2018 IL App (1st) 152515-U

SIXTH DIVISION
Order filed: August 17, 2018

No. 1-15-2515

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 7601
	)	
WILBERT COLEMAN,	)	Honorable
	)	Mauricio Araujo,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for possession of a controlled substance with intent to deliver is reversed and remanded for a new trial where the circuit court refused to have a transcript of the *in camera* hearing to determine the applicability of the surveillance location privilege prepared for the record.

¶ 2 Following a bench trial, the defendant, Wilbert Coleman, was convicted of possession of a controlled substance with intent to deliver in violation of section 401(d) of the Illinois Controlled Substances Act. 720 ILCS 570/401(d) (West 2012). He was sentenced to 6 years' imprisonment with 461 days' credit for time served and a 3-year term of mandatory supervised

release (MSR). On appeal, the defendant argues that: (1) the circuit court erred when it refused to have a transcript of the *in camera* hearing to determine the applicability of the surveillance location privilege prepared for the record; (2) the circuit court erred when it upheld the State's claimed surveillance location privilege without first considering his need for disclosure of the surveillance officer's location; and (3) the surveillance location privilege should be rejected as a matter of law. For the following reasons, we reverse the defendant's conviction and sentence and remand the matter for a new trial.

¶ 3 Following his arrest, the defendant was charged by information with two counts of possession of a controlled substance with intent to deliver "within 1000 feet of any school" in violation of sections 407(b)(2) and 401(d) of the Act. 720 ILCS 570/407(b)(2), 401(d) (West 2012). The State *nolle prossed* Count II and amended Count I to possession of a controlled substance with intent to deliver, removing the language "within 1000 feet of any school." Specifically, Count I alleged that the defendant "unlawfully and knowingly possessed with intent to deliver *** less than 1 gram of a substance containing a certain controlled substance *** heroin"[1] in violation of section 401(d) of the Act. 720 ILCS 570/401(d) (West 2012).

¶ 4 At the defendant's bench trial, Chicago Police Officer John Sandoval testified that he was working as a surveillance officer for a narcotics surveillance operation at around 12:45 pm on April 15, 2014, in the area of 1505 South Millard Avenue in Chicago. After about 34 minutes of surveillance, Officer Sandoval saw the defendant on Central Park Avenue at the "1400 block, beginning of the 1500 block." Officer Sandoval stated that he observed the defendant from 15 to 35 feet away with an unobstructed view. At times, he would notice the defendant talking with his co-arrestee (who is not a party to this appeal).

[1] For purposes of readability, uppercase type has been removed from the quoted text.

¶ 5 Officer Sandoval testified that he observed the defendant engage in three narcotics transactions. During each transaction, he observed the defendant walk to the rear of 1515 South Millard, approach a wrought iron fence, bend down and pick up a blue and white Newport cigarette box from the base of the fence, retrieve a clear plastic bag from the box, remove a small, blue item from inside the plastic bag, insert the plastic bag back inside the cigarette box, place the box back on the ground, and return and give a small blue item to each individual involved in the three transactions.

¶ 6 After these three transactions, Officer Sandoval radioed the enforcement officers a description of the defendant and told them that the defendant "was walking westbound on 15th toward Millard." Officer Sandoval, then broke surveillance, approached the defendant, and detained him with the help of the enforcement officers. Officer Sandoval directed Officer Duran to the wrought iron fence where he retrieved the cigarette box. Officer Sandoval testified that he never lost sight of the cigarette box, that nobody went near it other than the defendant prior to its retrieval, that the area where it was recovered was a "relatively clean" concrete slab, and that there were no other cigarette boxes. After Officer Sandoval placed the defendant into custody, he performed a custodial search at the "10th District," recovering $53 from the defendant's left pants pocket.

¶ 7 On cross-examination, defense counsel asked Officer Sandoval to disclose the exact location from which he conducted surveillance of the defendant. Officer Sandoval responded that he could not disclose the location because of "officer safety." The State objected to defense counsel's question, citing "point of surveillance [privilege]" as the grounds. Following arguments on the State's objection, the circuit court elected to conduct an *in camera* examination of Officer Sandoval. Prior to that examination, defense counsel requested that a transcript of the

in camera interview be prepared for the record to have it available for appeal. The State suggested that the circuit court conduct an *in camera* examination to determine whether the location should be disclosed, and "put it on the record based on that." Over defense counsel's objection, the circuit court decided to "look at it *in camera* and make *** comments on the record."

