been driving the Honda earlier that evening.

¶ 21 The other element of DWLR that the State had to prove is of course that, at the time, defendant's license was revoked. See 625 ILCS 5/6-303(a) (West 2012). The trial record does not prove that, before the Toyota was stopped the second time, either officer had a reasonable suspicion that defendant had been driving the Honda *with a revoked license*. When Paradies ran the Honda's registration, it came back to Daum, who had a valid license. There was no evidence that, when Paradies saw defendant driving the Honda, he even knew defendant's identity, much less anything about the status of his license. Thus, up until Velez's stop of the Toyota, Paradies apparently had no basis to stop defendant.

¶ 22 Further, the evidence is questionable, at best, that, before he stopped the Toyota, Velez had a reasonable suspicion that defendant lacked a valid license. Although Velez had apparently learned from Paradies that defendant, now a passenger in the Toyota, had earlier been driving the Honda, nothing suggests that Velez had any idea at the time who defendant was or whether he had a valid license. At most, Velez's statement to Daum that he stopped the Toyota because there was a new passenger could be read to imply that Velez made the stop because he believed that the new passenger—defendant—had committed an offense of some sort. Even granting as much, however, the grounds for Velez's suspicion of defendant are anything but clear. No offense other than DWLR had any basis, and, to create a reasonable suspicion of this offense, the officers' collective knowledge would have to have included information implying that defendant lacked a valid license. Nothing in the record allows the inference that, before the second stop, either Paradies or Velez had such information.

¶ 23 Of course, the needed evidence (and much else besides) might have come out at a hearing on a motion to suppress, had defendant's trial counsel filed one. But defendant is not required to prove that, but for trial counsel's omission, the result would have been different. He need show only a *reasonable probability* that the result would have been different. *Strickland*, 466 U.S. at 694. The ultimate focus is on the fundamental fairness of the proceeding. *Id.*

¶ 24 Although this is a close case, we conclude that defendant's trial counsel's failure to move to quash defendant's arrest and suppress the evidence obtained by the second stop was objectively unreasonable and that it is reasonably likely that, but for this lapse, the result of the proceeding would have been different. The crucial consideration here is that, absent the evidence obtained by the second stop, the officers would have had no basis to identify defendant as the driver of the Honda earlier, and thus no basis to conclude that defendant had committed

DWLR. Paradies testified that the Honda had been registered to Daum. Although, at trial, he identified defendant as the driver of the Honda, there is no evidence that, when he saw defendant driving the Honda, he knew who defendant was. There is no evidence that he knew *anything* about defendant at that point, even his identity, much less the status of his driving privileges.

¶ 25 Thus, had the second stop not occurred, Paradies would have had no reasonable grounds to suspect defendant of DWLR. Velez would have had no reasonable grounds either. After the allegedly improper second stop, of course, Paradies and Velez could "connect the dots": they knew defendant's identity from his license; they could check the status of his license; and, in addition to being able to match the portrait on the license to the driver he had seen earlier, Paradies also had defendant's admission that he had been driving the Honda.

¶ 26 We cannot, of course, state whether defendant would have succeeded on a motion to quash his arrest and suppress the evidence obtained as a result of the second stop. We hold only that, on the evidence of record, counsel's failure to file the motion was error under *Strickland*. Also, we do not know what additional evidence might come out if, on remand, defendant moves to quash and suppress. But, as noted, under *Strickland*, defendant does not have the impossible burden to forecast the result of the motion.

¶ 27 Although whether to move to suppress evidence is ordinarily a strategic choice, we can see no strategic basis for counsel's decision (or failure) here. No apparent downside existed to filing the motion and, as far as it appears on this record, there was an excellent chance of prevailing both on the motion and at trial. In sum, we conclude that trial counsel's omission was objectively unreasonable and that the omission placed the fundamental fairness of the proceeding in doubt. Therefore, we vacate defendant's conviction and we remand the cause so that defendant can have the opportunity to file a motion to quash and suppress.

¶ 28 We vacate the judgment of the circuit court of Kane County and remand for further proceedings consistent with this order.

¶ 29 Vacated and remanded.