2016 IL App (4th) 131083-U

NO. 4-13-1083

FILED
February 26, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
JOHNATHAN CAMPBELL,	)	No. 11CF845
Defendant-Appellant.	)	
	)	Honorable
	)	Leo J. Zappa,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's denial of defendant's motion to suppress because defendant forfeited his argument, and, in addition, the record on appeal was insufficient to review that argument.

¶ 2 In September 2011, Springfield police officers arrested defendant, Johnathan Campbell, after a search of a pill bottle in his vehicle's trunk revealed a controlled substance that was not in its original container. See 720 ILCS 570/312(g) (West 2010) ("A person *** may lawfully possess [a prescribed controlled substance] only in the container in which it was delivered to him or her by the person dispensing such substance."). After defendant's arrest, officers secured search warrants for three storage lockers used by defendant. The resulting searches revealed several items of contraband, which led the State to charge defendant with the following: six counts of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)); manufacture or delivery of 15 or more but less than 100 grams of a substance containing cocaine

(720 ILCS 570/401(a)(2)(A) (West 2010)); and manufacture or delivery of more than 500 grams but not more than 2,000 grams of cannabis (720 ILCS 550/5(e) (West 2010)). (Defendant was not charged with an offense in relation to the controlled substance found in his vehicle's trunk.)

¶ 3 Defendant filed a motion to "Quash Arrest & Suppress Evidence." The motion argued that the controlled substance seized from defendant's trunk should be suppressed because the search of the trunk and the pill bottle was unlawful. The trial court denied the motion. At a subsequent stipulated bench trial, the court found defendant guilty of all eight charges. The court later sentenced defendant to an aggregate sentence of 20 years in prison.

¶ 4 Defendant argues that the trial court erred by denying his motion to suppress. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 In September 2011, after the execution of search warrants upon three storage lockers, the State charged defendant with six counts of unlawful possession of a weapon by a felon; one count of manufacture or delivery of 15 or more but less than 100 grams of a substance containing cocaine; and one count of manufacture or delivery of more than 500 grams but not more than 2,000 grams of cannabis. Defendant's charges were supported entirely by the contraband seized from the storage lockers, not from the improperly contained controlled substance found in defendant's vehicle.

¶ 7 A. Defendant's "Motion To Quash Arrest & Suppress Evidence"

¶ 8 In June 2012, defendant filed a motion entitled, "Defendant's Motion To Quash Arrest & Suppress Evidence." Defendant sought to "suppress evidence obtained through the unlawful search of a pill bottle in *** [defendant's] trunk." Defendant asserted that the "evidence obtained inside the pill bottle served the basis for [defendant's] unlawful arrest and a subsequent

search warrant." Defendant concluded the motion by requesting that the trial court "suppress the seizure of the pills located in the pill bottle." Defendant then added, "Depending on the outcome of this motion, [defendant] reserves the right to challenge the validity of the search warrant which was authorized, in part, based on the unlawfully obtained evidence."

¶ 9 At the August 2012 hearing on defendant's motion, Springfield police officer Michael Eagan testified that he was on patrol on September 27, 2011, when he received a call from Drug Enforcement Agency (DEA) officer George Bonnett informing him that Bonnett had observed a vehicle fail to stop at a stop sign. Bonnett relayed the car's license plate number and description to Eagan, explained that the car was in Eagan's vicinity, and requested that Eagan initiate a traffic stop. Eagan initiated a traffic stop of the vehicle.

¶ 10 Eagan exited his cruiser and approached the vehicle. The driver was the sole occupant. His driver's license identified him as defendant. Defendant's window was down, and Eagan smelled raw cannabis. Eagan observed that defendant's speech was slow and "thick-tongued" and that he was slow to respond to questions. Eagan ordered defendant out of the vehicle, placed him in handcuffs, and sat him in the back of Eagan's squad car.

¶ 11 Eagan searched the vehicle's interior for cannabis. Inside the passenger compartment, Eagan found a bag containing keys and two empty prescription pill bottles, but no cannabis. He then searched the vehicle's trunk, where he found two more prescription pill bottles. The label of one bottle stated it was a prescription for Vicodin, which Eagan testified is a brand name for hydrocodone, a controlled substance. Eagan testified further that he opened the Vicodin bottle, looking for cannabis. He stated that opening the bottle was necessary because the bottle's label and lid prevented him from seeing its contents. According to Eagan, pill bottles are a common hiding place for cannabis.

