2018 IL App (1st) 153332-U

SIXTH DIVISION
AUGUST 10, 2018

No. 1-15-3332

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 19171
	)	
MARLON JONES,	)	Honorable
	)	Thomas J. Byrne,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction is affirmed, as the record is insufficient to review his claim of ineffective assistance of trial counsel. Two assessments from the fines and fees order are vacated as erroneous.

¶ 2 Following a bench trial, defendant Marlon Jones was convicted of possession of a controlled substance with intent to deliver and sentenced to six years' imprisonment. On appeal, defendant contends that his trial counsel rendered ineffective assistance by failing to file a motion to suppress his statements to police. Defendant also contends, and the State agrees, that

two assessments should be vacated from his fines and fees order. We vacate the two assessments but affirm defendant's conviction and sentence in all other respects.

¶ 3 Defendant was charged with one count of possession of a controlled substance with intent to deliver between 15 and 100 grams of heroin. At trial, Chicago police officer Jerry Scaife testified that on October 3, 2014, he was part of a team of 10 to 15 officers that executed a search warrant at a single family home. Officer Scaife saw defendant walking toward the front porch of the home, and testified that defendant matched the description of the person the police were looking for. Officer Scaife detained defendant in front of the house. Officer Scaife and other police officers knocked on the front door, announced their office, and entered the home.

¶ 4 Inside, Officer Scaife encountered an elderly woman named Ada Jones. After speaking with her, Officer Scaife was directed upstairs. One of the rooms upstairs contained a couch, dresser, television and television stand. Officer Scaife entered that room with three other officers. He observed a plate on the floor containing a brown or tan chunky substance, a couple of clear plastic bags containing a chunky tan substance, and three pink plastic Ziploc bags containing a brown or tan powdery substance. Officer Scaife testified that, based on his 20 years of experience as a police officer, which included hundreds of arrests for narcotics, he suspected that the substance was heroin. Officer Scaife also observed other items on the floor, including a grinder, a digital scale, small plastic Ziploc bags, bottles of Dormin and B-12, and $2871 in cash. Another officer photographed and recovered all of these items.

¶ 5 Defendant was placed into custody in the living room. Officer Scaife searched defendant and recovered $198 from his front right pocket.

¶ 6 At the police station, Officers Scaife and Haidari spoke with defendant in the holding cell. Defendant was advised of his *Miranda* rights and acknowledged that he understood them. Officer Scaife testified that defendant stated that he lived in the house, that the room upstairs was his, and that everything in that room belonged to him.

¶ 7 On cross-examination, Officer Scaife testified that defendant was placed into custody on the front porch, and that the police brought defendant inside after they spoke with Ada Jones. There was another woman named Valerie Jones present in the home. In addition to the rooms upstairs, there were two bedrooms on the main floor. The room upstairs was in disarray and contained many other items, including clothes. Officer Scaife acknowledged that he did not know if anyone else lived in the house, or if anyone else had access to the upstairs rooms.

¶ 8 Officer Scaife also acknowledged that his police report indicated that defendant was still at the home when he told police that the bedroom was his and the items recovered from that bedroom belonged to him. Officer Scaife testified that defendant made the same statement twice, once at the house in front of Ada and Valerie, and again at the police station. However, the police report did not indicate that defendant made a statement at the police station.

¶ 9 Chicago police officer Saud Haidari testified that he was part of the team that executed the search warrant. Officer Haidari first saw defendant in front of the house. When the police entered the residence, Officer Haidari remained on the first floor until Officer Scaife called him upstairs. In a room upstairs, Officer Haidari observed numerous items on the floor. He recovered three clear plastic bags containing suspect heroin, as well as three pink Ziploc bags of suspect heroin, two grinders, a scale, sandwich bags, bottles of Dormin and vitamin B-12, which are cutting agents, and $2,871.

¶ 10 Officer Haidari testified that another officer directed him to a dresser in the room which contained men's clothing and two pieces of mail. Both pieces of mail were addressed to defendant and dated July 2014. Officer Haidari recovered the pieces of mail, which he identified in court.

¶ 11 The State presented a stipulation that a forensic chemist at the Illinois State Police crime laboratory would testify that the substance contained in one of the plastic bags recovered by police tested positive for 37.6 grams of heroin.

