2019 IL App (1st) 171451-U

No. 1-17-1451

Order filed October 15, 2019

Second 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. 16 CR 9861
	)	
LEONARD EARLY,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Coghlan concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's judgment, concluding the record is not sufficient to support defendant's claim of ineffective assistance of counsel. Pursuant to Illinois Supreme Court Rule 472(e), we remand so defendant may raise to the trial court his challenges to the application of *per diem* presentence incarceration credit.

¶ 2 Following a bench trial, the trial court found defendant guilty of unlawful use of a weapon by a felon, sentenced him to three years' imprisonment, and imposed various fines and fees. Defendant appeals, arguing (1) he was denied the effective assistance of counsel as a result

of his trial counsel's failure to file a motion to quash arrest and suppress evidence; and (2) the court erred in its application of *per diem* credit against the fines and fees. We affirm defendant's conviction but remand the matter for further proceedings consistent with Illinois Supreme Court Rule 472(e) (eff. May 17, 2019).

¶ 3 The State charged defendant by indictment with two counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2016)) based on his possession of a handgun and bullets. The matter proceeded to a bench trial, at which the following evidence was presented.

¶ 4 Sergeant Brian Johnson testified that shortly after midnight on May 27, 2016, he responded to a call of a "person with a handgun" at a residence in the 7900 block of South Honore Street in Chicago. Johnson arrived at the residence, left his unmarked squad car, and approached the residence. Defendant's daughter, Erica Early, met Johnson outside and, after the two had a brief conversation, Johnson entered the residence.

¶ 5 When Johnson entered the residence, he saw defendant, who appeared to be sleeping, on the couch in the front room. Johnson asked defendant where the gun was, and defendant told him it was in a tan jacket in the front closet. Defendant was not given his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) before being asked where the gun was.

¶ 6 Johnson went to the closet, opened it, and removed a tan Carhartt jacket "which was kind of laid on top of some other clothing." Johnson "felt the jacket from inside and out" and felt a hard object which he believed to be a handgun inside the jacket. Johnson removed a semiautomatic handgun from inside the jacket and handed it to Officer Adrian Rosiles.

¶ 7 After recovering the handgun, Johnson did not speak any further with defendant but did speak with Erica and defendant's wife, Gloria Thurman. Defendant was then placed into custody.

¶ 8 The parties stipulated that if Rosiles were called to testify, he would state that shortly after midnight on May 27, 2016, he responded to a call in the 7900 block of South Honore Street in Chicago and entered the residence. Johnson handed him a semiautomatic handgun. Rosiles removed one live round of ammunition from the chamber of the gun and the magazine, which contained five live rounds of ammunition. The handgun was properly inventoried by Chicago police officers.

¶ 9 A certified copy of defendant's conviction for home invasion and armed robbery in Vermillion County case no. 95 CF 454 was admitted into evidence without objection.

¶ 10 Rosiles testified that on May 27, 2016, he was on patrol with his partner, Officer Harry Vazquez. Shortly after midnight, he and Vazquez responded to "a person with a gun" call in the 7900 block of South Honore Street in Chicago. Rosiles entered the residence, where Johnson and other officers were present. When Rosiles arrived, defendant "was barely waking up."

¶ 11 Rosiles observed defendant direct Johnson to a closet, from which Johnson recovered a handgun that was in a jacket. Defendant was placed into custody and transported to a processing room at the police station. At the police station, defendant waived his *Miranda* rights and spoke with Rosiles and Vazquez. Rosiles asked defendant what had happened earlier in the day, and defendant told them he had a verbal altercation with his wife regarding text messages she had received from another person. According to Rosiles, defendant had told Thurman, not verbatim, "he would drop whoever she was talking with." Rosiles then asked defendant where he got the firearm, to which defendant replied "from the streets." Rosiles also asked defendant whether he

had a valid firearm owner's identification (FOID) card or concealed carry license (CCL), and defendant stated he did not. During the interview, defendant volunteered he was a convicted felon.