¶ 12 Inside the bottle, Eagan observed two different kinds of pills. He could not tell by looking into the pill bottle what kind of pills they were. He further inspected the pills and discovered from their markings that they were Vicodin and Xanax, also a controlled substance. Eagan arrested defendant for possessing Xanax in a container other than that in which it was delivered to him by the person who dispensed it. 720 ILCS 570/312(g) (West 2010). Eagan found no cannabis in the vehicle.

¶ 13 Neither party presented further evidence. The State argued that defendant's motion to suppress should be denied because the search of the pill bottle and the subsequent arrest of defendant were valid. Defendant made the following argument:

> "[DEFENSE COUNSEL]: Judge, the contraband was recovered from the storage locker. There was nothing to allow doing a search, that would be improper based on the information that the officer just testified to there.
>
> [THE COURT]: Well, the problem is your motion basically deals with the stop, doesn't deal with the search warrant, so are you saying that based upon the—your argument would be then that it's an illegal stop, therefore, they didn't have the basis to get the search warrant?
>
> [DEFENSE COUNSEL]: Yes, Your Honor, we make that argument at this point in time.
>
> [THE COURT]: All right.
>
> [State's Attorney], do you have any other witnesses?
>
> [THE STATE]: Well, as to what motion, I guess?

[THE COURT]: I guess my question is do you have any other witnesses to the traffic stop itself and/or the search consequent to the stop?

[THE STATE]: At this point, no. Not as to that portion.

[THE COURT]: So that's the only motion you wanted heard today [defense counsel], I assume?

[DEFENSE COUNSEL]: It is, Judge, and we're reserving the right to contest the warrant."

The trial court ordered both parties to submit "some kind of memo, or cases, however you want to do it, and a proposed order" within five weeks.

¶ 14 On October 11, 2012, the State filed a memorandum in opposition to defendant's motion to suppress. In it, the State argued that (1) Eagan had probable cause to stop defendant's vehicle; (2) the odor of cannabis established probable cause to perform a warrantless search of the vehicle; (3) the probable cause to search the vehicle extended to the search of the pill bottle inside the trunk; and (4) the presence of two kinds of pills within the pill bottle established probable cause to manipulate the pills to determine their identity. As a result, the State argued that defendant's motion should be denied.

¶ 15 On October 17, 2012, one of the parties (the record does not reveal which party) filed copies of six Illinois cases addressing traffic stops and warrantless vehicle searches. Also on that date, the trial court entered an order denying defendant's motion to suppress. The court made the following findings: (1) the traffic stop of defendant's vehicle was valid based on defendant's traffic violation; (2) Eagan had probable cause to search defendant's vehicle based on the odor of cannabis; (3) Eagan was justified in opening the pill bottle found in defendant's trunk

based on the testimony that pill bottles are common hiding places for cannabis, and Eagan could not see the contents of the bottle without opening it; (4) Eagan had probable cause to manipulate the pills to determine their identity after opening the pill bottle; (5) Eagan had probable cause to arrest defendant based on the presence of Xanax within a prescription bottle labeled for Vicodin.

¶ 16 On November 16, 2012, defendant filed a memorandum of law. In it, defendant argued that the search of the Vicodin bottle was unlawful. The memorandum concluded, "[Defendant] respectfully requests the Court suppress the pill bottles because they were obtained pursuant to an unlawful search. *** Should the court suppress the pills, Mr. Campbell intends to move for suppression of the search warrant."

¶ 17 In January 2013, defendant filed a motion to reconsider the trial court's denial of his motion to suppress. In it, he argued that the search of the trunk was unlawful.

¶ 18 In March 2013, a hearing was held on defendant's motion to reconsider. Defendant argued that Eagan lacked probable cause to search the trunk and the pill bottle found therein. In April 2013, the trial court entered a written order denying defendant's motion to reconsider.

¶ 19 B. The Stipulated Bench Trial

¶ 20 In October 2013, the cause proceeded to a stipulated bench trial. The parties filed a written stipulation of facts. The stipulation contained a summary of the facts presented at the hearing on defendant's motion to suppress, in addition to the following facts. On September 14, 2011, Bonnett received information about defendant from a confidential source. As a result, on September 27, 2013, DEA agent Glenn Hass monitored defendant. Hass saw defendant drive to a storage facility and park in front of storage unit No. 128. Defendant entered the storage unit and then returned to his vehicle. Springfield police sergeant Don Mumaw followed the vehicle and observed it violate the traffic code. That information was relayed to Eagan, who stopped and

searched the vehicle.