¶ 12 Defendant moved for a directed finding, which the trial court denied. The defendant elected not to testify.

¶ 13 Following closing arguments, the trial court found that the second floor of the home was used for a drug operation to package, sell and distribute heroin. The court acknowledged that there was "impeachment" because the police report did not indicate that defendant made a statement at the police station. However, the court stated that it was "inclined to believe that statement took place" even if it was not recorded in the police report. The court also found that the men's clothing and the mail addressed to defendant corroborated defendant's statement that he lived in the room where the heroin and other items were recovered. After noting that it also credited the police officers' testimony, the court concluded that, based upon all of the evidence, it was convinced beyond a reasonable doubt that defendant was guilty of possession of a controlled substance with intent to deliver.

¶ 14 The trial court sentenced defendant to the minimum term of six years' imprisonment. The court also awarded defendant 381 days of sentencing credit, and assessed him $3619 in various fines, fees and court costs.

¶ 15 On appeal, defendant primarily contends that his trial counsel rendered ineffective assistance by failing to move to suppress his statements that the upstairs bedroom was his, and that the items recovered from that room belonged to him. Defendant claims that he was in custody when he made his first statement, when he was questioned at the house without having received *Miranda* warnings. Although he made a second, nearly identical, statement at the police station after receiving *Miranda* warnings, defendant asserts that this was an example of the "question first, warn later" technique proscribed in *Missouri v. Seibert*, 542 U.S. 600 (2004). Defendant argues that he was prejudiced by his counsel's failure to file a motion, because there is a reasonable probability that his statements would be suppressed, the State would not have been able to prove his control of the contraband, and he would not have been convicted. On that basis, he seeks reversal of his conviction and remand for a suppression hearing.

¶ 16 The State responds that the defendant cannot establish ineffectiveness of his counsel, as the record is silent regarding the circumstances surrounding defendant's first statement to Officer Scaife at the scene. The State argues that there is no testimony as to whether defendant made that statement voluntarily, or pursuant to questioning. The State asserts that, on this record, defendant cannot establish prejudice from his counsel's failure to file a motion to suppress, because he cannot show that a motion to suppress would have been successful. Alternatively, the State argues that there is no evidence that the police engaged in an "ask first, warn later" interrogation in violation of *Seibert*, and so at least his second statement, which he made after receiving *Miranda* warnings, was admissible.

¶ 17 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

People v. Veach, 2017 IL 120649, ¶ 29. To support a claim of ineffective assistance of counsel, defendant must demonstrate that counsel's representation was deficient, and that he suffered resulting prejudice. *Strickland*, 466 U.S. at 687. Specifically, defendant must show that counsel's performance was objectively unreasonable, and that there is a reasonable probability that the outcome of the proceeding would have been different if not for counsel's error. *Veach*, 2017 IL 120649, ¶ 30. If defendant cannot prove that he suffered prejudice, this court need not determine whether counsel's performance was deficient. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Moreover, *Strickland* requires defendant to demonstrate actual prejudice, and mere speculation as to prejudice is not sufficient. *People v. Bew*, 228 Ill. 2d 122, 135-36 (2008).

¶ 18 To establish that he was prejudiced by trial counsel's failure to file a motion to suppress his statements, defendant must show that there is a reasonable probability that the motion would have been granted, and that the outcome of the trial would have been different if his statements had been suppressed. *Givens*, 237 Ill. 2d at 331. Moreover, if a motion to suppress would have been futile, then counsel's failure to file that motion does not constitute ineffective assistance. *Id.*

¶ 19 Generally, a defendant is required to raise a claim of ineffective assistance of counsel on direct appeal or risk forfeiting the claim. *Veach*, 2017 IL 120649, ¶ 47. However, where a record is incomplete or inadequate to allow a reviewing court to resolve an ineffective assistance of counsel claim, such a claim may be better suited to a collateral proceeding. *Id.* ¶ 46. When an ineffective assistance claim depends on facts that are not found in the record, procedural default will not preclude a defendant from raising that claim on collateral review. *Id.* ¶ 47.

¶ 20 Here, we find that the record is inadequate for us to resolve defendant's ineffective assistance of counsel claim. Defendant's argument is based on his assertion that the statement he

made at the house was the result of a custodial interrogation by Officer Scaife without *Miranda* warnings. However, as the State points out, the context and circumstances of that statement were never developed in the trial court record and remain unclear.

