2018 IL App (1st) 160893-U

No. 1-16-0893

Order filed February 28, 2018

Third 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 3304
	)	
VICTOR PROANO,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's trial counsel did not provide ineffective assistance of counsel when he withdrew and did not litigate a motion to quash arrest and suppress evidence. The trial court did not err when it denied defendant's motion to suppress his statement because he was not subject to custodial interrogation under *Miranda* when he made the statement. The fines, fees, and costs order is modified.

¶ 2 Following a bench trial, defendant Victor Proano was found guilty of possession of a controlled substance (heroin) (720 ILCS 570/402(c) (West 2014)) and sentenced to 24 months of intensive probation. On appeal, defendant contends that the trial court erred when it denied his

motion to suppress statements because he was under custodial interrogation when he gave his statement but did not receive *Miranda* warnings. He also argues that he was denied effective assistance of counsel because his trial counsel did not argue a motion to suppress the evidence obtained as a result of an illegal seizure of defendant. Lastly, defendant challenges certain fines and fees that were assessed against him. We affirm but order modification of the fines, fees, and costs order.

¶ 3 In January 2014, defendant was charged with possession of less than 15 grams of heroin. Before trial, defendant filed a motion to quash arrest and suppress evidence and a motion to suppress statements. On the day of trial, defendant withdrew the motion to quash arrest and suppress evidence and proceeded on the motion to suppress statements. The hearing on the motion to suppress statements and trial were held contemporaneously.

¶ 4 Chicago police officer Andrew Janik testified that, on January 21, 2014, he was conducting narcotics surveillance from a covert vehicle in the area of "3700 West Grenshaw." At about 7:30 p.m., he saw a "red Nissan Pathfinder" vehicle pull up at a building on West Grenshaw Street. A woman was driving and a man, identified as defendant, was in the passenger seat. Defendant exited the vehicle and walked to the vestibule area of the building, where there were men standing inside. The street lights and lights in front of the building were on and Janik was in front of the curb, about 10 to 15 feet away.

¶ 5 Defendant did not go inside the building but went to the door and asked for "one blow" from one of the men, which Janik testified is street terminology for heroin. Defendant tendered United States currency to one of the men in exchange for a "small item." Defendant returned to the passenger side of the vehicle, which drove eastbound on Grenshaw. Janik observed that the

vehicle had a Maryland license plate. He communicated all he had observed to the enforcement unit, including Officer Gentile.

¶ 6 On cross-examination, Janik testified that he could not identify the item that was subsequently recovered from defendant as the item he saw him receive during the exchange because it was a "small item."

¶ 7 Chicago police officer Michael Gentile testified that, on January 21, 2014, at about 7:30 or 8 p.m., he and his partner, Officer Messick, were in an enforcement vehicle assigned to the area of 3700 West Grenshaw. Gentile was dressed in plain clothes but his vest, star, and gun were visible. At about 7:45 p.m., after he received a radio transmission from Janik, he saw a "red Nissan Pathfinder SUV" with a Maryland license plate coming from the area of 3700 West Grenshaw and travelling eastbound on Grenshaw. A woman was driving the vehicle and a man, identified as defendant, was in the passenger's seat. Gentile and Messick followed the vehicle, turned on their emergency lights, and pulled it over at the "3700 block of West Roosevelt."

¶ 8 Gentile went to the passenger side and, as he approached, he saw defendant's "left hand going towards his left leg along the side of his left leg." Janik testified that he "quickly asked [defendant] to get out of the vehicle because I didn't know if he - - I believed he - - I knew he purchased narcotics" and "[t]hat's why I believed, but I didn't know if it was possibly a weapon of some sort that [defendant] was trying to conceal." When Gentile asked him to step out of his vehicle, defendant complied.

¶ 9 Gentile informed defendant that he was the police and had been "watching the block that he just left" because he wanted "[t]o inform him that [they] observed the drug transaction that he just made" and to tell him why he was pulled over. After Gentile told defendant that he "had

been watching the block," defendant "was very nervous," and told Gentile, " 'all I have is one blow. It's in the pill bottle right there,' " pointing to a "pink change purse" which was on the passenger seat where he had been sitting. The change purse was about three inches by three inches in size. Inside, Gentile found a pill bottle and a "clear plastic baggie containing a tan powder substance suspect heroin."

¶ 10 On cross-examination, Gentile testified that, when he approached the passenger side of the vehicle, he identified himself as a police officer and his gun was not drawn. After defendant got out of the vehicle, he turned and put his hands on the vehicle on his own. Gentile performed "a patdown," putting his hands on defendant to see if there was something that could hurt him. He did not feel any drugs or weapons on defendant.