¶ 21 After the search of defendant's vehicle, Bonnett seized the bag of keys found in the passenger compartment and discovered that one of them fit the lock on storage locker No. 128. Bonnett did not immediately open the storage locker. Instead, Springfield police department officer Ron Howard and his canine partner conducted a drug sniff of the doors of unit No. 128 and the surrounding units. The canine alerted only to unit No. 128. Bonnett obtained a search warrant for unit No. 128. Inside the unit, officers found, *inter alia*, two shotguns, two pistols, a rifle, body armor, cannabis, and a substance containing cocaine. Based on additional information, police searched two more storage units, where they discovered cannabis, controlled substances, and currency. The stipulation included facts tending to show that defendant possessed the contraband recovered from the storage lockers.

¶ 22 The trial court found defendant guilty on all counts. After a December 2013 sentencing hearing, the court imposed concurrent sentences of 20 years in prison on counts I through VII and a concurrent sentence of 12 years in prison on count VIII.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 Defendant argues that the trial court erred by denying his motion to suppress. Specifically, defendant argues that the court should have suppressed the contents of the storage lockers because, had the court properly suppressed the pills found in defendant's vehicle, the search warrants for the storage lockers would have lacked probable cause.

¶ 26 We reject defendant's argument that the court should have suppressed the contents of the storage lockers for two reasons: (1) defendant forfeited that argument by failing to raise it in the trial court; and (2) even if defendant had preserved that argument for review, he failed to

introduce sufficient evidence in the trial court to allow review on appeal.

¶ 27 A. Forfeiture

¶ 28 Defendant claims that he raised two arguments in the trial court: (1) to suppress the pills found in the trunk and (2) to suppress the evidence found in the storage lockers. We disagree and conclude that defendant raised only the first argument. (As the charged offenses were supported entirely by the contents of the storage lockers, suppression of the pills alone would not entitle defendant to any relief on appeal.)

¶ 29 We first note that the appropriate motion for raising defendant's arguments in the trial court was a "Motion to Suppress Evidence Illegally Seized." 725 ILCS 5/114-12 (West 2012). Section 114-12 of the Code of Criminal Procedure of 1963 explains when a motion to suppress evidence is appropriate and what the motion must contain:

> "(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that:
>
> (1) The search and seizure without a warrant was illegal; or
>
> (2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; the evidence seized is not that described in the warrant; *there was not probable cause for the issuance of the warrant*; or, the warrant was illegally executed." (Emphasis added.) 725 ILCS 5/114-12(a)(1), (2) (West 2012).

¶ 30 In the present case, defendant filed a motion entitled, "Defendant's Motion To Quash Arrest & Suppress Evidence." Defendant should have excised the reference to "Motion to Quash Arrest." A "Motion to Quash Arrest" is not recognized by the Code of Criminal Procedure of 1963. See 725 ILCS 5/114-1 to 114-15 (West 2012) (listing pretrial motions, including "Motion to Suppress Evidence Illegally Seized," but not mentioning a "Motion to Quash Arrest"). As we have explained in *People v. Ramirez*, 2013 IL App (4th) 121153, ¶¶ 55-58, 996 N.E.2d 1227, and *People v. Hansen*, 2012 IL App (4th) 110603, ¶¶ 62-63, 968 N.E.2d 164, labeling a motion as a "Motion To Quash" is not only meaningless, but also confusing, and the practice should be abolished.

¶ 31 Motions to suppress under section 114-12 must set forth at a minimum the following: (1) the title of the motion should be "Motion To Suppress Evidence"; (2) the motion must clearly identify the evidence sought to be suppressed; and (3) the motion must state facts showing wherein the search and seizure were unlawful. *Ramirez*, 2013 IL App (4th) 121153, ¶ 59, 996 N.E.2d 1227. In *Ramirez*, we cited favorably the following language from the Oregon Court of Appeals:

> " 'A motion to suppress is, in effect, a pleading to the extent that it frames the issues to be determined in a pretrial hearing on the motion. The fundamental role of a pleading is to give an opposing party notice of the pleader's position concerning the facts and law so that the opposing party can begin to prepare his defense. A pleading thus both defines and limits the areas of consideration at a trial or other evidentiary hearing ***, by enabling the court to determine the relevance of offered evidence.' " *Id.* ¶ 60,

996 N.E.2d 1227 (quoting *State v. Johnson*, (16 Or. App. 560, 567, 519 P.2d 1053, 1057 (1974)).

¶ 32 To raise the arguments defendant now seeks to raise on appeal, he should have filed in the trial court a "Motion to Suppress Evidence Illegally Seized." That motion should have clearly identified that it sought to suppress (1) the Xanax pills found in the pill bottle located in defendant's trunk and (2) the weapons and drugs (identified specifically) found in the storage lockers. The motion should have then gone on to state facts showing that the seizures of the identified evidence were unlawful.

