2016 IL App (1st) 141506-U

SECOND DIVISION
July 19, 2016

No. 1-14-1506

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 17118
	)	
BRENDAN HALE,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: Counsel was ineffective for failing to pursue a motion to quash arrest and suppress evidence.

¶ 2 Following a stipulated bench trial, defendant, Brenden Hale, was found guilty of aggravated unlawful use of a weapon ("AUUW"). The court sentenced him to one year in the Illinois Department of Corrections and one year of mandatory supervised release. On appeal, defendant contends that his trial counsel was ineffective for advising him to proceed with a

stipulated bench trial without litigating or preserving his motion to quash defendant's arrest and suppress certain evidence. Defendant also requests that we correct the order assessing his fines, fees, and costs.

¶ 3 The incident giving rise to the charges occurred on August 27, 2013, at 7910 South Luella Avenue in Chicago, Illinois. On September 10, 2013, defendant was charged with six counts of the Class four felony of AUUW.

¶ 4 On October 23, 2013, defense counsel filed a written motion to dismiss all the charges as unconstitutional based on *People* v. *Aguilar*, 2013 (IL) 112116. After a hearing on February 13, 2014, the court dismissed counts one (720 ILCS 5/24-1.6(a)(2)/(3)(A) (West 2012)) and four (720 ILCS 5/24-1.6(a)(1)/(3)(A) (West 2012)) only. Defense counsel immediately filed a motion to: (1) quash defendant's arrest; (2) suppress certain evidence seized in connection with defendant's arrest; and (3) "suppress any and all statements made by defendant while in the custody of police during and subsequent to defendant's arrest." The motion was set for hearing on March 28, 2014.

¶ 5 When the motion was called for hearing on that day, defense counsel stated, "One thing we wanted to do is to possibly do a 402 in advance of it." The court explained to defendant that the purpose of such a conference would be to dispose of his case without going to trial, which is usually accomplished with a guilty plea. The court elaborated that, should defendant elect to proceed with the conference, the court would learn about his criminal and social background, and the facts of his case. The court further explained that defendant could reject the results of the conference, however, proceeding with the conference would not entitle him to a new judge. Defendant consented, and the State recounted the facts it believed the evidence would show, including that the police were on patrol in "an area known for high narcotic and gang activity[.]"

The attorneys relayed some mitigating and aggravating evidence. The court offered defendant one year in the Illinois Department of Corrections, indicating that it was the minimum sentence. The court also offered to recommend defendant for the Illinois Department of Corrections Boot Camp and explained the program to him.

¶ 6 After a brief recess, the clerk called defendant's case:

"THE COURT: Mr. Hale, your lawyer says that you're interested in the sentence that I gave you but he would like — you'd like to do a stipulated bench trial to preserve the motion that you previously filed so that you could raise that on appeal if you thought it was appropriate; is that correct?

THE DEFENDANT: Yes, sir."

***

THE COURT: Now, what a stipulated bench trial is, it's more like a plea of guilty than it is a trial because you're not going to -- there is not going to be any live witnesses for you to cross-examine or confront, all right?

THE DEFENDANT: Yes, sir.

THE COURT: And at the end of the trial, the evidence being what the State says it's going to be, I'm going to be finding you guilty of what you're charged with, aggravated unlawful use of a weapon; do you understand?

THE DEFENDANT: Yes, sir."

¶ 7 The court detailed defendant's rights, thoroughly explained the consequences of the stipulated bench trial and the possible sentencing outcomes, distinguished it from a bench trial and a jury trial, and explained both. The court then asked defendant:

"THE COURT: Do you understand you're giving up those rights?

THE DEFENDANT: Yes, sir.

THE COURT: Do you still want to have a stipulated bench trial?

THE DEFENDANT: Yes, sir.

THE COURT: Have you talked with your lawyer about this?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with his representation?

THE DEFENDANT: Yes, sir."

¶ 8 Defendant accepted the offer of Boot Camp. The court accepted defendant's jury waiver, entered his plea of not guilty, and proceeded with the stipulated bench trial. The parties stipulated that Chicago police officer Sevilla was on patrol in the area of "7910 South Newell" on August 27, 2013. At about 3:30 p.m., he saw defendant turning the doorknob to the entryway to an apartment building. The door did not open and defendant walked away. Officer Sevilla then approached defendant, who fled from the officer's presence.