¶ 21 On direct examination, Officer Scaife testified that defendant made a statement at the police station after he was advised of his *Miranda* rights, but Officer Scaife did not mention defendant's statement at the house. On cross-examination, Officer Scaife agreed when defense counsel asked if defendant made a statement at the scene, and if that statement was made in front of Ada and Valerie Jones. Counsel did not make any further inquiries regarding the circumstances of that statement. Thus, the record is silent as to whether defendant voluntarily made the statement at the house, or if it was the result of police questioning. Even if it was the result of police questioning, the record is not sufficient to determine whether there was a custodial interrogation, or if Officer Scaife merely asked a preliminary on-the-scene question that did not require *Miranda* warnings. Furthermore, the record does not indicate whether or not defendant was advised of his *Miranda* rights at the scene. Based on this record, defendant's assertion that his statement at the scene resulted from custodial interrogation without *Miranda* warnings is mere speculation. As defendant's claim of ineffective assistance of counsel depends upon facts that are not found in the record, we are unable to resolve defendant's claim on direct appeal. *Veach*, 2017 IL 120649, ¶ 46. Defendant's claim is better suited to a collateral proceeding where the parties may develop the requisite factual record. *Id.* ¶¶ 44-47.

¶ 22 Defendant next contends, and the State agrees, that two assessments from his fines and fees order were erroneously assessed and should be vacated. Defendant acknowledges that he did not preserve the claimed errors because he did not challenge the assessments in the trial court.

See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). He argues, however, that this court may review his claims under Supreme Court Rule 615(b) (eff. Aug. 27, 1999), or alternatively, under the second prong of the plain error doctrine. The State acknowledges the forfeiture but agrees that the plain error doctrine applies, and addresses the merits of defendant's claims.

¶ 23 Errors in calculating fines and fees due to "clerical mistake" are not reviewable under the plain error doctrine. *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9, *pet. for leave to appeal granted*, No. 122549 (Nov. 22, 2017). Nor can we reach the merits of such claims under Rule 615(b). *People v. Grigorov*, 2017 IL App (1st) 143274, ¶¶ 13-14. However, the rules of forfeiture also apply to the State, and where, as in this case, the State fails to argue that defendant forfeited an issue, the State waives the forfeiture. *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. Thus, we may address the merits of defendant's claims. The propriety of the fines and fees imposed is a question of law which we review *de novo*. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 24 First, the parties agree, and we concur, that the $5 Electronic Citation Fee (705 ILCS 105/27.3e (West 2014)) must be vacated. That fee only applies to traffic, misdemeanor, municipal ordinance and conservation violations, and does not apply to defendant's felony offense. We vacate the $5 Electronic Citation Fee and direct the clerk of the circuit court to amend the fines, fees and costs order accordingly.

¶ 25 The parties also agree that the $20 Violent Crime Victims Assistance fine (VCVA) (725 ILCS 240/10(c)(2) (West 2010)) was erroneous and must be vacated. The State acknowledges that, under the prior version of the statute, the $20 fine could be assessed only where "no other fine is imposed." *Id.* The State correctly points out that this language was removed when the

statute was amended in July 2012. See Pub. Act 97-816, § 10 (eff. July 16, 2012). The statute now provides that any defendant convicted of a felony shall be assessed $100 for the VCVA fine. 725 ILCS 240/10(b)(1) (West 2012). Here, defendant was assessed the VCVA fine under the wrong version of the statute. He should have been assessed $100 under section 10(b)(1), but instead, was assessed $20 under the former version of the statute. We cannot raise defendant's assessment to the $100 fine, as this court is prohibited from increasing a defendant's sentence on review. See *People v. Castleberry*, 2015 IL 116916, ¶ 24. Thus, as the State concedes, we must vacate the $20 VCVA fine, which was erroneously imposed. *People v. Glass*, 2017 IL App (1st) 143551, ¶ 23. We direct the clerk of the circuit court to amend the fines and fees order accordingly.

¶ 26 For the foregoing reasons, we vacate the $5 Electronic Citation Fee and the $20 Violent Crime Victims Assistance fine from the fines, fees and costs order. We affirm defendant's conviction and sentence in all other respects.

¶ 27 Affirmed in part; vacated in part; fines and fees order corrected.