

No. 1-14-1679

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 8713
)	
ANDREW JEFFERSON,)	Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Burke concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction for possession of a controlled substance is affirmed over his claim that he received ineffective assistance of trial counsel based on counsel's failure to impeach the testimony of the State's primary witness.

¶ 2 At the conclusion of a bench trial, defendant Andrew Jefferson was found guilty of possession of a controlled substance and sentenced to three years' imprisonment. On appeal, defendant contends that he was denied effective assistance of trial counsel based on counsel's failure to impeach the testimony of the State's primary witness. We affirm.

¶ 3 Defendant was arrested on April 1, 2013, and subsequently charged by information with possession of a controlled substance, with intent to deliver, alprazolam, commonly referred to as Xanax.

¶ 4 At trial, Chicago police officer Marvin Lofton testified that in the afternoon of April 1, 2013, he and his partner, Officer Corey Chapton, were on foot patrol near the area of the 4000 block of West Madison Avenue, Chicago. While at this location, Officer Lofton, from a distance of about 30 to 40 feet, observed defendant engage in a hand-to-hand transaction with an unidentified individual. During the transaction, defendant retrieved a small item from one of his hands then tendered it to the individual with his other hand in exchange for an unspecified amount of money. As Officer Lofton approached defendant from a distance of approximately 15 to 20 feet, he observed him engage in another similar transaction. Officer Lofton further testified he did not lose sight of defendant between the occurrence of the first transaction and the moment he detained him. Officers Lofton and Chapton detained defendant and recovered from his hand a prescription pill bottle containing about 30 pills and bearing the name "Gerald Delaney." The State introduced the pill bottle into evidence and Officer Lofton identified the bottle in court as the one he recovered from defendant. A custodial search of defendant's person yielded in excess of \$200 in currency.

¶ 5 On cross-examination, Officer Lofton acknowledged that from his vantage point he was not able to determine what item defendant tendered to each individual. He was not able to state if it was more than one item, or if it was packaged. Officer Lofton also acknowledged that he did not see how much money was being tendered in the exchange. Officer Lofton admitted that he could not make out the pill bottle in defendant's hand until he approached defendant and he

did not observe defendant open the bottle. Officer Lofton stated that he recovered the pill bottle from defendant's left hand. Officer Lofton prepared an arrest report in this matter and acknowledged that he did not note in the report that he recovered money from defendant. Officer Lofton also admitted that he did not ask defendant if he had a prescription for Xanax.

¶ 6 The parties stipulated that the pill bottle recovered from defendant contained 30 white tablets whose contents tested positive for the presence of Xanax. The State then rested.

¶ 7 Defendant testified that on the day in question he was waiting for his wife to go to an appointment when two officers approached him and requested he produce his identification (I.D.). Defendant informed the officers that he did not have his I.D. and accompanied them to their "truck." The officers searched defendant and recovered his prescription pill bottle from his jacket pocket. Defendant testified that he told the officers that he had a prescription for the pills and that he was able to provide proof of that prescription, but that the officers informed him it was "too late." Defendant denied that he spoke to anyone before the officers approached him or that he had anything in his hands at the time. Defendant also denied that on the date in question he was selling Xanax. Defendant stated that he has had a prescription for Xanax "for months" and that he has the prescription filled at a pharmacy. Defense counsel introduced into evidence and defendant identified a prescription printout from Walgreens bearing defendant's name. Defendant stated that he had a valid prescription for Xanax on the date of his arrest.

¶ 8 On cross-examination, defendant admitted that he did not have the prescription printout on his person at the time of his arrest. Defendant denied that the pill bottle bearing Gerald Delaney's name was the same pill bottle that the officers recovered from his person. Defendant stated that the bottle he possessed and which the officers recovered contained 60 pills.

Defendant acknowledged that his name was not Gerald Delaney and that he has never used the name Gerald Delaney as an alias.

¶ 9 On redirect, defendant testified that the first time he knew anything about the pill bottle bearing Gerald Delaney's name was at trial. Defendant stated that on the date of his arrest the only pill bottle in his possession was the bottle with his name and prescription.

¶ 10 After hearing closing argument, the court found defendant guilty of possession of a controlled substance. In announcing its decision, the court stated that because there was no testimony that the officers observed defendant opening the pill bottle or removing items from it, there was a reasonable doubt as to the intent element of the offense. The court also stated that, although "defendant may have been entitled to have [Xanax] in his possession under the terms of his prescription, he [was] not entitled to have the pills that he had which belonged to somebody else." The court then sentenced defendant to three years' imprisonment.

¶ 11 On appeal, defendant contends that his trial counsel was ineffective for failing to impeach Officer Lofton with his arrest report. The arrest report states in pertinent part:

"After the second transaction, the [officer] approached by foot. During the field interview, [defendant] related that he was not going to lie and that he had pills *** on him. The [officer] inquired as to the whereabouts of the pills. [Defendant] then produced two pill bottles from his right front pant pocket. Further investigation revealed that one prescription belonged to the [defendant] and the second to Gerald Delaney containing 30 pills of Xanax. Defendant did not possess a prescription for Xanax."

