2016 IL App (1st) 140043-U

SIXTH DIVISION
January 22, 2016

No. 1-14-0043

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 2063
	)	
ANTHONY THOMAS,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant's convictions affirmed over his claim of ineffectiveness for trial counsel's failure to file a motion to quash and suppress where that motion would have been unsuccessful.

¶ 2 Defendant, Anthony Thomas, was found guilty of unlawful possession of a weapon by a felon and possession of cannabis with intent to deliver. On appeal, defendant contends that his trial counsel was ineffective for failing to file a motion to quash his arrest and suppress his subsequent incriminating statements admitting ownership of the weapon and the cannabis. For the reasons that follow, we affirm.

¶ 3 Defendant was charged with two counts of the unlawful possession of a weapon by a felon and the possession of cannabis with intent to deliver which allegedly occurred on December 30, 2011. Defendant and codefendant, Mark Pollard[1] were tried in a joint bench trial.

¶ 4 Chicago police officer McFadden, an eleven-year veteran of the Chicago police department, testified that on December 30, 2011, he was part of a narcotics team of 10 to 12 officers who executed a search warrant at a two-story, single-family residence located at 6831 South Parnell Avenue in Chicago (the residence). When they received no response after knocking on the door, the officers forcibly entered the residence. Officer McFadden, who was one of the first to enter, "[i]nstantly" observed a semi-automatic, nine-millimeter handgun on the bottom shelf of a table in the "front room" on the first floor. The firearm was loaded and had an "extended clip" with 23 live rounds. Officer McFadden also observed defendant in an adjacent dining room less than 10 feet from the weapon. Another officer detained defendant, and Officer McFadden searched the rest of the residence.

¶ 5 During the search, Officer McFadden noticed a "[s]trong odor of cannabis." While searching a first-floor bedroom and its closet, Officer McFadden found a plastic container which held small individual plastic bags, a cardboard box containing suspect cannabis and another plastic bag containing suspect cannabis. Officer McFadden did not find any mail in that bedroom. In a bedroom on the second floor, Officer McFadden discovered a plastic bag inside a suitcase containing suspect cannabis, as well as a black garbage bag which held two smaller plastic bags containing suspect cannabis. Additionally, Officer McFadden identified a photograph which depicted "small plastic bags containing a green, leafy substance suspect

[1] Mr. Pollard is not a party to this appeal.

cannabis" which other officers found on the dining room table. The police located other individuals upstairs in the residence including codefendant, Mr. Pollard.

¶ 6 Officer Hoffman testified that he served as the evidence officer during the execution of the search warrant at the residence. As such, he photographed the scene, and collected and inventoried various recovered items including bags of suspect cannabis, a police scanner, two digital scales and a handgun. While searching the residence, Officer Hoffman observed the digital scale, police scanner, a roll of sandwich bags, and several smaller "knotted bags" inside a larger Ziploc bag containing suspect cannabis on the dining room table. The parties later stipulated that those knotted bags tested positive for 73.4 grams of cannabis. During the search, the officer also recovered a letter from the Chicago Housing Authority, addressed to a "Mark L. Thomas," which bore the address of the residence. Officer Hoffman did not "believe" that Mark Thomas was present during the execution of the warrant and did not recover evidence indicating that defendant used Mark Thomas as an alias or any evidence suggesting that defendant lived at the residence.

¶ 7 Chicago police officer Nunez testified that after defendant was detained, he was given his *Miranda* rights and defendant acknowledged that he understood those rights. Defendant admitted to Officer Nunez that he brought the recovered handgun into the "living room" of the residence so that he could "shoot it" on New Year's Eve. Defendant also admitted that the large bag on the "living room" table containing the smaller bags of cannabis, belonged to him. Officer Nunez later explained that he considered the dining room and living room the same room when shown a police report bearing his signature which stated that the five bags of suspect cannabis at

issue were found on the "dining room table." Officer Nunez obtained identification from defendant, which showed he did not live at the subject residence.

¶ 8 A certified copy of defendant's 2006 conviction to the charge of manufacturing and delivery of cocaine after a plea of guilty was admitted into evidence.