¶ 12 Defendant made a motion for a directed finding, which the trial court denied.

¶ 13 Defendant testified that shortly after midnight on May 27, 2016, he was asleep on the couch in Thurman's house and shaken awake by 10 police officers. When defendant woke up, the police officers placed him in handcuffs, placed his black jacket that was on the couch with him over his shoulders, and took him to the police car. The officers took defendant to the police station.

¶ 14 Defendant denied telling Rosiles that he had purchased the gun "off the street," he had told Thurman he was "going to drop whoever she was talking to," and he told police officers he had a gun. Defendant admitted, however, he did not have a valid FOID card at the time of the offense. Defendant believed he was at the station for a misdemeanor. Defendant testified the police had the gun when he woke up and he did not see from where it was recovered.

¶ 15 The State called Vazquez in rebuttal, who testified that when he arrived at the residence with Rosiles, he spoke with Erica, who appeared "shaken up," frightened, and scared. Vazquez entered the residence and woke defendant by talking to him. Vazquez confirmed Johnson's and Rosiles's accounts of what occurred inside the residence and during the interview at the police station, except he testified the gun was recovered from a black, not tan, coat in the closet.

¶ 16 Additionally, over his objection, defendant's two prior convictions for retail theft were admitted into evidence for the purpose of impeachment.

¶ 17 Finding the officers' testimony credible despite the fact defendant's postarrest statements were not written or recorded, the trial court found defendant guilty of the charge relating to his possession of the handgun but not the bullets. Defendant filed a posttrial motion, which the court denied.

¶ 18 The trial court sentenced defendant to three years' imprisonment and imposed various fines and fees. This appeal followed.

¶ 19 On appeal, defendant first contends he was deprived of his constitutional right to effective assistance of counsel where his attorney failed to file a motion to quash arrest and suppress evidence. When evaluating a claim of ineffective assistance of counsel, we apply a two-prong test under which the defendant must prove his counsel's performance fell below an objectively reasonable standard and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Caballero*, 126 Ill. 2d 248, 259-60 (1989). "To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). Acts or omissions by counsel will not be considered matters of strategy, however, where there is no sound tactical reason that could conceivably support the act or omission. *People v. Nunez*, 263 Ill. App. 3d 740, 748 (1994).

¶ 20 Ordinarily, the decision to file a pretrial motion is a matter of trial strategy which cannot form the basis of a claim of ineffective assistance claim. *People v. Johnson*, 372 Ill. App. 3d 772, 777-78 (2007). Thus, "[w]here a defendant alleges that counsel was ineffective for failing to file a motion to suppress evidence, the defendant must overcome the 'strong presumption' that counsel's decision was the result of sound trial strategy." *People v. Joiner*, 2018 IL App (1st)

150343, ¶ 38 (quoting *People v. Little*, 322 Ill. App. 3d 607, 611 (2001)). In this context, the defendant establishes prejudice by demonstrating "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 cannot find counsel's performance deficient where the motion would have been futile. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 21 Defendant's entire argument is premised upon the officers' lack of probable cause to arrest him. An arrest made without probable cause violates the United States and Illinois constitutions' prohibitions against unreasonable searches and seizures. *People v. Lee*, 214 Ill. 2d 476, 484 (2005). According to defendant, the only evidence relating to probable cause for his arrest was the officers' testimony they responded to "a person with a gun" call and then arrested him after they recovered a gun from where defendant told the police it could be found. Asserting the mere possession of a firearm inside one's home is not a crime (see *e.g.*, *People v. Aguilar*, 2013 IL 112116), defendant argues the record is sufficient to demonstrate the officers lacked probable cause to arrest him.

