2016 IL App (1st) 140252-U

THIRD DIVISION
May 25, 2016

No. 1-14-0252

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 9307
	)	
KEVIN CROWDER,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

¶ 1 Held: Defendant's convictions are affirmed over his contention that his trial counsel was constitutionally ineffective for failing to request a motion to sever his trial from his codefendant because defendant could not establish prejudice resulted from his counsel's allegedly deficient performance.

¶ 2 Following a joint bench trial with codefendant Antonio Powell,[1] defendant Kevin Crowder was found guilty of possession of a controlled substance (cocaine) and possession of

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[1] Powell is not a party to this appeal.

cannabis. The trial court sentenced defendant to six years in prison. On appeal, he contends that his trial counsel was constitutionally ineffective for failing to file a motion to sever his trial from Powell's where, during Powell's case-in-chief, he presented a defense antagonistic to defendant. We affirm.

¶ 3 The State charged defendant and Powell by joint indictment with three counts of possession of a controlled substance (cocaine) with intent to deliver and three counts of possession of cannabis with intent to deliver.

¶ 4 At a joint trial where defendant and Powell were represented by separate counsel, Chicago Police Officer Ewing was the only witness for the State. At approximately 8 p.m. on April 15, 2013, Ewing was part of an 8 to 10-member team about to execute a search warrant on a single-family house located on the 9900 block of South University Avenue.[2] Ewing parked his squad car in an alley next to the house and began walking to the residence. As he approached the house, he observed defendant and another man standing outside the residence on the front lawn. Ewing did not know how long defendant had been standing outside. Officers detained both men, and Ewing told defendant that they had a search warrant "for his residence." Ewing asked defendant "if he had his keys," which defendant provided. As one of the officers attempted to use the keys to enter the residence, Ewing "heard someone lock the deadbolt on the top door." Defendant's keys did not unlock the deadbolt. As a result, the officers forcibly entered the

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[2] Although Ewing stated the address of the house was on the 9900 block of South University Avenue, other evidence presented at trial and the record make clear the house was actually on the 9500 block of South University Avenue.

residence. They were unable to determine whether defendant's keys worked in any of the door's other locks.

¶ 5 Ewing described the house's first floor. There was a living room immediately beyond the front door, two bedrooms, one in the front and one in the rear, a bathroom, a kitchen and a den in the rear. As the officers entered, they initially searched for occupants of the house but did not observe anyone in the living room. As they continued searching, Ewing observed Powell coming out of the front bedroom with clear plastic baggies in his hands containing suspect narcotics. Powell dropped the baggies, and the officers detained him. The officers then found and detained two females in the front bedroom. After they had detained the only three occupants of the house, they search the residence for contraband.

¶ 6 In the front bedroom on a dresser, Ewing observed three plastic bags and a scale. One of the bags contained 10 smaller baggies, another contained 6 smaller baggies and the third contained loose suspect cannabis. In separate open drawers of the dresser, Ewing found a clear plastic bag containing suspect cocaine and another bag containing four smaller baggies with suspect cannabis. On a desk, he observed four clear plastic bags containing suspect cocaine. On a microwave stand next to the desk, Ewing found a black and red bag containing a plastic bag with suspect cannabis. The front bedroom was the only room in the residence where the police found suspect narcotics.

¶ 7 In the rear bedroom of the residence, Ewing observed two video monitors with live video feeds showing the outside of the house and an alley. He recovered a firearm from underneath a chair and several pieces of mail. Of the seven pieces of mail, which were admitted into evidence,

six were addressed to defendant at the address subject to the search warrant and one was addressed to "Ralph Johnson" at that address. Addressed to defendant were two mailings from "Walking By Faith" postmarked January 25, 2013 and February 15, 2013, and a class-action opt-out form dated March 16, 2009. Undated mail addressed to defendant consisted of a mailing from Kenneth Copeland Ministries and solicitations from Comcast and NetSpend.

¶ 8 In the den of the residence, Ewing found a video camera directed outside the house sitting on a windowsill. In the basement of the residence, Ewing observed two more video monitors on a table with live video feeds of the outside of the house, the same video feeds found in the rear bedroom. On one of the monitors, Ewing noticed he could see the police squad cars parked in the alley. Underneath the table, officers recovered a semiautomatic nine millimeter handgun, two empty magazines and a clear plastic bag filled with ammunition. In the basement's laundry room, the police recovered additional ammunition. Ewing stated there was a bedroom in the attic of house with women's clothing. Outside the residence, Ewing observed a video camera on a corner of the house's garage, directed toward the alley.

