2014 IL App (1st) 121495-U

FIFTH DIVISION
August 1, 2014

No. 1-12-1495

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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. 11 CR 2810
	)	
JOSHUA YOUNG,	)	Honorable
	)	John T. Doody, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not abuse its discretion in denying the defense's request to disclose a police surveillance location where the transcript of the *in camera* hearing supported the State's case. The precise surveillance location was not necessary for defendant to cross-examine the surveillance officer about observing the offense.

¶ 2 Following a bench trial, defendant Joshua Young was convicted of the delivery of between 2.5 grams and 10 grams of cannabis on school grounds (720 ILCS 550/5(b) (West 2010); 720 ILCS 550/5.2(d) (West 2010)) and was sentenced to 18 months of probation. On

appeal, defendant contends the trial court erred in denying the defense's request that the State disclose the surveillance location from which an officer observed defendant participate in two drug transactions. We affirm.

¶ 3 In May 2011, defense counsel filed a pre-trial motion to compel disclosure of the surveillance location used by Chicago police officer Kyle Mingari in observing defendant. Counsel asserted that knowledge of the surveillance location was "relevant and helpful to the defense," and non-disclosure of the location would hinder the defense's ability to investigate the officer's opportunity to observe the activity. Counsel argued disclosure of the location was material to the issue of defendant's guilt because the case rested on Mingari's ability to see and hear the transactions. The State responded the surveillance location should not be disclosed due to the public's interest in officer safety and protecting the location for future use. After an *in camera* hearing at which Mingari testified, the court noted the transcript of that hearing would be sealed. The court denied the defense's motion for disclosure of the surveillance location, stating its ruling was based on "both public safety and [the] officer's safety."

¶ 4 At trial, Mingari testified that at about 7:45 p.m. on January 9, 2011, he was conducting surveillance in the area of 4932 W. West End Avenue in Chicago. Mingari saw defendant wave down a vehicle and speak to the passenger in the vehicle. Mingari, who was 10 to 15 feet away from the vehicle, heard defendant ask "How many do you need?" and the passenger replied, "Three." Mingari saw defendant hand items to the passenger in exchange for currency. The officer testified the street was illuminated by artificial light from street lamps and the transaction occurred directly under a streetlight. Mingari testified he believed he had observed a narcotics

transaction, and he radioed two enforcement officers with a description of the vehicle and the direction that the vehicle had travelled after the exchange with defendant.

¶ 5 Chicago police officer Alexander testified he and a partner were working in an unmarked squad car as part of a team of enforcement officers. After receiving a radio call, Alexander and his partner stopped a vehicle in the 4900 block of West End Avenue. Alexander recovered three small plastic bags of suspect cannabis from the passenger of the vehicle.

¶ 6 Mingari testified that about five minutes after he called the enforcement team, he received a return call that the stop was "positive." Mingari then watched as defendant waved down another vehicle, which stopped on the opposite side of the street from where the first car had stopped. Mingari heard defendant ask the passenger, "How many do you need?" and the passenger responded, "One." Defendant handed the passenger unknown items in exchange for money. Mingari said he was 25 to 30 feet away from that transaction but had an unobstructed view. After the second transaction, Mingari again radioed the enforcement officers about the vehicle and received a return message. Mingari then radioed defendant's description and location to the enforcement officers, who arrived in the vicinity of Mingari and arrested defendant.

¶ 7 On cross-examination, Mingari stated he did not recall if he was wearing street clothes or a uniform on that day. He did not use any visual aids while on surveillance. Defense counsel asked to elicit further details about Mingari's vantage point "without asking the address," and counsel elicited the officer's surveillance location was at street-level. Mingari further stated that he was in a crouched position and was not behind a vehicle. Mingari again stated he was 10 to 15 feet away from defendant and on defendant's side of the street when he observed the first transaction and reaffirmed other details of that exchange. Mingari said he did not know the

denomination of the currency accepted by defendant and, at the time of the transaction, he did not know the contents of the items that were exchanged.

¶ 8 Mingari stated that between the first and second transactions, defendant walked into a gangway. When Mingari observed the second transaction, he was "in the vicinity of [his] original surveillance location" but walked about 10 to 15 feet away from where he watched the first transaction. Mingari said it was possible that cars were parked on the side of the street where he was standing when he observed the second transaction. During that exchange, the officer was on the driver's side of the car while defendant spoke to the passenger, and he saw defendant accept currency and count multiple bills.

¶ 9 The parties stipulated to the chain of custody and the contents of the bags retrieved from the two vehicles. The bags contained a total of 3.206 grams of cannabis. The parties also stipulated the distance from 4932 W. West End Avenue to a nearby elementary school, Spencer Elementary at 214 N. Lavergne, is 799 feet.

¶ 10 In closing argument, defense counsel asserted that it was unclear what objects were passed between defendant and the occupants of the vehicles. Counsel also challenged Mingari's ability to overhear defendant's conversations. The trial court found defendant guilty of the charged offense. Defendant's post-trial motion was denied, and defendant now appeals.