¶ 22 The police's determination of probable cause focuses on the facts known to the police at the time the arrest was made. *Lee*, 214 Ill. 2d at 484. "A warrantless arrest cannot be justified by what is found during a subsequent search incident to arrest." *Id.* A court does not concern itself with a police officer's subjective belief as to the existence of probable cause; rather, we apply an objective analysis. *Id.* Police need only reasonable grounds to believe the defendant committed a crime to justify his or her arrest. *People v. Buss*, 187 Ill. 2d 144, 206 (1999). "The standard for determining whether probable cause is present is probability of criminal activity, rather than

proof beyond a reasonable doubt." *Lee*, 214 Ill. 2d at 485. We must examine the totality of the circumstances to determine whether there is probable cause to believe defendant committed a crime and, therefore, is subject to arrest. *Id.*

¶ 23 It is defendant's burden to establish a factual basis demonstrating the unargued suppression motion would have been meritorious (*People v. Burnett*, 2019 IL App (1st) 163018, ¶ 16), but the record before us does not contain sufficient information about the circumstances relating to his arrest from which we can make this determination. Because no motion to quash arrest and suppress evidence was filed and the case just went to trial, the State was concerned only with proving defendant committed the charged offense, and it "had no reason to demonstrate the factual basis that putatively gave the officers probable cause to arrest defendant in the first place." *Burnett*, 2019 IL App (1st) 163018, ¶ 11. "As the United States Supreme Court has observed, a reviewing court often cannot entertain a claim of ineffective assistance of counsel on direct review when the claimed error was not a focus in the case below." *Id.* (citing *Massaro v. United States*, 538 U.S. 500, 504-05 (2003)). Thus, some claims of ineffective assistance of counsel must be pursued under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2018)), where a factual record to support the claim may be developed. *People v. Veach*, 2017 IL 120649, ¶¶ 46-48; see also *People v. Erickson*, 161 Ill. 2d 82, 87-88 (1994) (ineffective-assistance claims based on what counsel ought to have done may depend on proof of matters which are not in the record and such claims are not subject to procedural default in proceedings under the Act).

¶ 24 Because the record here was not developed to establish the existence or lack of probable cause, we have no means of determining the basis for the officers' probable cause determination

and, therefore, no means to determine whether defendant's attorney was ineffective for failing to file a motion to quash arrest and suppress evidence. See *Burnett*, 2019 IL App (1st) 163018, ¶ 12. Accordingly, on this record, defendant is unable to overcome the "strong presumption" that his attorney's failure to file the motion was the result of sound trial strategy, and we must affirm his conviction. See *Joiner*, 2018 IL App (1st) 150343, ¶ 38.

¶ 25 In *Burnett*, we rejected an argument almost identical to the one defendant raises here, finding the defendant attempted "to spin the lack of testimony about probable cause into a conclusion that *there was* no probable cause" and had drawn "an affirmative conclusion from a negative premise." (Emphasis in original.) *Burnett*, 2019 IL App (1st) 163018, ¶ 14. We conclude, as we did in *Burnett*, the lack of evidence currently in the record concerning probable cause does not mean there was no evidence to support a probable cause determination and does not demonstrate defendant's arrest was unjustified. *Id.*

¶ 26 The State maintains the record is sufficient to resolve defendant's claim. It relies on two police reports contained in the record but the substance of which was never considered by the trial court. According to the State, the officers would have testified consistently with their reports at a suppression hearing, and the information contained therein, including the officers' conversations with Erica and Thurman at the scene and the officers' motivation for arresting defendant, would have established probable cause to arrest defendant. See *People v. Patterson*, 192 Ill. 2d 93, 111 (2000) (hearsay evidence is admissible at hearings on motions to quash arrest and suppress evidence).

¶ 27 We reject the State's invitation to rely on the police reports. If we were to do so, we would be required to speculate the officers in this case would testify consistently with the

reports, offering nothing more and nothing less. To accept the State's position would require this court to make findings of fact relating to the circumstances of defendant's arrest, without the benefit of live testimony and adversarial testing. We do not have such power; rather, we, as a court of review, are bound to "review the case in light of the record made in the trial court." *People v. Young*, 124 Ill. 2d 147, 152 (1988). Because the information contained in the police reports was never presented to the trial court, we are unable to consider them here.

¶ 28 After examining defendant's ineffective-assistance claim in accordance with *Veach*, 2017 IL 120649, we conclude defendant's claim is one which is better suited for proceedings under the Act, where defendant may develop a factual record to support his claim.