¶ 11 Gentile testified that, when he was doing the patdown search, defendant was not free to leave. During the patdown, Gentile testified he "was talking to [defendant]," and "[defendant] told him right from the start 'all I have is one bag and it's in that purse.' " Gentile also testified that, when he was performing the patdown, he told defendant why he had been stopped, that another officer had seen him purchase heroin, and that he "just plain told [defendant] ***[w]e were just on that block watching you purchase, and that's when he pointed and he's like, 'all I got is one bag and it's in that purse.' " Gentile did not ask defendant where the heroin was located. Asked whether he read defendant his *Miranda* warnings before he conversed with him, Gentile responded, "No. I just informed him that we were on the block. That's all I ever did." Asked whether he told defendant "he had been seen buying heroin," Gentile responded, "I actually just told him we were watching the block, and that's when he gave me that information." He did not tell defendant he was looking for heroin or that he was suspected of having a bag of

heroin that had just been purchased. Gentile did not read defendant his *Miranda* warnings and testified that defendant made his statement voluntarily within "seconds" after he got out of the car.

¶ 12 Gentile did not see defendant purchase any narcotics. The change purse was closed when Gentile recovered it and he never saw it in defendant's hands.

¶ 13 The parties stipulated that, if called to testify, a forensic scientist would testify that he weighed and tested the recovered item and it tested positive for heroin in the amount of 0.4 grams.

¶ 14 Following argument, the trial court denied defendant's motion to suppress statements and found him guilty of possession of heroin. With respect to the motion to suppress statements, it found, *inter alia*, as follows:

> "I don't believe that this was an arrest. That he was under arrest at this particular point in time. It was during the course of an investigation based upon the Terry [*sic*] stop. Based upon what this officer, Gentile, learned for [*sic*] Janik.
>
> Secondly, the officer, from all the circumstances and the information that he provided to [defendant] is the reason why he was being stopped. It was at that point that [defendant] made the inculpatory statement regarding the drugs in the vehicle."

¶ 15 The court subsequently denied defendant's posttrial motions, noting that it was not "an interrogation after the arrest. It was a field inquiry, which really wouldn't trigger Miranda [*sic*] at the time that the statement was made." It sentenced defendant to 24 months of intensive probation and imposed fines and fees.

¶ 16 Defendant first contends that he was denied effective assistance of counsel because his trial counsel withdrew the motion to suppress the evidence on the date of trial and failed to argue it. He asserts that the motion would have been meritorious because defendant was illegally seized, as Gentile did not have reasonable suspicion to stop his vehicle and frisk him for weapons. He therefore argues that defendant's statement and the drugs recovered from the change purse inside the vehicle, which were obtained after the seizure, should be suppressed. Defendant contends that the State could not have proved him guilty without this evidence and trial counsel's failure to argue the motion prejudiced him and undermined any confidence in the outcome of the case. He requests that we reverse his conviction and remand for a new trial.

¶ 17 We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under this standard, to establish a claim for ineffective assistance of counsel, a defendant must demonstrate that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Because a defendant must satisfy both prongs of the ineffective assistance of counsel test (*Strickland*, 466 U.S. at 697), we may resolve the issue based only on the prejudice prong (*People v. Patterson*, 2014 IL 115102, ¶ 81).

¶ 18 To prove prejudice when a claim is based on counsel's failure to file a motion to suppress, 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." *People v. Henderson*, 2013 IL 114040, ¶ 15. We review this issue *de novo*. *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 38.

¶ 19 Defendant has not established prejudice under the second prong of the *Strickland* test. He has not demonstrated that his motion to quash arrest and suppress evidence would have been meritorious had his counsel litigated it, as Gentile had reasonable suspicion to justify a *Terry* stop and frisk pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968).

¶ 20 The fourth amendment guarantees a person's right "to be free from unreasonable searches and seizures." *People v. Colyar*, 2013 IL 111835, ¶ 31; U.S. Const., amend. IV. When a person is seized, "the fourth amendment generally requires a warrant supported by probable cause." *People v. Thomas*, 198 Ill. 2d 103, 108 (2001). When a person is arrested without a warrant, it is only valid if it is supported by probable cause. *People v. Grant*, 2013 IL 112734, ¶ 11. However, in *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court recognized an exception to the probable cause requirement for investigative stops, or *Terry* stops. *People v. Maxey*, 2011 IL App (1st) 100011, ¶ 45. Under *Terry*, "a police officer may lawfully stop a person for brief questioning when the officer reasonably believes that the person has committed, or is about to commit, a crime." *People v. Jackson*, 2012 IL App (1st) 103300, ¶ 16.

