2018 IL App (1st) 151759-U

No. 1-15-1759

Order filed April 13, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 18340
	)	
MICHAEL OLIVO,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's trial counsel did not provide ineffective assistance of counsel when he did not file a motion to suppress evidence. The motion would not have been meritorious, as defendant's mother had apparent authority to consent to the search of the bin where the firearm was recovered.

¶ 2 Following a bench trial, defendant Michael Olivo was found guilty of, *inter alia*, armed robbery (720 ILCS 5/18-2(a)(1) (West 2014)) and armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2014)) and sentenced to concurrent terms of 11 years' and 9 years'

imprisonment, respectively. On appeal, defendant contends that he was denied effective assistance of counsel because his trial counsel did not file a motion to suppress the loaded firearm retrieved from a closed bin located inside his mother's residence as well as defendant's statement relating to that evidence. Defendant's mother consented to the search of the residence, but defendant argues that his mother did not have authority to consent to the search of the bin. We affirm.

¶ 3 Defendant was charged with armed robbery based on carrying a dangerous weapon other than a firearm, AHC, two counts of unlawful use or possession of a weapon by a felon based on possession of a firearm and firearm ammunition, aggravated unlawful restraint, and two counts of aggravated battery.

¶ 4 At trial, Andres Lazcano testified that, on October 2, 2014, he was changing tires for a vehicle he was preparing to tow when a person, identified in court as defendant, came behind him, pushed his head down, and told him not to move because "he was going to kill" him. Lazcano gave defendant his money and wallet and defendant ran away. During the incident, defendant cut Lazcano in the throat. When trying to call the police, Lazcano noticed his bluetooth ear piece was missing so he went back to the location where he was robbed. There, he found a phone a few feet away from the vehicle he had been preparing to tow. Lazcano gave the police the phone and identified defendant in a photo array.

¶ 5 Chicago police officer Saulsbury testified that, on October 2, 2014, during the robbery investigation, Lazcano gave him the phone he recovered from the scene. The phone rang and Saulsbury's partner answered it. The woman on the phone confirmed that she had lost her phone, but had given it to her son to use. She identified her son and gave the officers the address to her

apartment building. The officers went to that location, where they found defendant in a nearby alley. The officers placed defendant into custody and, after a custodial search, recovered a bluetooth ear piece from him. At the police station, Saulsbury gave the phone and bluetooth ear piece to a detective.

¶ 6 Chicago police detective Steve Buglio testified that, on October 2, 2014, he was assigned to investigate the armed robbery. He was present when Lazcano identified defendant in a photo array as the person who had robbed him. After Lazcano identified defendant, Buglio briefly interviewed defendant, which was "relatively fruitless." Buglio then went to the home of Jolene Staniszewski, defendant's mother. When Buglio arrived at the apartment building, the security guards told him that they knew defendant and that Staniszewski lived in the building, and they directed him to her unit. Buglio showed Staniszewski the phone which had been recovered at the scene and she identified it as her phone.

¶ 7 Buglio told Staniszewski that the police were aware that defendant had returned home between the robbery and the arrest and they wanted to check her apartment for proceeds from the robbery. Staniszewski agreed to the search and signed a consent to search form. Staniszewski told Buglio that defendant "had been staying there a few days" and showed the officers "a spot that he contained all his stuff while he had been staying at her house." She directed Buglio to a "[l]arger blue bin type container" that was in the "front room" of the apartment. Staniszewski told Buglio that defendant slept in that front room and "he had kept his stuff in that bin." When the officers opened the blue bin, "[i]n plain view as soon as [they] opened it," they discovered a ".38-caliber revolver Taurus blue steel," which was loaded with five live rounds and one spent

round. Inside the bin, the officers also found a watch, some papers, and "a wallet with some identification belonging to the defendant," including a debit card with his name.

¶ 8 When Buglio recovered the firearm, Staniszewski was "quite upset" that there was a firearm in her apartment, as she had little children there. Later at the police station, Buglio spoke with defendant. After Buglio advised defendant of his *Miranda* warnings, Buglio told defendant that he had recovered a weapon "from the house." When Buglio inquired about the weapon, defendant stated that he "had bought the weapon off the street some time ago and he kept it just for his own personal safety." Buglio identified People's Exhibit No. 11 as the recovered firearm and ammunition.