¶ 8 After a brief recess, the circuit court stated: "I've met with the officer off the record. I will say *** he was not on the public way, and that based upon that and some other information there, if you are asking for a motion to reveal surveillance location, *** I am going to deny that." When defense counsel asked the precise surveillance location, the court responded, "It will remain undisclosed *** is what I'm trying to say." The court agreed that defense counsel would be free to inquire on "how far, how close and what else was around" the officer. Defense counsel renewed the objection on the grounds that there had not been "a showing made pursuant to the case law of the need for nondisclosure of [the] location." After the objection was renewed, the following dialogue occurred:

> "THE COURT: All right. What do you think I need to hit?
>
> [DEFENSE COUNSEL]: Judge, the rule in the case law is, *** it's a useful location?
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL]: It's a private residence or private area that's being utilized?
>
> THE COURT: It's a nonpublic area, so yes."

¶ 9 Officer Sandoval returned to the court room, and cross-examination resumed. Officer Sandoval testified that he was not indoors while conducting surveillance. He moved around

during his surveillance between 10 to 50 feet, but remained within 15 to 35 feet of the defendant. When Officer Sandoval broke surveillance to detain the defendant, he was approximately 85 feet away from him. Officer Sandoval testified that the entire time he conducted the surveillance, he had an unobstructed view of the wrought iron fence where the cigarette box was hidden, he never lost sight of it, and the only person who touched it was the defendant.

¶ 10 Officer Duran testified that on April 15, 2014, he was acting as an enforcement officer working with Officer Sandoval. After approximately 30 minutes, Officer Sandoval radioed Officer Duran with a description of the defendant and requested assistance at the intersection of 15th and Millard. Officer Duran stated that when he arrived at the location, he observed Officer Sandoval approaching on foot, detaining both the defendant and his co-arrestee. Officer Sandoval then directed Officer Duran to the wrought iron fence at 1515 South Millard to recover the cigarette box. Inside the box was a clear plastic bag with "two mini Ziplocs" containing a white powdered substance that had a blue tint. Officer Duran testified that there were no other cigarette boxes, that there was no other debris, and that there was no one else in the area where he retrieved the cigarette box. On cross-examination, Officer Duran testified that while acting as an enforcement officer, he was waiting two and one-half blocks east of Millard and 15th, and arrived at the location where the defendant was detained, seconds after Officer Sandoval. Officer Duran never observed the defendant make any transactions, he never saw the defendant near the cigarette box, and he relied solely on Officer Sandoval's radio transmissions.

¶ 11 The parties stipulated that a proper chain of custody with respect to the two mini Ziplocs containing a white powdered substance was maintained at all times. The parties further stipulated that the two items were inventoried pursuant to the Chicago Police Department inventory procedures, that they were transferred to the Illinois State Police Crime Lab, that a test

of the white powdered contents of the two items was conducted at the lab, that the contents tested positive for heroin, that the contents of one of the items weighed 0.3 grams, and that the estimated total weight of the contents of both items was 0.6 grams.

¶ 12 After the stipulations were made a part of the record, the State rested. The defendant moved for a directed finding, which was denied. Thereafter, the defense rested without presenting any evidence and the defendant choosing not to testify.

¶ 13 Following closing arguments, the circuit court found the defendant guilty of possession of a controlled substance with intent to deliver. The defendant, thereafter, filed his "Motion to Reconsider and/or for a New Trial," which the circuit court denied. The circuit court sentenced the defendant to a term of 6 years' imprisonment with 461 days' credit for time served and a 3-year term of MSR. After sentencing, the defendant filed a motion to reconsider his sentence, which the circuit court denied. This appeal followed.

¶ 14 For his first assignment of error, the defendant argues that the circuit court erred when it refused to have a transcript of the *in camera* hearing to determine the applicability of the surveillance location privilege prepared for the record. The State confesses error, and we agree.