¶ 21 "To justify a *Terry* stop *** the officer must have a reasonable, articulable suspicion that the person detained has committed or is about to commit a crime." *Maxey*, 2011 IL App (1st) 100011, ¶ 46. The reasonable suspicion standard is "less demanding" than the probable cause standard required for arrests. *People v. Timmsen*, 2016 IL 118181, ¶ 9. Under *Terry*, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. When reviewing the validity of a *Terry* stop and whether an officer had reasonable suspicion, we apply an objective standard and consider the totality of the circumstances. *Timmsen*, 2016 IL 118181, ¶

9 (citing *Terry*, 392 U.S. at 21)). We also "consider commonsense judgments and inferences about human behavior." *People v. Payne*, 393 Ill. App. 3d 175, 180 (2009).

¶ 22 During a narcotics surveillance investigation, Janik saw a woman drive a "red Nissan Pathfinder" with Maryland license plates up to an apartment building on West Grenshaw. From Janik's car about 10 to 15 feet away, he saw defendant exit the passenger side of the vehicle, walk up to the door of the apartment building, and ask for "one blow," which Janik testified was street terminology for heroin. Defendant then tendered United State's currency to a man in exchange for a "small item." Janik informed Gentile about what he had observed and Gentile saw a vehicle matching Janik's description come from the same area where Janik had just observed defendant in engage in the transaction.

¶ 23 Based on Janik's observations and considering the totality of the circumstances, Gentile had a reasonable suspicion that defendant had purchased heroin and possessed illegal drugs and thus had committed, or was committing, a crime. Gentile therefore had reasonable suspicion to justify an investigative *Terry* stop.

¶ 24 Defendant argues Janik's testimony that he heard defendant ask for "blow" 10 to 15 feet away in a closed car was incredible. However, the court denied defendant's motion to suppress statements, which we discuss below, and found that defendant's incriminating statement was made "during the course of an investigation based upon the Terry [*sic*] stop *** and what *** Gentile learned for [*sic*] Janik." It therefore necessarily found Janik's testimony regarding his observations of the transaction to be credible. From our review of the testimony, we cannot find that the court's credibility determination regarding Janik's observations was against the manifest weight of the evidence. See *People v. Slater*, 228 Ill. 2d 137, 149 (2008) (on review of a motion

to suppress, we give "great deference" to the trial court's credibility determinations and factual findings and these finding are only reversed if they are "against the manifest weight of the evidence").

¶ 25 Defendant argues that, even if Gentile had reasonable suspicion to conduct an investigative stop, he violated defendant's constitutional rights by performing a patdown search, as he did not have "any legitimate reason" to suspect that defendant was armed and dangerous. He argues that his incriminating statement and the drugs recovered from the vehicle should be suppressed because they were the result of an illegal seizure. We note that no evidence was recovered from defendant's person during the patdown search. Nevertheless, because defendant made his incriminating statement during the execution of the patdwn search, we will review whether his search was justified under *Terry*.

¶ 26 We conclude that Gentile's patdown search was justified. When Gentile stopped defendant's vehicle, he had reasonable suspicion based on Janik's observations that defendant had just engaged in an illegal narcotics transaction. Then, when Gentile approached defendant, he saw defendant move his left hand "towards his left leg along the side of his left leg." Gentile believed defendant was trying to hide a weapon, explaining that defendant had "purchased narcotics" and "I didn't know if it was possibly a weapon of some sort that he was trying to conceal." Based on these facts, Gentile's belief that defendant was trying to conceal a weapon was reasonable. See *People v. Richardson*, 2017 IL App (1st) 130203-B, ¶ 26 (where the defendant's vehicle matched the description of a vehicle that had been stolen 90 minutes before the officers stopped him, the court found, "[t]his fact could contribute to the officer's reasonable

suspicion that the occupants were involved in criminal activity and were potentially armed and dangerous").

¶ 27 To justify the patdown search, Gentile " 'need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' " *Richardson*, 2017 IL App (1st) 130203-B, ¶ 23 (quoting *Terry,* 392 U.S. at 30-31). In considering the totality of the circumstances, we conclude that Gentile had reasonable suspicion that defendant was armed and dangerous and, thus, the patdown search was justified. See *Richardson*, 2017 IL App (1st) 130203-B, ¶¶ 26-27 (the court concluded that the officer's patdown search was justified where defendant matched the description of a reportedly stolen vehicle and his "movements in the car supported a reasonable suspicion that he was armed or had access to a weapon in the vehicle").