¶ 9 After the search concluded, an officer searched Powell and recovered $3,706. Ewing could not recall anything being recovered from defendant. Ewing did not determine who owned the house, whose name was on the deed or if someone had a lease for the residence.

¶ 10 At the conclusion of the State's case, the parties stipulated that the three plastic bags found on top of the dresser weighed 30.5 grams and tested positive for cannabis, the plastic bag containing four smaller baggies found in a dresser drawer weighed 12.1 grams and tested positive for cannabis, the other plastic bag found in a dresser drawer weighed 6.6 grams and

tested positive for cocaine, the four plastic bags from the desk weighed 126.2 grams and tested positive for cocaine, the plastic bag from the microwave stand weighed 442.5 grams and tested positive for cannabis, and the five plastic bags found on the ground by the front bedroom weighed 59.8 grams and tested positive for cocaine.

¶ 11 Defendant did not present any witnesses or testify. Powell did not testify but presented two witnesses on his behalf, Omari Lloyd and Kelly McDuffie.

¶ 12 Lloyd testified he and Powell visited defendant's house on the night in question to smoke cannabis. Lloyd knew defendant and had been to his house several times before without Powell to smoke cannabis. Lloyd knew it was defendant's house because defendant lived there, Lloyd had seen him there and knew "where [he] stays at." Defendant opened the door for Lloyd and Powell, and led them to the "back room," the den. Lloyd and Powell met two women, "Kanei" and McDuffie, at defendant's house. Lloyd stated none of them went into the front bedroom of the residence because defendant had "his doors locked." Lloyd also stated that they were limited to the den because defendant did not "allow company all over his house." Although the group brought its own cannabis, it did not have any "blunts to smoke," so Lloyd decided to walk to the store, leaving Powell and the two women in the den.

¶ 13 When Lloyd went outside and walked near the alley, he encountered the police who detained him, searched him and found cannabis on him. He had been at the house for 20 to 30 minutes before the police arrived. Around this time, defendant came out of the house alone. Lloyd witnessed the police detain him and walk him to the front door. Defendant opened the security door to the residence and the officers then "busted in" the front door.

¶ 14 On cross-examination by defendant's counsel, Lloyd acknowledged he was convicted in 2007 of selling narcotics. He stated that defendant did not sell him cannabis, and that night, he had not made plans with defendant, but rather with Powell and the two women. The police never charged him with the cannabis they found on him.

¶ 15 McDuffie testified she and Kanei Miller went to defendant's house on the night in question to smoke with Miller's friends, Powell and Lloyd. McDuffie had been to defendant's house once or twice before. When McDuffie arrived at defendant's house, defendant was there. McDuffie and Miller went to the den with Powell while Lloyd left to get blunts and snacks. She denied that she entered the front bedroom. As on the previous occasions McDuffie visited defendant's house, she never went in the front bedroom because the door was "always closed or locked." Fifteen minutes after she arrived, the police entered the residence and found her, Miller and Powell in the den. None of them had left the den since arriving at the residence.

¶ 16 On cross-examination by defendant's counsel, McDuffie stated that Miller was currently in jail. Whenever McDuffie went to defendant's house, she brought her own cannabis because defendant never provided it.

¶ 17 After the parties rested, the court confirmed that no motion to sever was filed by the parties, which Powell's counsel acknowledged.

¶ 18 After argument, the trial court found defendant guilty of two counts of possession of a controlled substance and three counts of possession of cannabis, the lesser-included offenses of the charged possession with intent to deliver offenses. The court found defendant not guilty of possession of a controlled substance with intent to deliver predicated on the cocaine found on the

ground outside the front bedroom. It found Powell guilty of one count of possession of a controlled substance predicated on the cocaine found on the ground outside the front bedroom and not guilty on the remaining counts.

