2017 IL App (1st) 171033-U

No. 1-17-1033

Third Division
September 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re JEREMY P., a minor (The People of the State of Illinois, Petitioner-Appellee, v. Jeremy P., Respondent-Appellant).	))))))))))	Appeal from the Circuit Court of Cook County. No. 16 JD 2303 Honorable Stuart F. Lubin, Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court's failure to hold *in camera* hearing regarding the applicability of the surveillance-location privilege was harmless error where the surveilling witness provided testimony that was merely cumulative corroboration.

¶ 2 Respondent Jeremy P., born March 14, 2003, was adjudicated delinquent of the offenses of aggravated unlawful use of a weapon and unlawful possession of a firearm. He was sentenced to two years' juvenile probation. On appeal, respondent contends that the surveillance-location privilege applied by the trial court should be rejected as a matter of law,

and alternatively, that the trial court erred in applying the privilege without an *in camera* hearing with the surveilling witness. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 14, 2016, respondent was arrested after police officers found him near a loaded gun during a surveillance operation. The State subsequently filed a petition for adjudication of wardship of the respondent, charging him with two counts of aggravated unlawful use of a weapon, one count of unlawful possession of firearms, and one count of criminal trespass to a vehicle. Prior to the adjudication hearing, respondent filed a motion for the pretrial disclosure of a police officer's surveillance position. The officer had observed respondent enter a stolen car before moving to a different vehicle where he was ultimately arrested. Respondent argued that the officer's exact location was relevant to his defense because it affected the officer's credibility and ability to identify him. The State responded that the surveillance location was a private home and its disclosure would jeopardize future police operations in the area. After a hearing, the trial court denied respondent's motion stating that it did not need to hold an *in camera* hearing with the officer because respondent had not established "a sufficient basis."

¶ 5 At respondent's adjudication hearing, Officer Cardella testified that he and another officer observed a parked white car that had been reported stolen. The officers set up a surveillance location 60 to 90 feet away from the car. Cardella later observed respondent enter the rear seat of the white car before exiting and entering the rear seat of a silver SUV. The officer immediately called in other officers and they arrived at the silver vehicle within 30 seconds. Respondent objected to Cardella's testimony, and the court overruled the objection.

¶ 6 Officer Michael Chrzanowski testified that he and another officer were assisting in the surveillance operation when they parked near the SUV and approached it on foot. Two individuals sat in the front seats of the vehicle and respondent sat in a rear seat. The three individuals exited the SUV and Chrzanowski saw a black, semiautomatic pistol on the rear floorboard near where respondent's foot had been. The officer recovered the weapon and found it was loaded with seven live rounds. Respondent was arrested and taken to the police station.

¶ 7 Detective Jeffery Malik testified that he met with respondent at the police station in the presence of a youth officer. Respondent admitted that he was "in possession of the handgun from the time he was in the first vehicle." He placed the gun on the floor when the police officers approached. He had purchased the gun from a gang member for protection.

¶ 8 The court adjudicated respondent delinquent on the counts of aggravated unlawful use of a weapon and unlawful possession of firearms. It acquitted him of the trespass to vehicle count. The court placed respondent on two years' juvenile probation.

¶ 9 II. ANALYSIS

¶ 10 A. Surveillance-Location Privilege

¶ 11 Respondent first contends that the surveillance-location privilege should be rejected as a matter of law because it does not meet requirements set forth by our supreme court regarding the adoption of evidentiary privileges. The State responds that the privilege has long been recognized by the appellate court as well as other courts around the country.

¶ 12 The evidentiary privilege for surveillance locations was first recognized in Illinois in *People v. Criss*, 294 Ill. App. 3d 276, 280-81 (1998). The appellate court recognized the privilege as an extension of the informant's privilege because both seek to protect the secrecy

of information used by law enforcement in apprehending criminals. *Id.* It explained that a defendant could overcome the privilege by demonstrating that the disclosure of the location was material or necessary to his defense and the need for the knowledge outweighed the public's interest in the secrecy of the location. *Id.* The court concluded the failure to recognize a qualified privilege "would seriously cripple legitimate criminal surveillance and endanger the lives of police officers and those who allow their property to be used for criminal surveillance." *Id.* at 281. Since *Criss*, numerous panels of the appellate court have upheld the existence of the surveillance location privilege. See *In re Manuel M.*, 2017 IL App (1st) 162381, ¶ 18; *People v. Price*, 404 Ill. App. 3d 324, 330-31 (2010); *People v. Bell*, 373 Ill. App. 3d 811, 818 (2007); *People v. Knight*, 323 Ill. App. 3d 1117, 1128 (2001).

¶ 13 Respondent argues that the surveillance-location privilege should not be recognized because it does not meet a test for recognizing evidentiary privileges set forth by our supreme court in *People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521, 527 (1998), nearly a year after *Criss*. In *Birkett*, the court considered the City of Chicago's claim that certain documents concerning construction at O'Hare airport were privileged under "a deliberative process privilege" that had not been recognized in Illinois. *Id.* at 523-25. Noting that evidentiary privileges are strongly disfavored, the court explained that the creation of privileges is "presumptively a legislative task." *Id.* at 527, 533. The court also stated that new evidentiary privileges may be recognized:

> "in 'rare instances,' where each of the following conditions are met: (1) the communications originated in a confidence that they will not be disclosed; (2) this element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the

> community ought to be sedulously fostered; and (4) the injury that would inure to the relation by disclosure would be greater than the benefit thereby gained for the correct disposal of litigation." (Emphasis omitted.) *Id.* at 533, (quoting *Illinois Education Labor Relations Board v. Homer Community Consolidated School District No. 208* (*Homer*), 132 Ill. 2d 29, 35 (1989)).