¶ 9 After a brief foot chase, the defendant ultimately gave up running and looked at the sky, and according to the stipulation, said "F***, why did I run, you got me." and "don't f*** me up, I have ain't gonna lie, I got a gun in my pocket." Officer Sevilla's partner, Officer Shaffer, recovered from the defendant's front pant pocket, one 25-caliber nickel-plated semiautomatic handgun with one live round in the chamber and six live rounds in the magazine. Sometime after his arrest and *Miranda* warnings, defendant told police, "I'm a Four Corner Hustler and got beef with the No Limit Stones and I gotta carry that gun for protection." He also stated that he bought the gun from a friend of a friend for $50.

¶ 10 It was further stipulated, through a certified document from the Illinois State Police, that Braden Hale's date of birth is March 15, 1994, and as of September 26, 2013, he had never been

issued a Firearm Owner's Identification Card (FOID). Defense counsel did not make closing remarks and the State asked the court to make the appropriate evidentiary findings based upon the evidence.

¶ 11 The court found defendant guilty on count two, possession of a firearm without a valid FOID card on a public street within the city limits of Chicago, Illinois. 720 ILCS 5/24-1.6(a)(2)/(3)(C) (West 2012). Count five, (720 ILCS 5/24-1.6(a)(1)/(3)(C) (West 2012)) merged with count two. The court found defendant not guilty on counts three and six. 720 ILCS 5/24-1.6(a)(1)/(3)(I) (West 2012). At the sentencing hearing on April 28, 2014, the State recommended a sentence of three years. The court sentenced defendant to one year in the Illinois Department of Corrections and one year of mandatory supervised release. Defendant filed his notice of appeal on that day but no posttrial motion was filed.

¶ 12 On appeal, defendant contends that his trial counsel was ineffective for failing to pursue the motion to quash his arrest and suppress certain evidence: the statements defendant made to police during his detention and arrest, and the loaded handgun they recovered from his person.

¶ 13 Initially, we acknowledge that, in certain instances, we have declined to address ineffective-assistance claims based on the failure to file a motion to suppress. *People v. Evans*, 2015 IL App (1st) 130991, ¶ 34; *People v. Durgan*, 346 Ill. App 3d 1121, 1142 (2004). For example, in *Evans*, the record was devoid of evidence from which to adjudicate the merits of defendant's contention, and he was entitled to raise his claim, and further develop the record, in a collateral proceeding under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)). *Id.*

¶ 14 In the present case, however, defendant was sentenced to one year in prison and one year of mandatory supervised release on April 28, 2014. If defendant completed his sentence without

filing a postconviction petition, that collateral relief is no longer available to him. *People v. Carrera*, 239 Ill. 2d 241, 257 (2010) ("The constraints of defendant's liberty due to his criminal conviction expired with defendant's successful completion of his probation, so that defendant is no longer eligible to seek relief under the Act."). Moreover, both parties argue the merits of their position, based on this record, without contesting its sufficiency. Finally, unlike in *Evans*, the record in this case is not devoid of evidence from which to evaluate the claim. We therefore turn to the merits of the issue on appeal.

¶ 15 To prevail on his claim that counsel was ineffective, defendant must show that: (1) the representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *People v. Hall*, 217 Ill. 2d 324, 335 (2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To satisfy the first prong, defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Traditionally, the decision whether to file a motion to suppress is a matter of trial strategy, which is entitled to great deference. *People v. Bew*, 228 Ill. 2d 122, 128 (2008). Under the second prong, to establish prejudice when counsel failed to file or litigate a motion to suppress, defendant must show a reasonable probability that the motion would succeed and that suppression of the challenged evidence would have led to a different trial outcome. *People v. Henderson*, 2013 IL 114040, ¶¶12-15. Based on this record, defendant has shown that he received inadequate representation and that he was prejudiced as a result.

¶ 16 To determine whether defendant received reasonably adequate representation, we first consider the prejudice he suffered as a result of his trial counsel's failure to litigate the motion to

suppress and quash his arrest. We conclude that the motion to suppress the evidence based on the officer's conduct constituting the stop at its inception had a reasonable probability of success.

¶ 17 The United States and Illinois Constitutions both protect individuals from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const.1970, art. I, § 6. Reasonableness under the Fourth Amendment generally requires probable cause or a warrant. *People v. Thomas*, 198 Ill. 2d 103, 108 (2001). Not every encounter between the police and a person involves a seizure or restraint of liberty implicating the Fourth Amendment. *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006). "A person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). Where, as here, defendant's freedom of movement was not restrained by a factor independent of the police, a seizure occurs if a reasonable person, under the circumstances, feels unable to leave. *Luedemann*, 222 Ill. 2d at 550.