¶ 28 Given our findings, defendant's incriminating statement, which we discuss below in context of *Miranda*, and the resultant recovery of the heroin from the passenger seat would not have been suppressed. Thus, defendant's motion to quash arrest and suppress evidence would not have been meritorious. Defendant therefore has not established a claim for ineffective assistance of counsel, as he did not demonstrate that he was prejudiced when trial counsel did not litigate the motion.

¶ 29 Defendant next contends that the trial court erred when it denied his motion to suppress the statement he made to Gentile because the statement was the product of custodial interrogation and he was not advised of his *Miranda* rights. Defendant asserts he was in custody for purposes of *Miranda* and Gentile's comments were intended to elicit an incriminating

response. He therefore contends that his statement should have been suppressed and that we should reverse his conviction because his statement was necessary to sustain the conviction.

¶ 30 When we review a ruling on a motion to suppress, the trial court's findings of fact and credibility determinations are "accorded great deference and will be reversed only if they are against the manifest weight of the evidence." *Slater*, 228 Ill. 2d at 149. We review *de novo* the court's ultimate ruling on the motion. *Id.*

¶ 31 Under *Miranda v. Arizona*, 384 U.S. 436, 444, 478-79 (1966), an individual subject to custodial interrogation must be informed of certain rights before any questioning. *Miranda* warnings are only necessary, however, when "the person is both in custody and being interrogated by the police." *People v. Briseno*, 343 Ill. App. 3d 953, 957 (2003).

¶ 32 *Miranda* warnings are not required when "the police conduct a general on-the-scene questioning as to facts surrounding a crime." *People v. Parks*, 48 Ill. 2d 232, 237 (1971). Rather, "the safeguards prescribed by Miranda [*sic*] become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' " *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)). For example, in *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984), the United States Supreme court concluded that individuals "temporarily detained" pursuant to ordinary traffic stops are not "in custody" for purposes of *Miranda*. It found the "usual traffic stop is more analogous to a so-called 'Terry stop,' [citation], than to a formal arrest." *Berkemer*, 468 U.S. at 439.

¶ 33 We find defendant was not in custody for purposes of *Miranda*. We first note, as previously discussed, the *Terry* stop was justified, as Gentile had a reasonable suspicion that defendant had committed a crime, *i.e.*, possession of illegal narcotics, based on the transaction

that Janik observed. Although Gentile testified that defendant was not free to leave during the patdown, "the fact that defendant was unable to leave, and thus was subject to a *Terry* seizure, is not dispositive on the issue of whether defendant was 'in custody' for purposes of Miranda." *People v. Jeffers*, 365 Ill. App. 3d 422, 429 (2006).

¶ 34 The relevant factors the courts consider to determine whether a statement was made in a custodial setting include: "(1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present during the interrogation; (3) the presence or absence of family and friends of the individual; (4) any indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused." *Slater*, 228 Ill. 2d at 150.

¶ 35 Taking all the circumstances and factors into consideration, we find that defendant was not in custody under *Miranda.*

¶ 36 The stop took place at 7:30 p.m. on a public street at 3700 West Roosevelt Road, there were only two officers present, and only one officer performed the patdown search. See *Briseno*, 343 Ill. App. 3d at 958 (2003) (finding that the defendant was not in custody under *Miranda*, noting that the defendant was stopped on a "major thoroughfare" and only two officers were in his "immediate presence").

¶ 37 Further, defendant did not make his statement after prolonged detention but gave it within "seconds" of getting out of the car for the patdown search. Gentile had not placed him in a locked squad car or told him he was being arrested. He had not drawn his gun, used force, or placed defendant in handcuffs. See *Havlin*, 409 Ill. App. 3d at 434-35 (where the officer

searched the vehicle during a traffic stop and then asked the defendant and the other two occupants about contraband found inside it, the court found that the defendant was not in custody, noting that the officers did not display weapons or physically restrain the individuals by force and defendant was not placed in a locked squad car, handcuffed, or told he was under arrest).

¶ 38 Furthermore, Gwendolyn Smith, identified as defendant's girlfriend in the presentence investigation report (PSI), was also at the scene, because she was the driver of the vehicle. And there is nothing in the record to show that defendant's age, intelligence, or mental makeup negatively affected his understanding of the situation. Under the circumstances and factors, defendant was not in custody under *Miranda* when he made his statement.