¶ 11 As a threshold matter, we address the State's contention that defendant forfeited any challenge to the trial court proceedings by failing to raise in his post-trial motion the issue of the surveillance location disclosure. To preserve a claim for review, a defendant ordinarily must object at trial and also include the alleged error in a post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). We do not find defendant has forfeited this issue, because *Enoch* includes

an exception to forfeiture for constitutional issues that were raised at trial but not preserved in a post-trial motion. See *People v. Cregan*, 2014 IL 113600, ¶ 18 (noting the possibility that those issues will be eventually raised in a post-conviction petition). We therefore consider defendant's substantive arguments on appeal.

¶ 12 Defendant contends his conviction should be reversed and his case remanded for a new trial because the trial court erred in denying his motion to disclose the surveillance location used by Mingari. Defendant contends that as a result of the court's ruling, his constitutional right to confront opposing witnesses and question Mingari about his location was violated. In the alternative, defendant asks this court to reject the use of the qualified privilege protecting the disclosure of surveillance locations because the Illinois Supreme Court has not spoken on the issue.

¶ 13 We first address defendant's latter contention. Defendant asserts that two other states have refused to apply a surveillance location privilege, and he contends Illinois courts "have struggled to find a workable method to measure when the privilege should be allowed." Defendant contends the surveillance privilege should be rejected as a matter of law.

¶ 14 As the cases set out below demonstrate, Illinois has formed a consistent body of law regarding the surveillance privilege. As this court recently noted in *People v. Price*, 404 Ill. App. 3d 324, 330 (2010), the surveillance privilege was first recognized in Illinois in *People v. Criss*, 294 Ill. App. 3d 276 (1998), and evolved from the informant's privilege, which has been codified in our state. See 735 ILCS 5/8-802.3 (West 2010); *Criss*, 294 Ill. App. 3d at 279-80 (noting that several states had recognized the surveillance location privilege by 1998). In light of

the Illinois precedent applied in this decision, we reject defendant's contention that the surveillance location privilege should not be applied.

¶ 15 A criminal defendant has a constitutional right to confront witnesses against him, which includes the right to cross-examination. See U.S. Const., amends. VI, XIV, Ill. Const. 1970, art. 1, § 8; *Crawford v. Washington*, 541 U.S. 36, 54 (2004). The defendant's right to confront a witness is not absolute, however, and the right to cross-examine is satisfied when the defendant is permitted to expose the fact-finder to facts from which it can assess the credibility and reliability of the witnesses. *People v. Quinn*, 332 Ill. App. 3d 40, 43 (2002). The trial court is given broad discretion to limit the scope of cross-examination at trial, and the court's restriction of cross-examination will not be reversed absent an abuse of discretion resulting in manifest prejudice. *Price*, 404 Ill. App. 3d at 330; *Criss*, 294 Ill. App. 3d at 279-80.

¶ 16 The State enjoys a qualified privilege regarding the disclosure of covert surveillance locations. *Quinn*, 332 Ill. App. 3d at 43; *People v. Knight*, 323 Ill. App. 3d 1117, 1127-28 (2001); *Criss*, 294 Ill. App. 3d at 281. The State bears the initial burden of proof in demonstrating that the surveillance privilege should apply in a given case. *Price*, 404 Ill. App. 3d at 331. The State carries its burden of proof by presenting evidence to the court that the surveillance location was either (1) on private property with the permission of the owner, or (2) in a location that is useful and whose utility would be compromised by disclosure. *Price*, 404 Ill. App. 3d at 332.

¶ 17 In evaluating whether the privilege applies, the trial court should hold an *in camera* hearing outside the presence of the defendant in which the State's witness must reveal the surveillance location and make a preliminary showing that disclosure of the location would harm

the public interest. *Knight*, 323 Ill. App. 3d at 1127. The need for disclosure of a surveillance location is decided on a case-by-case basis, and the trial court must balance the public interest with the defendant's need to prepare a defense and to engage in "accurate fact finding." *Quinn*, 332 Ill. App. 3d at 43. The factors the court should consider regarding the public interest in nondisclosure are the crime charged, the possible defenses, and the potential significance of the privileged information. *Id*.

¶ 18 If the State has carried its burden, the defendant can overcome the privilege by demonstrating the need for disclosure. *Criss*, 294 Ill. App. 3d at 281 (noting, though, that mere speculation as to the need for disclosure is not sufficient). Disclosure of a surveillance location will be compelled at trial if the allegedly privileged information is material to the issue of guilt. *Knight*, 323 Ill. App. 3d at 1127.

¶ 19 In the case at bar, defendant acknowledges he was subject to a greater burden as to the need for disclosure because the defense sought disclosure of the surveillance location at a pre-trial hearing as opposed to during trial. See *Knight*, 323 Ill. App. 3d at 1126 ("the surveillance privilege should be treated differently when raised at a suppression hearing as opposed to when it is raised at a trial"); see also *People v. Stokes*, 392 Ill. App. 3d 335, 340 (2009). In seeking disclosure at a pre-trial hearing, the defendant must make a "strong showing that the disclosure of the location is material or necessary to his defense and that his need for the information outweighs the public interest" in the location's secrecy. *Price*, 404 Ill. App. 3d at 332 (in contrast, when the State attempts to raise the surveillance privilege for the first time during trial, a defendant need only show the location would be "relevant and helpful" to his defense or "essential to the fair determination" of the cause); *Criss*, 294 Ill. App. 3d at 281.

