2016 IL App (2d) 140747-U
No. 2-14-0747
Order filed November 17, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRUCE LEE CASTLEBERRY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 13-CF-1957 Honorable Ronald J. White, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to quash and suppress: the police were entitled to arrest defendant, and they thus were entitled to conduct the protective sweep during which they saw the drugs that led to a search warrant; we may not disturb the court's finding that the sweep was constitutionally brief. Defense counsel was not ineffective for promising during his opening statement to call a witness, whom he did not go on to call: defendant was not prejudiced, as counsel did not promise testimony with clear significance.

¶ 2 Following a jury trial in the circuit court of Winnebago County, defendant, Bruce Lee Castleberry, was found guilty of unlawful possession of a controlled substance with intent to deliver within 1,000 feet of a park (720 ILCS 570/407(b)(1) (West 2012)) and possession of

cannabis (720 ILCS 550/4(d) (West 2012)). He was sentenced to concurrent prison terms of 15 years for the former offense and 3 years for the latter. The physical evidence upon which defendant's conviction was based was obtained pursuant to a search warrant. Defendant argues on appeal that the trial court erred in denying his pretrial motion to quash his arrest and suppress the evidence. He also argues that he was deprived of the effective assistance of counsel at trial, inasmuch as his attorney promised during his opening statement that he would present certain testimony, but then failed to do so. We affirm.

¶ 3 Two detectives with the Rockford police department's narcotics unit—John Wassner and Mark Jimenez—testified at the hearing on the motion to suppress. On July 12, 2013, Wassner, Jimenez, and other officers from the narcotics unit were executing a warrant to search the downstairs apartment of a two-flat apartment building in Rockford. Wassner testified that, as he was walking up to the rear of the building, he saw defendant through a second-floor window. Defendant was standing in the doorway to the upstairs apartment. Defendant saw Wassner and entered the upstairs apartment. After knocking on the rear door of the downstairs apartment, announcing their presence, and waiting a few seconds, the officers forcibly entered the apartment. Jimenez testified that he was the first officer through the door. He ran through the kitchen into a living/dining room. At that point, he observed that the front door of the apartment was open and defendant was in the doorway. Defendant ran out the door, and Jimenez ordered him to stop. Defendant ran up a flight of stairs in the common hallway in front of the downstairs apartment. Jimenez pursued defendant through the open front door of the upstairs apartment. Jimenez testified that he caught defendant "just inside that door." There were two other individuals in the living room.

¶ 4 When it became evident to Wassner that defendant was in custody, he proceeded upstairs. Defendant was taken downstairs and Wassner, Jimenez, and other officers conducted a protective sweep of the upstairs apartment. The two other individuals in the apartment were also taken downstairs and detained. Wassner testified that, when he went upstairs, he initially went to the upstairs apartment's living area. Then he went "[t]hrough the kitchen," where he smelled the odor of cannabis. Wassner and Jimenez both testified that in an open kitchen cabinet they saw bags containing substances that resembled cannabis and cocaine. Wassner and Jimenez did not open any cabinets; the bags were in plain view. Jimenez testified that the protective sweep took less than a minute. So did Wassner, initially. However, Wassner's later testimony suggests that the protective sweep took about eight minutes. Wassner subsequently obtained a warrant to search the upstairs apartment. When that warrant was executed, crack cocaine, cannabis, handguns, and ammunition were recovered from the upstairs apartment. In addition, a "casino club card" bearing defendant's name was found on the floor of the living/dining room. A key to one of the locks on the front door of the upstairs apartment was found in defendant's pants pocket.

¶ 5 Defendant testified that he was arrested as he was leaving the downstairs apartment through the front door. He denied having observed police officers from the upstairs window. He also denied that he ran upstairs and that he was apprehended in the upstairs apartment.

¶ 6 The trial court ruled that the protective sweep of the upstairs apartment was lawful and that the discovery of what appeared to be cannabis and cocaine in the kitchen provided probable cause for the warrant to search the upstairs apartment. The trial court noted the discrepancy between Wassner's testimony and Jimenez's about the duration of the protective sweep. The

court concluded that Wassner was simply mistaken when he suggested that the protective sweep took about eight minutes.

¶ 7 We first consider whether the trial court erred in denying defendant's motion to quash his arrest and suppress evidence. Defendant contends that he was unlawfully arrested and that the search warrant for the upstairs apartment was obtained only after an improper protective sweep of that apartment following defendant's arrest. Upon review of a ruling on a motion to suppress, the trial court's findings of fact are entitled to great deference, and we will reverse those findings only if they are against the manifest weight of the evidence. *People v. Jarvis*, 2016 IL App (2d) 141231, ¶ 17. The trial court's legal conclusion whether the evidence must be suppressed is subject to *de novo* review. *Id.*

¶ 8 There is no question that the police were entitled to search the downstairs apartment pursuant to a warrant. Law enforcement officers executing a warrant to search for illegal drugs may detain those encountered on the premises in order to maintain officer safety and prevent those present from disposing of evidence. *People v. Connor*, 358 Ill. App. 3d 945, 958 (2005). Jimenez testified that, upon entering the lower apartment's living/dining room through the kitchen, he observed that defendant was in the doorway. Jimenez was authorized to detain defendant. Further, because defendant ran out of the apartment and disobeyed Jimenez's order to stop, Jimenez had probable cause to arrest defendant for resisting a peace officer. 720 ILCS 5/31-1(a) (West 2012).