¶ 29 Defendant, citing *People v. Fellers*, 2016 IL App (4th) 140486, argues we may retain jurisdiction over this matter and remand it for an evidentiary hearing on the issue of his attorney's ineffectiveness. In *Fellers*, 2016 IL App (4th) 140486, ¶ 34, the court concluded the record on direct appeal was not sufficient to support the defendant's ineffective-assistance claim, which was based on counsel's failure to file a motion to suppress. However, because collateral relief was not available to the defendant, the court retained jurisdiction and remanded the case to the trial court for a hearing, at which the parties would be permitted to elicit evidence and establish a factual record on the issue. *Id.* ¶¶ 35-36. Defendant notes that his discharge from mandatory supervised release is imminent, at which point he will no longer be able to seek collateral relief (see *People v. Rajagopal*, 381 Ill. App. 3d 326, 329-30 (2008) (recognizing relief under the Act is not available to defendants who have completed their sentences)), and we should therefore retain jurisdiction and remand the matter for a hearing on his claim of ineffective assistance.

¶ 30 We decline defendant's invitation to retain jurisdiction and remand this matter for a hearing. In doing so, we note there was no prohibition against defendant seeking relief under the Act while his direct appeal was pending. See *People v. Harris*, 224 Ill. 2d 115, 126-27 (2007) (A postconviction petition may be filed while a direct appeal is pending, and postconviction proceedings and direct appeals may proceed at the same time.). The fact defendant is now or may soon be unable to seek relief using the proper vehicle for this particular claim—proceedings pursuant to the Act—does not warrant a different result, particularly where defendant could have sought collateral relief after his conviction became final. Further, we note the record contains no evidence from which we can adduce that defendant's sentence has, in fact, been completed. The Department of Corrections website, upon which defendant relies and of which we may take judicial notice (see *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 66), establishes only that defendant's "projected discharge date" is imminent. https://www2.illinois.gov/idoc/Offender/pages/inmatesearch.aspx (last visited September 20, 2019). Accordingly, we affirm his conviction. See *Burnett*, 2019 IL App (1st) 163018, ¶ 16.

¶ 31 In his opening brief, defendant argued for the first time on appeal that the trial court erred in its application of *per diem* credit against various fines and fees. In his reply brief, however, defendant agrees with the State this matter should be remanded so defendant may file a motion raising these issues under Illinois Supreme Court Rule 472. We agree with the parties.

¶ 32 Illinois Supreme Court Rule 472 provides the circuit court retains jurisdiction to correct certain sentencing errors at any time following judgment, including during the pendency of an appeal. Ill. S. Ct. R. 472(a) (eff. May 17, 2019). Among the errors which may be corrected are "[e]rrors in the application of *per diem* credit against fines." Ill. S. Ct. R. 472(a)(2) (eff. May 17,

2019). Pursuant to Rule 472(e), in all criminal cases pending on appeal as of March 1, 2019, in which a party has attempted to raise an error with respect to the imposition or calculation of fines, fees, assessments, or costs for the first time on appeal, the reviewing court must remand the matter to the circuit court to allow the party to file a motion pursuant to the rule. Ill. S. Ct. R. 472(e) (eff. May 17, 2019); see *People v. Sanders*, 2019 IL App (1st) 160718, ¶ 53.

¶ 33 Here, defendant's appeal was pending on March 1, 2019, and he has raised the purported error with respect to the application of *per diem* credit against fines for the first time on appeal. Accordingly, we "remand to the circuit court to allow [defendant] to file a motion pursuant to [Rule 472]." Ill. S. Ct. R. 472(e); see *People v. Whittenburg*, 2019 IL App (1st) 163267, ¶ 6.

¶ 34 For the reasons stated, we remand the *per diem* credit issues pursuant to Illinois Supreme Court Rule 472(e) and affirm the trial court's judgment in all other respects.

¶ 35 Affirmed and remanded as to fines fees and costs.