¶ 19 The court concluded that Officer Ewing's testimony was believable, but it did not find enough evidence that defendant had the intent to deliver the narcotics found in the residence. The court, however, determined that defendant possessed the narcotics based on his "unquestionable" "connection" to the residence, shown by the recovery of several items of mail addressed to defendant at the residence, notably two recent pieces of mail and a class-action opt-out legal document. The court also stated that defendant gave the officers keys to the residence, even if the keys ultimately did not open any of the doors. The court observed that Powell's witnesses stated the residence belonged to defendant. It noted that much of the narcotics were found in plain view in the front bedroom. The court highlighted the "curious security system" found throughout the house, "leav[ing] no inference" in the court's mind that the system's intent was to "surveil" the property to make sure defendant was not "getting ripped off" or had "advance[] notice" of the police's presence. The trial court subsequently sentenced defendant to six years in prison. This appeal followed.

¶ 20 Defendant contends that his trial counsel was constitutionally ineffective for failing to file a motion to sever his trial from Powell's.

¶ 21 The Code of Criminal Procedure of 1963 (Code) allows for the joinder of related prosecutions if the offenses and defendants could have been joined in a single charge. 725 ILCS 5/114-7 (West 2012). The Code also provides when either a defendant or the State is prejudiced

by such joinder, the trial court may order separate trials or grant severance of defendants. 725 ILCS 5/114-8(a) (West 2012). There are two independent recognized grounds for severance: (1) where a codefendant has made an out-of-court statement implicating the defendant and (2) where "the codefendants' defenses are so antagonistic to each other that one of the codefendants cannot receive a fair trial jointly with the others." *People v. James*, 348 Ill. App. 3d 498, 507 (2004).

¶ 22 In the instant case, defendant bases his contention on the second ground for severance, arguing that his and Powell's defenses became so antagonistic when Powell's two witnesses shifted the blame for the narcotics found in the front bedroom from Powell onto defendant that he was denied a fair trial. Defendant argues that, when his trial counsel became aware that Powell's defense was antagonistic to his own, counsel should have filed a motion to sever his trial from Powell's, and the failure to do so rendered counsel constitutionally ineffective.

¶ 23 We evaluate claims of ineffective assistance of counsel under the two-prong approach set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Givens*, 237 Ill. 2d 311, 330-31 (2010). Under *Strickland*, defendant must show that his counsel was deficient and the deficiency prejudiced him. *Id.* at 331. The failure to establish either prong precludes a finding of ineffective assistance (*People v. Henderson*, 2013 IL 114040, ¶ 11), and defendant bears the burden of demonstrating the ineffectiveness. *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 52. We may proceed directly to the prejudice component of *Strickland* without determining first whether trial counsel's performance was deficient if we determine that defendant did not suffer prejudice (*id.* ¶ 70), which is how we proceed in the instant case.

¶ 24 To show prejudice, defendant must show there is a reasonable probability that the result of his trial would have been different had his counsel filed a motion to sever. *People v. McLemore*, 203 Ill. App. 3d 1052, 1057 (1990). Thus, the critical question becomes whether, when considering only Officer Ewing's testimony and the State's exhibits, a reasonable probability exists that defendant would not have been found guilty of possession of a controlled substance and cannabis.

¶ 25 Possession of narcotics may be actual or constructive. *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 36. Here, it is undisputed that defendant did not have actual possession of the narcotics, thus his guilt could only rest on a constructive possession theory, which exists when "defendant had knowledge of the presence of the contraband, and had control over the area where the contraband was found." *People v. Hunter*, 2013 IL 114100, ¶ 19. Constructive possession is usually proven exclusively by circumstantial evidence. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 23. Habitation in a residence where narcotics have been discovered demonstrates the requisite level of control to constitute constructive possession. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. Proof of residency is relevant to show a defendant lived at the premises. *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999). When narcotics are discovered in a residence under the defendant's control, "it may be inferred that he had the requisite knowledge and possession, absent other facts and circumstances which might create a reasonable doubt as to defendant's guilt." *People v. Bui*, 381 Ill. App. 3d 397, 419 (2008).

¶ 26 In the instant case, based on the testimony of Officer Ewing and the State's exhibits, the evidence that defendant constructively possessed the narcotics was significant. Ewing observed

defendant outside the residence when he arrived, and there was ample evidence of defendant's habitation inside the house. In the rear bedroom, Ewing recovered six pieces of mail addressed to defendant at the address subject to the warrant, including two pieces postmarked February 15, 2013 and January 25, 2013, two and three months, respectively, prior to the execution of the warrant. See *Maldonado*, 2015 IL App (1st) 131874, ¶ 29 (stating "it is clear from existing case law that mail addressed to a defendant found where contraband is recovered may be sufficient to allow an inference of residency, and thereby control" when the defendant is present during the execution of a search warrant at the residence). As the trial court noted, this evidence established that defendant had an "unquestionable" "connection" to the residence.