¶ 33 The motion that defendant actually filed in this case failed to meet the requirements of section 114-12 as to the evidence found in the storage lockers. The motion did not identify the contents of the storage lockers as evidence that defendant sought to have suppressed. Nor did the motion contain facts that would support suppression of the storage lockers' contents. To establish that those contents should have been suppressed, defendant would have needed to assert facts attacking the search warrant. 725 ILCS 5/114-12(a)(2) (West 2012). Instead, the facts and arguments relied on by defendant involved only the traffic stop and search of defendant's vehicle.

¶ 34 In addition, defendant's motion to suppress explicitly refrained from arguing for suppression of the storage lockers' contents. The motion stated, "Depending on the outcome of this motion, [defendant] reserves the right to challenge the validity of the search warrant which was authorized, in part, based on the unlawfully obtained evidence." Likewise, in the memorandum filed by defendant, he stated, "Should the court suppress the pills, [defendant] intends to move for suppression of the search warrant." Defendant's fillings sought suppression of the pills found in his vehicle's trunk and not the contents of the storage lockers.

¶ 35 Although the trial court asked defendant whether he was contesting the State's basis for getting the search warrant, and defendant responded in the affirmative, we do not find defendant's statement significant considering the context. Although defendant stated that he was challenging the warrant, defendant almost immediately qualified that statement by adding, "Should the court suppress the pills, Mr. Campbell intends to move for suppression of the search warrant." That statement clarified that defendant was not seeking to suppress the contents of the storage lockers.

¶ 36 To preserve for review a claim arguing for suppression of evidence, the claim must be raised in a motion to suppress and in a posttrial motion. *People v. Johnson*, 334 Ill. App. 3d 666, 672, 778 N.E.2d 772, 778 (2002). In this case, defendant did neither as to an argument that the contents of the storage lockers should be suppressed. He has therefore forfeited review of that claim on appeal.

¶ 37 Defendant may have even gone so far as to waive review of this issue. As Illinois courts have explained on multiple occasions, waiver and forfeiture are distinct concepts. *People v. Hughes*, 2015 IL 117242, ¶ 37. "Waiver is distinct from forfeiture ***. While forfeiture applies to issues that could have been raised but were not, waiver is the voluntary relinquishment of a known right." (Internal quotation marks omitted.) *People v. Phipps*, 238 Ill. 2d 54, 62, 933 N.E.2d 1186, 1191 (2010) (quoting *People v. Blair*, 215 Ill. 2d 427, 444 n.2 831 N.E.2d 604, 615 n.2 (2005)). In this case, defendant stated in his motion to suppress that "[d]epending on the outcome of this motion, [defendant] reserves the right to challenge the validity of the search warrant." At the hearing on that motion, defendant reiterated, "[W]e're reserving the right to contest the warrant." Finally, in defendant's memorandum of law, he stated, "Should the court suppress the pills, [defendant] intends to move for suppression of the search warrant." These statements

by defendant show that he was aware that an additional motion to suppress would be required to suppress the contents of the storage lockers. His later failure to file that motion then must have been knowledgeable, that is, a "voluntary relinquishment" of his right to file an additional motion to suppress. Whether considered forfeited or waived, we do not address defendant's argument that the contents of the storage lockers should have been suppressed.

¶ 38 B. The Trial Court's Decision Denying Defendant's Motion To Suppress the Evidence Resulting From the Vehicle Search

¶ 39 We decline to reach the merits of the trial court's decision to deny defendant's motion to suppress. As the foregoing discussion makes clear, defendant's motion to "Quash Arrest & Suppress Evidence" challenged only the propriety of the search of his vehicle and the seizure of evidence therefrom. However, he was not charged with anything found in his vehicle, so even if the trial court had granted the motion, the evidence the State used at trial to convict him—namely, the evidence seized from the storage lockers—would not have been barred because that evidence was not the subject of defendant's motion.