¶ 39 Moreover, even if we would find that defendant was in custody when he was stopped, we would find that defendant was not subject to police interrogation. "Under *Miranda*, an 'interrogation' refers both to express questioning and to any words or actions, other than those normally accompanying arrest and custody, that the police should know are reasonably likely to elicit an incriminating response." *People v. Jones*, 337 Ill. App. 3d 546, 551 (2003). The primary focus is on the defendant's perceptions, not the officer's intent. See *Jones*, 337 Ill. App. 3d at 551.

¶ 40 Here, Gentile's statements during the patdown search were "purely informational." Gentile informed defendant why he had been stopped, that police had been "watching the block that he just left," and may have told him that an officer saw him purchase drugs.[1] Gentile did not

[1] Gentile's testimony is unclear regarding whether he actually told defendant that the officers saw him purchase drugs. In response to questioning, he had acknowledged telling defendant officers saw him purchase drugs. But he also testified that "I just informed him that we were on the block. That's all I ever did" and "I actually just told him we were watching the block, and that's when he gave me that

ask him questions, tell him he was looking for heroin, or ask him where it was located. Because the statements did not seek or require a response from defendant, who made his statement within "seconds" of getting out the car, we cannot find that Gentile should have known that his statements informing defendant why the officer's stopped his vehicle were likely to elicit an incriminating response. See *Jones*, 337 Ill. App. 3d at 553 (where the officer told the defendant, who was under arrest after a traffic stop, that he had "located a handgun in the car" and the defendant asked him why he "went to a locked glove box without a search warrant," the court found that the officer's statement was "purely informational" and it could not determine that the officer "should have known that the statement was reasonably likely to elicit an incriminating response, as the statement did not seek or require a response at all."). Accordingly, we find that Gentile's statements were not interrogative.

¶ 41 Based on the circumstances and facts in this case, we conclude that defendant was not in custody or subject to interrogation under *Miranda*. The court therefore properly denied defendant's motion to suppress his statements.

¶ 42 Defendant next contends that the fines, fees, and costs order should be corrected because he was incorrectly assessed the $5 electronic citation fee and the $25 State Police services fund fine. He requests that we vacate these fees.

¶ 43 Defendant concedes that he did not raise his challenge to the assessed fines and fees in the trial court. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). He argues that we may review his challenge under the plain error doctrine and we have authority to modify the fines, fees and

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information." During the contemporaneous argument on the motion to suppress statements and trial, defense counsel acknowledged the conflict, arguing that, when Gentile and defendant were talking, Gentile "might not have said where's the drugs or we saw you at the house buying heroin and let me know about that in a classic question format, but he is asking questions. He is expecting an answer."

costs order under Illinois Supreme Court Rule 615(b)(1). The State agrees that the challenged assessments were improperly assessed. The State does not dispute that we have authority to review defendant's unpreserved challenge under the plain error rule.

¶ 44 We disagree with defendant that his challenge is reviewable under plain error. *People v. Grigorov*, 2017 IL App (1st) 143274, ¶¶ 13-14; *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9. Nevertheless, because the State does not argue that defendant forfeited review of his challenge to the assessed fines and fees, it has forfeited any forfeiture argument. See *People v. Williams,* 193 Ill. 2d 306, 347-48 (2000) (rules of waiver and forfeiture apply to the State). Therefore, even though defendant did not raise his challenge to the fines and fees in the trial court, we will review the issue. We review the propriety of court-ordered fines and fees *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 45 Defendant argues, and the State concedes, that we should vacate the $5 electronic citation fee. The statute authorizing the $5 electronic citation fee provides that the fee "shall be paid by the defendant in any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision." 705 ILCS 105/27.3e (West 2014). This fee does not apply to felonies. *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46. Here, defendant was convicted of possession of less than 15 grams of heroin, which is a Class 4 felony. 720 ILCS 570/402(c) (West 2014). Therefore, we vacate the $5 electronic citation fee.

¶ 46 Defendant next argues, and the State concedes, that we should vacate the $25 State Police services fund fine. The statute authorizing the fine provides that "[t]he provisions of this subsection (d), other than this sentence, are inoperative after June 30, 2011." 730 ILCS 5/5-9-

1.1(d) (West 2014). Defendant committed his offense in 2014. This fine therefore does not apply to him. Thus, we vacate the $25 State Police services fund fine.

¶ 47 For the reasons stated above, we affirm defendant's conviction and order the clerk of the circuit court to modify the fines, fees, and costs order accordingly.

¶ 48 Affirmed; fines, fees, and costs order modified.