¶ 18 Defendant contends that reasonable trial counsel would have argued Officer Sevilla did not have reasonable suspicion to stop defendant. "[A] police officer is entitled to briefly detain a person for questioning without probable cause if the officer reasonably believes that the person has committed, or is about to commit, a crime." *People v. Hyland*, 2012 IL App (1st) 110966, ¶30. However, the conduct constituting a stop must have been justified at its inception. *Thomas*, 198 Ill. 2d at 109, 113-14. Moreover, "It is well settled that flight alone is not sufficient to establish reasonable suspicion that a person has committed, or is about to commit, a crime." *Hyland*, 2012 IL App (1st) 110966, ¶32.

¶ 19 Here, defendant's activity that aroused Officer Sevilla's suspicion amounted to testing the door-handle leading to the entryway of an apartment, and then walking away. When Officer Sevilla approached defendant, he fled. Although defendant eventually gave up running, stated

"F***, why did I run, you got me[]" and admitted that he had a gun in his pocket, we cannot conclude that the officer's initial suspicion was justified or that it ripened into a reasonable suspicion based on defendant's flight alone. See *id*. Accordingly, a motion to suppress relevant evidence resulting from the stop had a reasonable probability of success. See *Wong Sun v. U.S.*, 371 U.S. 471, 485-86 (1963) (statements as well as physical evidence may be excluded from evidence as the fruit of a Fourth Amendment violation).

¶ 20 Although we cannot determine what the outcome of the hearing would have been, "we can state that, without the motion[], confidence in the result of defendant's trial is greatly undermined." *People v. Moore*, 307 Ill. App. 3d 107, 114 (1991). Accordingly, defendant has satisfied the prejudice prong under *Strickland* based on the failure to challenge the constitutionality of his stop. Because we find that the motion to suppress his statement that he was armed and the evidence subsequently recovered enjoyed a reasonable probability of success, we need not address defendant's alternative arguments regarding why the motion was likely to succeed.

¶ 21 Turning to the first *Strickland* prong, we evaluate counsel's performance based on the entire record (*People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 114) and may not engage in hindsight analysis (*People v. Fuller*, 205 Ill. 2d 308, 331 (2002)). We find that trial counsel's failure to subject the officer's suspicion that allegedly justified the stop to adversarial testing offended objective standards of reasonableness under the first *Strickland* prong. See *People v. Little*, 322 Ill. App. 3d 607, 613 (2001); *People v. Stewart*, 217 Ill. App. 3d 373, 376 (1991); see also *Moore*, 307 Ill. App. 3d at 114 (finding counsel's failure to file motions to quash arrest and suppress defendant's statements and seized evidence "deprived defendant of an opportunity to

challenge the police officers' actions and of the *only* defense available to defendant given the evidence presented at trial." (emphasis in original)).

¶ 22 The State nevertheless argues, viewing the record as a whole without the benefit of hindsight; trial counsel was effective because his strategy was to challenge the charges against defendant in the motion to dismiss. However, in *Little*, this court considered and dismissed a similar argument raised by the State, finding:

> "While the State notes that counsel vigorously tested both the credibility of the prosecution's witnesses and the strength of the evidence presented at trial, a strong question exists whether defendant's prosecution would have gone forth had defendant's counsel filed a pre-trial motion to quash and suppress. A motion to quash and suppress would have been defense counsel's strongest, and most likely wisest, course of action. The fact counsel had other defense options available to him does not excuse counsel's failure not to file a pretrial suppression motion. Defendant undoubtedly would have not suffered any harm if defense counsel elected to do so. We do not discern any basis in the record to support the State's contention that counsel's decision was the product of sound trial strategy." *Little*, 322 Ill. App. 3d at 613.

Here, as in *Little*, we reject the State's contention that, based on this record, trial counsel's failure to litigate the motion was the product of sound trial strategy under the first *Strickland* prong.

¶ 23 For all the forgoing reasons, we find that trial counsel's failure to litigate the motion to suppress and quash defendant's arrest undermines confidence in the outcome of the stipulated bench trial. See *Stewart*, 217 Ill. App. 3d at 376. We therefore, hold that defendant did not receive effective assistance of counsel. See *Id.* Accordingly, we reverse his conviction and

remand for further proceedings. See *Id.* "Presumably, a suppression motion will then be considered, and the parties will have the opportunity to present any further evidence that may be available." *Id.*; *Moore*, 307 Ill. App. 3d at 114.

¶ 24 Finally, defendant contests certain fines, fees, and costs assessed against him. Because we now reverse and remand (*Little*, 322 Ill. App. 3d at 620), it would be premature to order specific corrections to his mittimus at this time (*People v. Harris*, 2012 IL App (1st) 092251, ¶ 33).

¶ 25 For the reasons stated, we reverse the judgment of the circuit court of Cook County and remand this cause for further proceedings consistent with this opinion.

¶ 26 Reversed and remanded.