¶ 15 The Sixth Amendment to the United States Constitution (U.S. Const. amend. VI), which is applicable to the states through the Fourteenth Amendment (U.S. Const. amend. XIV), and Article I, Section 8 of the Illinois Constitution (Ill. Const. 1970, art. I, § 8), guarantee the accused in a criminal prosecution the right to confront and cross-examine the witnesses against him. However, the right of cross-examination is not absolute. The circuit court may limit the scope of cross-examination, and its decision to do so will not be disturbed on appeal absent an abuse of that discretion. *People v. Enis*, 139 Ill. 2d 264, 295 (1990).

¶ 16 Illinois recognizes a qualified privilege from disclosing private surveillance locations in a criminal proceeding against the target of the surveillance. *People v. Price*, 404 Ill. App. 3d 324, 330-31 (2010); *People v. Knight*, 323 Ill. App. 3d 1117, 1128 (2001); *People v. Criss*, 294 Ill. App. 3d 276, 281 (1998). Whether the privilege is applicable must be decided by the circuit court on a case-by-case basis, balancing the public interest in keeping the location secret against the defendant's right to test the credibility of a witness by cross-examination. *Criss*, 294 Ill. App. 3d at 281.

¶ 17 When the State invokes the surveillance location privilege at trial, as in the case at bar, it bears the initial burden of demonstrating that the privilege should apply. *Price*, 404 Ill. App. 3d at 331. It can satisfy its burden by establishing that the surveillance location was located on private property with the permission of the owner or was in a useful location which would be compromised if disclosed. *Id*. at 332. Once the State has met its burden, the defense can then overcome the privilege by showing that the surveillance location is relevant to the defense or essential to the fair determination of the case. *Id.*

¶ 18 In making its determination of whether to apply the privilege and prevent the defense from inquiring into the exact surveillance location, the circuit court may conduct an *in camera* examination of the surveillance officer out of the presence of the defendant and his attorney. *Id*.; *Knight*, 323 Ill. App. 3d at 1127. If the circuit court conducts such an *in camera* hearing, it should "ensure that a transcript of the hearing is created and preserved for appellate review." *People v. Flournoy*, 2016 IL App (1st) 142356, ¶ 46; see also Ill. S. Ct. R. 415(f) (eff. Oct. 1, 1971). Illinois Supreme Court Rule 415(f) in relevant part, provides as follows:

> "(f) In Camera Proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of

> disclosures, or portion of such showing, to be made *in camera*. A record shall be made of such proceedings. If the court enters an order granting relief following a showing *in camera*, the entire record of such showing shall be sealed, impounded, and preserved in the records of the court, to be made available to the reviewing court in the event of an appeal." Ill. S. Ct. R. 415(f) (eff. Oct. 1, 1971).

¶ 19 In *Flournoy*, 2016 IL App (1st) 142356, ¶ 46, this court reviewed the applicability of Rule 415(f) to an *in camera* hearing with facts similar to this case, and held that where the State requests that the surveillance location privilege be invoked, the circuit court "should not only hold an *in camera* hearing, but should also ensure that a transcript of that hearing is created, and preserved for appellate review." The *Flournoy* court found that the *in camera* hearing was not transcribed (*Id.* ¶ 37) and concluded that because it had no record of what evidence was presented at the *in camera* hearing, it was unable to determine whether the State met its initial burden of proof to demonstrate that the surveillance location privilege should apply. *Id*. ¶ 46.

¶ 20 We find *Flournoy* persuasive. Like the circuit court in *Flournoy*, the circuit court in this case conducted an *in camera* interview on whether to invoke the surveillance location privilege. The circuit court refused to have a transcript of the *in camera* hearing prepared for the record, despite defense counsel's request, violating Supreme Court Rule 415(f) (eff. Oct. 1, 1971).

¶ 21 Based on the foregoing analysis, we conclude that the circuit court erred when it refused to have a transcript of the *in camera* hearing prepared for the record, preventing us from being able to conduct a meaningful review of the *in camera* proceedings to determine whether the State met its initial burden of demonstrating that the surveillance location privilege should apply.

Consequently, we reverse the defendant's conviction and sentence and remand this case for a new trial. As a result of our disposition, we find no need to address the defendant's remaining assignments of error. We find no double jeopardy bar to a retrial, as the evidence of record is sufficient to support a finding of guilty on the offense charged. See *People v. Olivera,* 164 Ill. 2d 382, 393 (1995).

¶ 22 Reversed and remanded.