¶ 20 In the instant case, after the defense's pre-trial motion, the trial judge held an *in camera* proceeding in which the officer identified the surveillance location and explained the reasons not to reveal it, allowing the court to consider whether the disclosure of the location would harm the public interest. See *Knight*, 323 Ill. App. 3d at 1127; see also *People v. Britton*, 2012 IL App (1st) 102322, ¶ 24. After hearing Mingari's *in camera* testimony, the trial court concluded the surveillance location would not be disclosed for the safety of the public and the police. The record on appeal includes the sealed transcript of the *in camera* proceeding, which we have reviewed, and we find it supports the State's burden. Defendant therefore was required to make a strong showing that his need to know the surveillance location was material or necessary to his defense or that it outweighed the public interest in keeping the location secret. See *Price*, 404 Ill. App. 3d at 332.

¶ 21 Defendant contends it was evident from Mingari's trial testimony that the surveillance took place in a building in the area of 4932 W. West End Avenue, and thus the State had a minimal interest in maintaining the privacy of a slightly more precise surveillance location. However, this court has rejected the argument that a defendant must be allowed to question an officer about an exact surveillance site. *Stokes*, 392 Ill. App. 3d at 342; *Knight*, 323 Ill. App. 3d at 1127-28. The protection of a specific surveillance site, when the defense is aware of the general location of the officers, has been upheld where the defense has sufficient information to question the surveillance officer. See *Quinn*, 332 Ill. App. 3d at 44 (defense counsel was able to sufficiently challenge officer's credibility and reliability).

¶ 22 Here, defense counsel was able to thoroughly cross-examine Mingari about his physical position (street-level, in a crouched position), whether he was in uniform, his non-use of visual

aids, any obstructions in his line of sight, and his distance from the transactions. Although the officer testified he lost sight of defendant when defendant went into a gangway between transactions, defendant's identity as the seller was not in question. Instead, in closing argument, the defense questioned the officer's ability to view the transactions in arguing that reasonable doubt existed as to the contents of the items defendant exchanged with the vehicle occupants.

¶ 23 Defendant further argues that even if the State met its burden through the testimony at the *in camera* hearing, the surveillance location should have been disclosed to the defense because the State's case relied almost entirely on Mingari's testimony. The testimony in this case is comparable to that in *Quinn*, where the trial court's limitation of the defense's cross-examination of the surveillance officer as to his location was upheld. *Id*. at 42-43. Here, as in *Quinn*, the testimony of the surveillance officer testimony was corroborated by the enforcement officer, who recovered three bags from the passenger of the vehicle, and the identity of the offender was not contested.

¶ 24 In arguing that the need for disclosure was driven by the "centrality" of Mingari's testimony, defendant relies heavily on *Knight* and *Price*, which are not comparable to the facts here. Indeed, this court has expressly rejected a defendant's attempt to compare those cases with a situation in which a surveillance officer was thoroughly cross-examined. See *People v. Reed*, 2013 IL App (1st) 113465, ¶ 22 (distinguishing *Knight* and *Price* in rejecting the defendant's contention that disclosure of a surveillance location must "almost always" be ordered when the case depends on a single officer's ability to observe the offense). In *Knight*, the defendant's identity as a drug seller was countered by a pastor's testimony that the defendant was unloading a van at the location where he was arrested for selling drugs, and the officer conducting

surveillance only observed one transaction, lost sight of the offender for several minutes, and recovered no money from the defendant. *Knight*, 323 Ill. App. 3d at 1120-21. In *Price*, unlike here, an *in camera* interview of the surveillance officer was not conducted.

¶ 25 Defendant next contends the State needs to prove that he actually passed contraband to the narcotics buyers. Defendant attempts to extend the right of confrontation to encompass not only the identity of the person viewed by the surveillance officer, but also to the "identity of the item he was said to tender." The evidence established the content of the items passed by defendant. Officer Mingari testified that he saw defendant pass items to the passengers after they asked for "three" and "one," respectively. The same number of items was retrieved from each of those passengers by the enforcement officer, and the items were positively tested to be cannabis.

¶ 26 In summary, the trial court did not abuse its considerable discretion in allowing the State to invoke the privilege to protect the exact location of Mingari's surveillance. The trial court heard the officer's *in camera* testimony about the State's interest in keeping the location secret. This court has reviewed the testimony and found it to support the State's burden of proof. The court then allowed defense counsel to question Mingari about his surveillance position such that the officer's credibility could be assessed. We find no abuse of discretion in the court's ruling.

¶ 27 Accordingly, the judgment of the trial court is affirmed.

¶ 28 Affirmed.