¶ 9 Defendant argues, however, that Jimenez's testimony about pursuing defendant is at odds with Wassner's testimony. Before entering the downstairs apartment, Wassner saw defendant outside a rear door to the upstairs apartment. According to defendant, if the testimony is to be believed, defendant would have to have "decided to teleport downstairs to the first floor

apartment where the police were, just so he could be chased back upstairs to where he started." To the contrary, it is plausible that defendant saw that the police were at the rear door to the downstairs apartment and had enough of a head start to get there via the front staircase before the police forcibly entered the apartment. It is also plausible that defendant did not give sufficient thought to the likely consequences of attempting to escape back into the upstairs apartment.

¶ 10 Defendant also challenges the protective sweep of the upstairs apartment that supplied probable cause to secure the search warrant. Defendant argues that the protective sweep was impermissible because the officers who conducted it did so without reasonable suspicion that anyone on the premises posed a danger. Defendant also argues that the duration of the search was longer than necessary to ensure officer safety. We disagree. "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327 (1990). In *Buie*, the Court held that police officers may, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, *** there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 334. Here, drugs were found in plain view in the kitchen. The record shows that the kitchen immediately adjoined the living/dining room where defendant was arrested. The police were therefore entitled to look in the kitchen, as a matter of course, without first forming a reasonable suspicion that anyone posing a danger was lurking there. Furthermore, there was conflicting evidence as to how long the protective sweep took. The trial court credited testimony that it took less than a minute. Deferring to that finding (as we

must), we conclude that the sweep was sufficiently "quick" to pass constitutional muster. *Id.* at 327.

¶ 11 We next consider defendant's argument that he was deprived of the effective assistance of counsel because, during his opening statement, his attorney told the jury that it would hear certain exculpatory evidence, but then failed to present that evidence. Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984), which requires a showing that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In order to show deficient performance, "the defendant must overcome the 'strong presumption' that his counsel's representation fell within the 'wide range of reasonable professional assistance.' " *People v. Franklin*, 135 Ill. 2d 78, 117 (1990) (quoting *Strickland*, 466 U.S. at 689).

¶ 12 During his opening statement, defense counsel stated, "The State won't call the landlord of that apartment building to testify that [defendant] was the tenant. And [defendant] is gonna call the real tenant of that apartment to tell you that she was the tenant and that he wasn't, that she had the leasehold." Defendant cites *People v. Briones*, 352 Ill. App. 3d 913 (2004), and *People v. Bryant*, 391 Ill. App. 3d 228 (2009), in support of his argument that defense counsel's failure to call the "real tenant" of the upper apartment amounted to ineffective assistance of counsel. In *Briones*, defense counsel promised the jury, during her opening statement, that it would hear the defendant's testimony. The *Briones* court refused to presume that counsel's unexplained failure to call the defendant as a witness was the result of trial strategy. *Briones*, 352 Ill. App. 3d at 919. The *Briones* court reasoned that "[w]hen defense counsel promised the

jury in opening statements that the defendant would testify but counsel later determined that the promise would go unfulfilled, it was counsel's responsibility to evidence in the record that she was not deficient, *i.e.*, that the determination was a result of the defendant's fickleness or of counsel's sound trial strategy due to unexpected events." *Id.*

¶ 13 As a later case—*People v. Kirklin*, 2015 IL App (1st) 131420—illustrates, however, the presumption of trial strategy may still attach where a defense counsel fails to keep a promise made during his opening statement to call a witness other than the defendant. After noting that unexpected events may warrant a decision not to call such a witness, the *Kirklin* court concluded that, "[s]ince the record on appeal was not developed to establish either the reasons of the trial attorney or the motives of the witnesses, this issue cannot be resolved on direct appeal." *Id.* ¶ 138. Here, defendant does not contend that the record negates the possibility that unexpected events during the course of the trial warranted a strategic decision not to call the witness in question. In this respect, the present case is readily distinguishable from *Bryant*, in which evidence presented at the hearing on the defendant's posttrial motion rebutted the presumption that counsel's failure to present certain evidence, as promised during his opening statement, was a reasonable strategy. *Bryant*, 391 Ill. App. 3d at 239.

¶ 14 However, defendant's theory of prejudice is unpersuasive. Defendant argues as follows:

> "The sole issue in contention at trial was whether the evidence showed that [defendant] had constructive possession of the cocaine and cannabis found in the apartment. A witness who would testify that she lived at the apartment—and that [defendant] did not—would go a long way to disproving the State's case against [defendant]. Defense counsel promised the jury that they would hear from this witness and the absence of this testimony left the jury with nothing to counter to [*sic*] the State's evidence and only the

> speculation of what happened to the witness and why defense counsel did not present her testimony."

Counsel told the jury that the witness he would call was "the real tenant" and that she "had the leasehold." It is not altogether clear whether jurors would have understood this to mean that defendant did not reside at the apartment, or simply that he was not a party to the lease. If the latter, the promised testimony would have been insignificant. Constructive possession may be proved through evidence of the defendant's habitation in the premises where a controlled substance is found. *People v. Dismuke*, 2013 IL App (2d) 120925, ¶ 16. As counsel's promise did not clearly pertain to that issue, there is no reasonable probability that counsel's promise affected the verdict.[1]

¶ 15 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 16 Affirmed.

[1] We note that we are not resolving the related but distinct claim that counsel was ineffective for failing to call an exculpatory witness, irrespective of any promise. Any such claim could be raised only in a postconviction petition, supported by the witness's affidavit of her proposed exculpatory testimony.