¶ 9 On cross-examination, when asked "You said at some point she said that the stuff in the living room was [defendant's], is that correct?" Buglio responded, "Not everything in the front room. She directed us to the bin that was in the front room. Because he had been staying there a few days and stayed in the front room is where he was sleeping." Buglio testified that the apartment was a small, one bedroom apartment and that there were other things around the bin, but Staniszewski directed the officers to the bin, telling them, " 'that was his.' "

¶ 10 The bin was a 20-gallon bin and Buglio believed there were "some loose items right on top of it." The officers removed the items and took off the lid and then saw the wallet and firearm inside the bin. Staniszewski did not tell Buglio when defendant had last accessed the bin but told him defendant had been at her apartment earlier that day and had spent the night there.

¶ 11 Staniszewski testified that, in October 2014, she lived in her apartment with her two daughters and defendant lived there "[o]n and off." Defendant kept some items at the apartment, including a blue bin of his belongings, which the police searched on October 2, 2014. She signed

a consent to search before they entered that area. When she saw the firearm, she was "shocked" and "[t]otally freaked out" because she had never seen a gun in person and could not believe that there was a weapon in her apartment.

¶ 12 On cross-examination, Staniszewski testified that, on October 2, 2014, defendant stayed with her briefly and was "like back and forth." Defendant had previously lived in a downstairs apartment with his stepfather until his stepfather died. The bin came from the downstairs apartment and had been in her apartment for about two and one-half months, three at the most. When asked specifically if the bin originally came from the downstairs apartment, Staniszewski testified that she believed it did but there "was so much commotion with packing ***, just packing things up, Salvation Army coming, the belongings, like furniture. So I mean it was a lot of hands there so it could have been other people that was moving in and out with the stuff." She testified that, during the two and one-half months that the bin had been in her apartment, friends came in and out of the apartment.

¶ 13 On re-direct, Staniszewski testified that, when defendant's stepfather died, defendant started staying with her, which is when the bin came into the apartment. When defendant stayed at her house, he kept his belongings in the bin and the front apartment closet, where he kept his clothes.

¶ 14 The court admitted into evidence certified copies of defendant's prior convictions from 1997 and 2001 for "manufacture/delivery of a controlled substance."

¶ 15 Defendant presented a stipulation between the parties that a latent fingerprint examiner would testify that he examined the recovered firearm and determined that the "three latent ridge impressions were not suitable for identification."

¶ 16 Following argument, the trial court found defendant guilty of all counts. The court subsequently denied defendant's motion for a new trial, and sentenced him to 11 years in prison for armed robbery and 9 years in prison for AHC, to be served concurrently. It merged all other counts into these two convictions.

¶ 17 Defendant contends on appeal that he was denied effective assistance of counsel because his trial counsel did not file a motion to suppress the loaded firearm that the officers recovered from the bin without a warrant or his consent. Defendant asserts that he had a reasonable expectation of privacy in the bin and that, although his mother had authority to consent to the general search of the home and room in which he stayed, she did not have actual or apparent authority to consent to the search of his closed bin within that room, as there was no evidence presented that she had mutual use, joint access, or control of the bin. Defendant claims that, because the bin was closed and Staniszewski told Buglio the bin belonged to defendant, it was unreasonable for Buglio to conclude that Staniszewski had authority to consent to the search of the bin. Defendant contends that a motion to suppress would have had a reasonable probability of success and would have changed the outcome of his AHC conviction.[1] He requests that we remand the case for a suppression hearing.

¶ 18 We review ineffective assistance of counsel claims under the standard provided in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under *Strickland*, to establish ineffective assistance of counsel claim, a defendant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the

[1] Defendant does not challenge his armed robbery conviction, which was not premised on his use of a firearm.

defense." *Strickland*, 466 U.S. at 687. A defendant must establish both prongs. *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 19 When an ineffective assistance of counsel claim is based on counsel's failure to file a motion to suppress, to establish prejudice, a defendant "must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Henderson*, 2013 IL 114040, ¶ 15. We review this issue *de novo*. *People v. Tayborn*, 2016 IL App (3d) 130594, ¶ 16.

¶ 20 Defendant has not established prejudice under the second prong of the *Strickland* analysis because he has not demonstrated that his unargued motion to suppress evidence was meritorious.

¶ 21 The fourth amendment protects "individuals from unreasonable searches and, generally, searches without a warrant are presumptively unreasonable." *People v. Burton*, 409 Ill. App. 3d 321, 328 (2011). However, "[a]n exception to the warrant requirement exists where law enforcement officers obtain consent to the search from either the person whose property is being searched or from a third party who possesses 'common authority' over the premises." *Burton*, 409 Ill. App. 3d at 328. Common authority can be established by showing that the person who consented to the search has actual or apparent authority. *People v. Lyons*, 2013 IL App (2d) 120392, ¶ 24. "The inquiry into whether the party consenting to a search of closed items has apparent or actual authority to do so is necessarily fact specific." *Burton*, 409 Ill. App. 3d at 330.