¶ 9 Defendant testified that, on the day the police arrested him, he lived in Harvey, Illinois. That day, he met Mr. Pollard at the intersection of West 68th Street and South Parnell Avenue and they proceeded to the residence. He and Mr. Pollard drank beer at a table. Mr. Pollard then went upstairs and defendant was sitting "[f]ar by the wall" in the dining room. Suddenly, the front door of the residence "flew open." Officer Nunez told defendant to get down on the floor, put a gun to his head, and then handcuffed him. Defendant told Officer Nunez that he was not alone in the residence. Defendant denied that there was a gun in the front room. He testified that only small amounts of cannabis were discovered by the police, but he did not know where in the residence the cannabis was found. Defendant denied making any statement to Officer Nunez concerning the gun or that any of the officers questioned him about the cannabis.

¶ 10 The trial court found defendant guilty of the two counts of unlawful possession of a weapon by a felon, which the court merged, and one count of possession of cannabis with intent to deliver. Defendant was subsequently sentenced to concurrent terms of six years' imprisonment for unlawful possession of a weapon by a felon, and five years' imprisonment for possession of cannabis with intent to deliver. This appeal followed.

¶ 11 On appeal defendant contends that because trial counsel failed to file a motion to quash his arrest and to suppress his statements, he received ineffective assistance of counsel.

¶ 12 We evaluate claims of ineffective assistance of counsel under the two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). See *People v. Givens*, 237 Ill. 2d 311, 330-31 (2010). Under *Strickland,* a defendant must show both that his counsel was deficient and that the deficiency prejudiced him. *Id.* at 331. A failure to establish either prong precludes a finding of ineffective assistance of counsel. *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 13 When examining whether trial counsel's performance was deficient for failing to file a motion to suppress evidence, there is a strong presumption that the decision was strategic and proper. *People v. Miller*, 2013 IL App (1st) 110879, ¶ 72; *People v. Caffey*, 205 Ill. 2d 52, 123 (2001) (Counsel's strategic choices are "virtually unchallengeable."). To overcome this presumption, a defendant must demonstrate that the motion to suppress would have succeeded, and that a reasonable probability exists that the outcome of his trial would have been different had the evidence been suppressed. *Henderson*, 2013 IL 114040, ¶¶ 12, 15.

¶ 14 We will first address whether defendant's motion to quash arrest and suppress his statements would have been successful.

¶ 15 Initially, we acknowledge that reviewing courts have declined to review a defendant's claim of ineffectiveness of counsel for failure to file a motion to suppress on direct appeal where the evidence which is necessary to assess the police conduct and, thus, whether the motion would have been successful is outside the record. *People v. Evans*, 2015 IL App (1st) 130991, ¶ 34. Such a claim is "almost never appropriate on direct appeal because absent a motion to suppress, it is highly unlikely that the State would garner its resources to prove the propriety of the officers' actions." *Id.* (quoting *People v. Durgan*, 346 Ill. App. 3d 1121, 1142-43 (2004)). Thus, a claim of ineffectiveness for failure to file a motion to suppress may be better suited for review

under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). *Evans*, 2015 IL App (1st) 130991, ¶ 34. However, in this case, we find sufficient facts of record to resolve defendant's ineffective assistance of counsel claim and we will address it.

¶ 16 Defendant raises numerous arguments as to why a motion to quash and suppress would have succeeded here, including that the police lacked probable cause to support his arrest. In particular, defendant argues: (1) his arrest was based "merely on his presence" in the residence during the search because no officer observed him in possession of the suspect cannabis or handgun; (2) he did not live at the residence; and (3) he was not named in the search warrant. The State responds, arguing that defendant's motion to quash and suppress would have been futile based on various theories, including the fact that the police had probable cause to arrest defendant before he made the incriminatory statement. We agree that the police had probable cause to arrest defendant and find that determination dispositive.

¶ 17 Custodial interrogation absent probable cause violates the fourth amendment. *People v. Centeno*, 333 Ill. App. 3d 604, 616-17 (2002). The execution of a lawful search warrant "implicitly carries with it the authority to detain occupants of the premises while the search is being conducted." *People v. Edwards*, 144 Ill. 2d 108, 126 (1991) (citing *Michigan v. Summers*, 452 U.S. 692, 705 (1981)). During the execution of the warrant, if "evidence establishing probable cause to arrest one or more of the occupants of the house is found, an arrest and a search incident thereto are constitutionally permissible." *Id.*