Defendant argues that the discrepancies between the officer's testimony and the version of events in the arrest report call into question the reliability of the officer's testimony. Specifically,

defendant points out that, contrary to Officer Lofton's testimony that the officers recovered a single pill bottle from defendant's left hand and that the bottle was in the name of Gerald Delaney, the arrest report states that the officers recovered two pill bottles from defendant's person and that one of the bottles was in defendant's name. Defendant claims that counsel's failure to use the arrest report to impeach the officer's trial testimony was unreasonable given that the officer's credibility was of primary importance in this case. Defendant maintains that counsel's failure was sufficiently significant to undermine confidence in the outcome of the trial.

¶ 12 The State responds that counsel was not ineffective for failing to question Officer Lofton about the arrest report because the report only concerned collateral matters. The State thus maintains that, even if counsel had used the report as impeachment, it would not have created a reasonable probability that the outcome of the trial would have been different.

¶ 13 To establish a claim of ineffective assistance of counsel, a defendant must prove both that: (1) counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) that the defendant suffered prejudice as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to show either deficient performance or prejudice defeats a claim of ineffective assistance. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). Because the facts surrounding defendant's ineffective assistance of counsel claim are not in dispute our review is *de novo*. *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008).

¶ 14 After reviewing the record, we find defendant's claim of ineffective assistance of counsel fails under both prongs of *Strickland*. That said, we need not consider the quality of counsel's performance where, as here, the case may be disposed of for lack of sufficient prejudice. *People*

v. Vasquez, 368 Ill. App. 3d 241, 255 (2006) citing *Strickland*, 466 U.S. at 697 (when a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and a reviewing court need not ever consider the quality of counsel's performance). In order to establish sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694.

¶ 15 Here, defendant cannot establish that counsel's failure to impeach Officer Lofton with his arrest report so prejudiced him that the result of defendant's trial would have been different. Contrary to defendant's argument, the arrest report is not of significant impeachment value where it expressly corroborates the substantial parts of Officer Lofton's testimony that defendant was found in possession of a pill bottle, bearing the name Gerald Delaney, and containing 30 pills of Xanax. See *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989) (when assessing the importance of counsel's failure to impeach under *Strickland*, the value of the potentially impeaching material must be put into perspective).

¶ 16 Although, the arrest report indicates that defendant was found with another pill bottle bearing his name and that both bottles were recovered from defendant's person, this additional information in no way undermines our confidence in the outcome of defendant's trial where he was found guilty of possession of a controlled substance based on his possession of a prescription pill bottle that was not in his name. *Jimerson*, 217 Ill 2d at 35-37 (counsel will not be deemed ineffective for failing to impeach a witness based on prior statements that have minor variances and inconsistencies with regard to collateral matters).

¶ 17 Defendant acknowledges this lack of prejudice in his brief, but nevertheless argues that while "[he] would have been guilty if either version were true, *** that is beside the point; the fact that [Officer Lofton] attested to both significantly different versions suggested that neither version might be true, diminishing 'the weight to be given the testimony...heard from the witness' on the stand." Contrary to defendant's argument, however, it is well established that *Strickland* requires actual prejudice be shown, not just mere speculation of prejudice. See *People v. Bew*, 228 Ill. 2d 122, 135-36 (2008) and cases cited therein.

¶ 18 Moreover, the trial court heard and considered defendant's testimony that on the date in question he only had his own pill bottle which contained 60 tablets, but rejected that testimony as incredible. In doing so, the court stated that it did "not believe that [the Gerald Delaney] pill bottle appeared out of thin air or that the officer's, according to the defendant's testimony, if you accept what he said, that they must have come up with a bottle of [X]anax while disregarding or discarding a bottle of pills that the defendant allegedly had in his possession legally." The court also stated that "while defendant may have been entitled to *** have [Xanax] in his possession under the terms of his prescription, he's not entitled to have the pills that he had which belonged to somebody else." In light of the court's finding, we cannot say that counsel was ineffective for failing to impeach Officer Lofton with his arrest report which would have only emphasized that defendant was in possession of a pill bottle bearing someone else's name.

¶ 19 In reaching this conclusion we are not persuaded by defendant's reliance on *People v. Salgado*, 263 Ill. App. 3d 238 (1994). In *Salgado*, the defendant was found guilty of first degree murder and two counts of attempted murder, based in large part on the testimony of an eyewitness who testified that he saw the defendant shooting on the night in question. *Salgado*,

263 Ill. App. 3d at 239-240, 246. The reviewing court reversed and remanded the defendant's convictions based in part on the defense counsel's failure to impeach the eyewitness' testimony with his prior testimony from the trial of the defendant's codefendants in which the witness testified that he did not see the defendant shooting. *Salgado*, 263 Ill. App. 3d at 246. In finding counsel's performance deficient, the appellate court stated that "the impeachment value of directly contradictory testimony made under oath at a prior trial by the State's premier eyewitness can hardly be overestimated." *Salgado*, 263 Ill. App. 3d at 247. Unlike *Salgado*, in this case, the evidence was not closely balanced and the arrest report has little impeachment value where the record shows it expressly corroborates the substantial parts of Officer's Lofton's testimony and merely presents a differing account which defendant concedes establishes his guilt.

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

¶ 21 Affirmed.