¶ 22 Actual authority is not dependent on property laws (*People v. Bell*, 403 Ill. App. 3d 398, 406 (2010)) but, rather, "rests instead upon the mutual use of the property by persons generally having joint access or control for most purposes" (*People v. Huffar*, 313 Ill. App. 3d 593, 596 (2000)). "Regardless of the nature of their relationship or the mere commingling of their

belongings, a third party and a defendant share common authority only if the third party's degree of control is equal to or greater than that possessed by the defendant." *Id.* at 596. When a defendant lives with a close relative, "courts will presume that the relative possesses common authority to consent to a search of the defendant's portion of the premises." *Id.* at 597. Further, "[a] homeowner's consent to a search of the home may not be effective consent to a search of a closed object inside the home." *United States v. Karo*, 468 U.S. 705, 725 (1984) (O'Connor, J., concurring, joined by Rehnquist, J.)).

¶ 23 If a third party lacks actual authority, he or she may still have apparent authority. Under the doctrine of "apparent authority" "a warrantless search does not violate the fourth amendment where the police receive consent from a third party whom the police reasonably believe possesses common authority, but who, in fact, does not." *Burton*, 409 Ill. App. 3d at 328. To determine whether apparent authority exists, the trial court must examine "whether the circumstances known to the police at the time of the entry or opening would warrant a person of reasonable caution in the belief that the consenting party had authority over the premises or effects." *People v. Miller*, 346 Ill. App. 3d 972, 986 (2004). However, "an officer may not blindly accept a person's consent to search, and a warrantless search without further inquiry is unlawful." *Burton*, 409 Ill. App. 3d at 329. It is the State's burden to prove that the officers had an objectively reasonable belief that the person who consented to the search had authority to consent. *Id.*

¶ 24 Here, defendant concedes that his mother, Staniszewski, had "common authority" to consent to a search of her apartment and the room in which he stayed. Defendant, however,

argues that Staniszewski did not have actual or apparent authority to consent to the search of his closed bin located in her residence.

¶ 25 We conclude that, even if Staniszewski did not have actual authority to consent to a search of the bin, she had apparent authority to consent to the search, as the officers could reasonably believe that his mother possessed common authority over the bin.

¶ 26 Before the officers searched Staniszewski's apartment and the bin, they knew from Staniszewski that it was her apartment, defendant had been staying there for a few days, and he slept in the front room of the small, one-bedroom apartment. Although the officers knew defendant kept some of his "stuff" in the blue bin located in the front room, not everything in that room belonged to him. The bin was located in plain view in that front living room rather than hidden in the closet where he also kept his belongings. The bin was not locked, sealed, or otherwise restricted or secured against anyone accessing or opening it. There was no evidence that the bin was labeled with defendant's name, that defendant gave his mother or anyone else entering the front room of the apartment instructions not to open or access the bin when he was not present, or that he took any action "that might indicate that he held a particular expectation of privacy to it." See *Burton*, 409 Ill. App. 3d at 327, 330-32 (where the defendant argued that a coat pocket was like a "closed container," the court found that the officers could reasonably believe that the defendant's girlfriend had authority to permit a search of the defendant's coat pocket contained in the coat closet where "the closet was not locked or private" and "all *eight* people residing in the apartment had access to the closet"). (Emphasis in the orginal).

¶ 27 Even though Staniszewski told the officers that the bin belonged to defendant and she did not know its contents, these facts do not mean that the officers should have concluded that his

mother was denied use, access, or control over the bin. See *People v. Bull*, 185 Ill. 2d 179, 196, 198 (1998) (where the defendant's girlfriend told the police that a closed box in the bedroom belonged to the defendant and she did not know what was inside, our supreme court upheld the validity of the girlfriend's consent to search it, noting "[t]he mere fact that defendant alone may have used the box does not indicate that [the defendant's girlfriend] was denied the mutual use, access to, or control over it"). Rather, given that the bin was not hidden or locked but was in plain view in the front living room and easily accessible to anyone who entered the living room, the officers could reasonably conclude that defendant did not have an expectation of privacy and that his mother had mutual or joint access to the bin.

¶ 28 Based on these facts, we conclude that the officers could have reasonably believed that defendant's mother had authority to consent to the search of the unlabeled, unlocked, and unsecured bin located in plain view in the front living room of her apartment. Thus, if counsel had filed a motion to suppress, the motion would not have been meritorious. Defendant therefore has not established ineffective assistance of counsel, as he has not demonstrated that he was prejudiced by trial counsel's failure to file a motion to suppress.

¶ 29 For the reasons stated above, we affirm defendant's conviction.

¶ 30 Affirmed.