¶ 18 Probable cause exists "when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Grant*, 2013 IL 112734, ¶ 11. An individual's mere presence in a location

subjected to the execution of a search warrant does not result in probable cause particularized to that person. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); see also *People v. McCarty*, 223 Ill. 2d 109, 155-56 (2006). An officer's experience and knowledge at the time of the arrest are relevant in determining if probable cause exists. *Grant*, 2013 IL 112734, ¶ 11. When multiple officers work together, "probable cause can be established from all the information collectively received by the officers even if that information is not specifically known to the officer who makes the arrest." *People v. Maxey*, 2011 IL App (1st) 100011, ¶ 54. The determination of probable cause depends upon the totality of the circumstances at the time of the arrest, and it is judged according to commonsense considerations based on the probability of criminal activity, not proof beyond a reasonable doubt. *Grant*, 2013 IL 112734, ¶ 11.

¶ 19 In the instant case, the officers had probable cause to believe defendant had committed a crime, which was based on significantly more evidence than his mere presence in the residence during the execution of the search warrant. After entering the residence, Officer McFadden immediately observed a loaded semi-automatic, nine-millimeter handgun with an "extended clip" on the bottom shelf of a table in the living room. The officer observed defendant less than 10 feet away from the gun in the adjacent dining room. On the dining room table, Officer Hoffman recovered several small plastic bags inside a larger bag containing suspect cannabis. Additionally, Officer Hoffman observed items on the dining room table associated with the sale of drugs: a digital scale, a police scanner, and a roll of sandwich bags. When the officers entered the residence, pursuant to the search warrant, defendant was the only person in the dining room and the only person on the first floor. See *People v. Pittman*, 216 Ill. App. 3d 598, 603 (1991) (finding the police had probable cause to arrest the defendant during the execution of a search

warrant in which he was not named where he was among eight people in a living room "situated in close proximity to the coffee table" upon which cannabis was found).

¶ 20 A finding of probable cause particularized to arrest defendant is not precluded by the fact: other people were present in the residence during the execution of the search warrant; defendant was not named in the warrant; and defendant was not shown to have lived at the residence. These factors are not necessary to convict a defendant. See *People v. Adams*, 161 Ill. 2d 333, 344-45 (1994) (control over the premises where drugs are located is not a prerequisite to prove constructive possession of them); *People v. Denton*, 264 Ill. App. 3d 793, 798 (1994) (fact that other individuals have access to drugs does not exonerate a defendant but, rather, suggests the possibility of joint possession). Although *Adams* and *Denton* address issues as to the sufficiency of the evidence and involved defendants who were proven guilty beyond a reasonable doubt, they are instructive on a probable cause determination because the standard of proof is the probability of criminal activity, which is less than proof beyond a reasonable doubt. See *Grant*, 2013 IL 112734, ¶ 11.

¶ 21 Based on the record before us, we cannot say that a reasonably cautious person would not believe that defendant had committed a crime and, in turn, we cannot say that the police did not have probable cause to arrest defendant before he was interrogated. Therefore, defendant's subsequent self-incriminating statements which he made to Officer Nunez during his custodial interrogation after being *Mirandized* were lawful. In reaching this conclusion, we find defendant's reliance on *People v. Elliot*, 314 Ill. App. 3d 187 (2000) misplaced.

¶ 22 In *Elliot*, when police officers executed a search warrant on a residence, they found the defendant—who did not live at the residence and was not named in the warrant—using the

bathroom and was, subsequently, arrested. *Id.* at 188-89. The circuit court found that the police did not have probable cause to conduct a custodial interrogation of the defendant because she did not possess any drugs, was not seen near any drugs and, generally, "the police had only a hunch that, because [the] defendant was in the apartment, she was either a user or a seller of drugs." *Id.* at 191. Here, however, defendant was near a table that held suspect cannabis in small plastic bags, along with other drug paraphernalia, and he was less than 10 feet away from a loaded handgun. Unlike the defendant in *Elliot*, the evidence creating suspicion of defendant's involvement in a crime or crimes was not limited to his mere presence in a residence subjected to the search warrant.

¶ 23 Because we have determined that the police lawfully detained defendant with probable cause, we find that defendant's motion to quash arrest and suppress statements would not have been successful. Failing to file a futile motion to quash and suppress cannot constitute ineffective assistance of counsel. See *Givens*, 237 Ill. 2d at 331. Therefore, we need not address whether a reasonable probability exists that the outcome of his trial would have been different had the evidence been suppressed. Accordingly, defendant's claim of ineffective assistance of counsel is meritless.

¶ 24 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.