Respondent asserts that the test requires that the privilege concern a communication and, because an officer's knowledge of a surveillance location results from personal experience rather than a communication, the surveillance location privilege fails the test. We find this argument unpersuasive. The test does not require that every evidentiary privilege be confined to communications; rather, it is a test to consider whether communications specifically should be privileged. See *Homer*, 132 Ill. 2d at 35 (framing the question as whether to "recognize a privilege to protect communications.") In any case, as the potential communications privilege in *Birkett* and the surveillance-location privilege are so dissimilar, we find *Birkett* to be inapposite.

¶ 14 Respondent also argues that we should disregard the multitude of prior appellate court opinions acknowledging the privilege because the opinion of one appellate court panel does not bind another panel (*O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008)) and our supreme court has not addressed the privilege. However, "[w]hen a question has been deliberately examined and decided, the question should be considered settled and closed to further argument." *People v. Espinoza*, 2015 IL 118218, ¶ 26. Although we acknowledge that *stare decisis* "is not an inexorable command" (*id.* at ¶ 30), we do not lightly contradict the reasoning of the abundant previous consistent opinions without

compelling reasons (see *id.* at 31). Respondent has given this court no compelling reason to re-examine an issue that has already been decided repeatedly by the appellate court.

¶ 15 B. Application of the Privilege

¶ 16 Respondent alternatively contends that the trial court erroneously applied the privilege where it did not hold an *in camera* hearing in order to weigh his need for the information against the public's interest in non-disclosure. The State responds that any error in failing to hold an *in camera* hearing was harmless.

¶ 17 Delinquent minors are afforded all of the basic constitutional rights granted to criminal defendants, with the exception of the right to a jury trial. *People v. Austin M.*, 2012 IL 111194, ¶ 76. These rights include the right to confront witnesses against the respondent and the related right to cross-examination. See U.S. Const., amends. VI, XIV, Ill. Const. 1970, art. 1, § 8; *Crawford v. Washington*, 541 U.S. 36, 54 (2004). The right to confront a witness is limited, however, and the right to cross-examination is satisfied when the court allows the defendant to seek facts relevant to the credibility and reliability of the witnesses. *People v. Quinn*, 332 Ill. App. 3d 40, 43 (2002). The trial court has broad discretion to limit the scope of cross-examination, and a restriction of cross-examination will not be reversed without an abuse of discretion resulting in manifest prejudice. *Price*, 404 Ill. App. 3d at 330; *Criss*, 294 Ill. App. 3d at 279-80.

¶ 18 Assertion of the surveillance-location privilege is a limitation on the right to cross-examination. As previously discussed, the State enjoys a qualified privilege regarding the disclosure of covert surveillance locations. *Quinn*, 332 Ill. App. 3d at 43. To successfully invoke the privilege, the State bears an initial burden of proof to show that the surveillance location was either on private property with the permission of the owner, or in a location that

is useful and its utility would be compromised by disclosure. *Price*, 404 Ill. App. 3d at 331-32. Once the privilege is sufficiently asserted, the trial court should hold an *in camera* hearing outside the presence of the defendant. *Knight*, 323 Ill. App. 3d at 1127. There, the witness must reveal the surveillance location and the State must make a preliminary showing that disclosure of the location would harm the public interest. *Id*. The applicability of the privilege must be decided on a case-by-case basis, with the trial court balancing the public interest with the defendant's need to prepare a defense and to engage in "accurate fact finding." *Quinn*, 332 Ill. App. 3d at 43. The court should consider the crime charged, any potential defenses, and the significance of the privileged information. *Id*. If the State meets its burden, the defendant can overcome the privilege by demonstrating the need for disclosure. *Criss*, 294 Ill. App. 3d at 281 (noting, though, that mere speculation as to the need for disclosure is not sufficient).

¶ 19 In the present case, the trial court did not hold an *in camera* hearing, instead stating that the initial burden of proof was on defendant. The practical effect of the court's ruling was a limitation on respondent's right to cross-examination. However, a restriction on cross-examination is only reversible error where it causes "manifest prejudice." *Criss*, 294 Ill. App. 3d at 279-80; see also *People v. Stokes*, 392 Ill. App. 3d 335, 343 (2009) (finding failure to hold *in camera* hearing before applying privilege harmless where "the case did not turn exclusively on the uncorroborated testimony of a single surveillance officer.")

¶ 20 Having reviewed the record, it is clear that respondent in the current case was not prejudiced by the trial court's application of the privilege. Respondent was prevented from eliciting Officer Cardella's surveillance location, and thus prevented from fully testing the credibility and reliability of the officer's testimony. Yet, Cardella's testimony was not crucial

to the State's case regarding the charges for which respondent was ultimately adjudicated delinquent. The officer testified that respondent entered a car before moving shortly thereafter into another vehicle. He did not observe a firearm nor did he report any movements by respondent in the second vehicle. Although this testimony was relevant to the trespass to vehicle count, respondent was acquitted of that charge and thus clearly that charge cannot be a source of prejudice. The adjudications of delinquency related solely to the firearm charges, which relied primarily upon the testimony of Officer Chrzanowski and respondent's confession. Officer Cardella made no mention of the firearm. At most, his brief testimony corroborated Chrzanowski's assertion that he found respondent within the second vehicle. Such minor corroboration is merely cumulative, particularly where the more substantial subject of Chrzanowski's testimony, the presence of a firearm, was corroborated by respondent's own statement. Therefore, we find that any error by the trial court in failing to hold an *in camera* hearing was harmless.

¶ 21 III. Conclusion

¶ 22 For the foregoing reasons, we find that the trial court's application of the surveillance-location privilege was not reversible error where Officer Cardella's testimony provided only minor and cumulative corroboration regarding the counts for which respondent was adjudicated delinquent. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 23 Affirmed.