¶ 40 Even assuming, *arguendo,* that the search of the vehicle was unlawful, the search warrants for the storage lockers were not necessarily invalid. Defendant's brief implies that if the search of defendant's vehicle was unlawful, and if the results of that search were included in the complaints for search warrants, then the resulting warrants were *ipso facto* invalid. We disagree. A "warrant is nonetheless valid if it could have issued upon the untainted information in the affidavit." 6 Wayne R. LaFave, Search and Seizure § 11.4(f), at 422 (5th ed. 2012). The record before us does not contain the search warrants for the storage lockers, nor does it contain any arguments by counsel or a ruling by the trial court regarding whether the search warrants would still be valid if the allegedly improper information had been excised therefrom. Thus, on this record, this court cannot determine whether the trial court's granting of defendant's motion to

suppress the evidence recovered from his vehicle, alone, would have affected the outcome of his trial.

¶ 41 The function of a motion to suppress is to bar the admission of evidence at trial. Defendant's motion in this case would not have accomplished the goal of barring the State from using at trial the evidence seized from the storage lockers that resulted in his convictions. In this appeal, defendant, in essence, is asking this court to render an advisory opinion, but we decline to do so. We need not reach the merits of defendant's claim that the motion to suppress should have been granted because the evidence he sought to suppress was not used against him at trial.

¶ 42 As defense counsel indicated to the trial court, defendant intended to litigate a two-step argument in separate motions to suppress (one which he filed and the second that he expected to file later) when, instead, he should have specified in one motion to suppress what he was really seeking—namely, the suppression of the evidence seized from the storage lockers. Then, defendant's argument for suppression of that evidence should have been two-pronged: first, that the search of his vehicle and the discovery of the improperly contained Xanax was unlawful; second, that the inclusion of information about the Xanax tainted the search warrants for the storage lockers, resulting in the suppression of the evidence seized from those lockers. However, defendant elected to include only the first prong of this argument in his motion to suppress, supposedly reserving the second prong pending the court's decision on the first. This approach was not correct and did not preserve for appeal the issue of the admissibility of the evidence seized from the storage lockers.

¶ 43 C. Failure To Create a Sufficient Record

¶ 44 Even if we were to review defendant's claim that the contents of the storage lockers should be suppressed, the record does not contain sufficient evidence for us to decide that

issue.

¶ 45 When reviewing a trial court's decision on a motion to suppress, a court of review may consider evidence presented both at the suppression hearing and at trial. *People v. Brooks*, 187 Ill. 2d 91, 126-28, 718 N.E.2d 88, 108-09 (1999). However, for evidence to be considered on review, that evidence must have been presented to the fact finder below. *Id.* at 128, 718 N.E.2d at 109. In this case, the affidavits supporting the State's applications for search warrants were never presented to the trial court. Therefore, we do not consider them.

¶ 46 As a result, we have no way to determine whether the evidence in the storage lockers should have been suppressed. Defendant argues on appeal that the evidence should be suppressed because without the evidence of the pills, there would not have been probable cause for the issuance of the warrant. However, without reviewing the applications for the search warrants, we have no way to determine whether the other information contained in those applications established probable cause. The appellant bears the burden of presenting a complete record, and we resolve any doubts that arise from an incomplete record against the appellant. *Webster v. Hartman*, 309 Ill. App. 3d 459, 460, 722 N.E.2d 266, 268 (1999).

¶ 47 Defendant essentially concedes this issue, arguing that "because in this case the search warrants and affidavits were never introduced at the suppression hearing or trial, this Court should not consider them." Defendant makes this claim in support of his argument that it was the State's burden to introduce the search warrants below and argue that they were supported by probable cause. We disagree.

¶ 48 The defendant bears the burden of proof at a hearing on a motion to suppress. *People v. Gipson*, 203 Ill. 2d 298, 306, 786 N.E.2d 540, 545 (2003). As we explained above, defendant failed to argue in the trial court that the search warrants were insufficient and that the

evidence from the storage lockers should be suppressed. Without defendant raising that argument in the trial court, the State had no duty—or opportunity—to present evidence to rebut it. See *Hughes*, 2015 IL 117242, ¶ 38, (noting "how new factual theories on appeal deprive the formerly prevailing party of the opportunity to present evidence on that point"); see also *People v. McAdrian*, 52 Ill. 2d 250, 254, 287 N.E.2d 688, 690 (1972) ("The failure to urge a particular theory before the trial court will often cause the opposing party to refrain from presenting available pertinent rebuttal evidence on such theory, which evidence could have a positive bearing on the disposition of the case in both the trial and reviewing courts.").

¶ 49 III. CONCLUSION

¶ 50 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 51 Affirmed.