¶ 27 Additionally, after Officer Ewing told defendant he had a search warrant for his residence and asked for his keys, defendant provided the officers his keys, leading to an inference of his control over the premises. Ewing also observed a security system in the house, including two videos monitors in the rear bedroom, where the mail addressed to defendant was found, with live video feeds showing outside the residence, facts the trial court noted would help warn defendant of the police.

¶ 28 Although the trial court mentioned the testimony of Lloyd and McDuffie in connecting defendant to the residence, it made these remarks only after discussing how the mail and keys connected defendant to the house. Their testimony was not the linchpin in the court's determination of defendant's guilt, but rather was cumulative to Ewing's testimony.

¶ 29 We recognize that none of the narcotics was discovered in the rear bedroom where the mail was found. However, the overwhelming evidence that defendant lived in the residence

strongly supports both his control and knowledge of the narcotics found in the front bedroom (see *Bui*, 381 Ill. App. 3d at 419; *Cunningham*, 309 Ill. App. 3d at 828), especially given that most of the narcotics recovered were in plain sight. Consequently, there is no reasonable probability that the outcome of defendant's trial would have changed had his trial counsel filed a motion to sever and the court not heard Lloyd and McDuffie's testimony. Defendant therefore suffered no prejudice, and his claim of ineffective assistance of counsel fails. See *Henderson*, 2013 IL 114040, ¶ 11.

¶ 30 Nevertheless, defendant maintains he was prejudiced by his counsel's allegedly deficient representation, highlighting that the State's evidence connecting him to the residence "was not utility bills, bank statements, or other important documents." Additionally, he argues the most recently recovered mail was postmarked "about seven months before the search on August 15, 2013" of the residence, and the trial court "stated that much of the mail was 'innocuous.' " First, we note that the search of the residence occurred on April 15, 2013, not four months later, as initially argued by defendant. Thus, the most recently postmarked mail found was dated only two months prior to the search of the house. Second, although the trial court mentioned that some of the mail was "innocuous," it further stated that some "were fairly recent with defendant's name and address," specifically mentioning the two pieces of mail from "Walking By Faith" postmarked in 2013. Moreover, defendant received six pieces of mail at that address from five different mailers, showing his receipt of mail there was not an isolated occurrence.

¶ 31 Next, defendant asserts that the police never found any proof of identification on defendant listing the residence as his address, and defendant never admitted to living in the

residence. To the former, there is no requirement that proof of residency be established through a state-issued identification. See *People v. McCarter*, 339 Ill. App. 3d 876, 879-80 (2003). Here, the several pieces of mail addressed to defendant at the residence coupled with his presence during the warrant's execution were sufficient to establish his habitation there. To the latter, it is the well-settled law that direct proof, such as a confession, is not necessary to prove constructive possession. See *People v. Faulkner*, 2015 IL App (1st) 132884, ¶¶ 24-28. Defendant also argues the police never located a deed or lease to the property naming defendant. However, such proof is also not required to prove constructive possession of contraband. See *People v. Williams*, 98 Ill. App. 3d 844, 848 (1981) (stating "whether [the defendant] had a legal interest in the apartment is not determinative of whether he exercised sufficient dominion and control over the premises to reasonably infer his possession of the [contraband]").

¶ 32 Finally, defendant highlights that, while he gave his keys to the police, there was no evidence that they actually opened the door to the residence subject to the search warrant. However, after defendant gave the police his keys, the officers heard the front door's deadbolt lock. When they could not unlock the deadbolt using defendant's keys, they by necessity forcibly entered the residence. At that point, the police had no reason to ascertain whether his keys unlocked the other locks on the door.

¶ 33 In sum, defendant was present when the police conducted the search of the residence, received mail at the residence and in the room where the mail was found, there were video monitors with live feeds of the outside of the house. This evidence sufficiently established his habitation and control of the residence, and thus his constructive possession of the narcotics

found therein. Therefore, defendant was not prejudiced by the fact that, as a result of trial counsel's failure to request severance, the trial court heard codefendant Powell's witnesses testify that the residence was defendant's.

¶ 34 Having found that defendant suffered no prejudice from his trial counsel's failure to request severance, we need not discuss whether his counsel's performance in that regard was deficient or whether such a motion would have been granted by the trial court.

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.