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2014 IL App (3d) 120564-U

Order filed July 8, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-12-0564
COURTNEY ATKINS, SR.,)	Circuit No. 10-CF-1047
Defendant-Appellant.)	The Honorable Timothy M. Lucas, Judge, Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial counsel was not ineffective for failing to raise motion to suppress issue in posttrial motion where the trial court properly denied defendant's motion to suppress evidence based on officers' probable cause to search defendant's vehicle.
- ¶ 2 Defendant Courtney Atkins, Sr., was charged with unlawful possession with intent to deliver a controlled substance and unlawful possession of a controlled substance after officer recovered cocaine from his vehicle and his apartment. Defendant's pretrial motion to quash arrest and suppress evidence was denied. The trial court found defendant guilty of the lesser

charge of possession and sentenced him to four-and-a-half years in prison. On appeal, defendant claims that the trial court erred in denying his motion to suppress and that trial counsel was ineffective for failing to preserve the issue in a posttrial motion. We affirm.

¶ 3 At the pretrial suppression hearing, Officers Brett Lawrence and Richard Linthicum testified that in the late morning or early afternoon hours on October 7, 2010, they were in plain clothes in a blue Chevy Trailblazer. The Trailblazer was equipped with head lights and tail lights that flashed back and forth (wigwag lights), a red and blue dash light, and a siren. Lawrence testified that he was driving and that they were headed southbound, returning to the station after responding to a large fire. Lawrence and Linthicum noticed defendant traveling two or three car lengths ahead of them in a blue Pontiac. No cars were in between them. Both officers testified that they did not know defendant. While they were driving behind defendant, the officers noticed that defendant was talking on a cell phone and that he kept looking at them in his rearview mirror. Lawrence testified that defendant's behavior made him suspicious because his Trailbazer "is pretty well known in the City of Peoria" as a police squad car.

¶ 4 As they followed defendant's vehicle, Lawrence observed defendant cross the dotted line between the two southbound lanes and drive down the middle of the road. Officer Linthicum testified that defendant crossed the dotted line twice and then crossed the center lane into the northbound lane. Both officers testified that they saw defendant reach down toward the floorboard of the vehicle. Lawrence testified that as they approached an intersection, he observed defendant look back at him in the rearview mirror and then reach underneath the driver's seat with his left hand.

¶ 5 After the intersection, defendant proceeded westbound and began weaving within the lane. Lawrence testified that, at that point, he initiated the stop based on improper lane usage.

He turned on the wigwag lights and the dash light but not the siren. Defendant pulled into the gas station and stopped next to the first pump. Lawrence and Linthicum exited the vehicle wearing their badges hanging from their necks outside their clothing. Defendant was still talking on his cell phone. Lawrence testified that as they approached, defendant looked at him over his left shoulder, smiled and pulled away at a high rate of speed. Linthicum also testified that defendant pulled away. The officers returned to their vehicle, activated the siren and followed defendant. As defendant slowed down at the stop sign, Lawrence pulled around defendant and positioned his Trailblazer in front of defendant's car. Lawrence and Linthicum ordered defendant out of the vehicle, but defendant continued to talk on his phone. Defendant looked at Lawrence and smiled; he did not get out of the vehicle. Lawrence then opened defendant's door and removed him from the driver's seat. Defendant did not resist. Lawrence testified that he placed defendant in handcuffs and arrested him for fleeing and eluding a police officer.

¶ 6 After escorting defendant to a squad car, Officer Lawrence conducted a search of defendant's vehicle in the area where he saw defendant reach down. He discovered a package of suspected cocaine under the driver's side floor mat. Defendant did not consent to a search of the vehicle.

¶ 7 Defendant was issued citations for improper lane usage and fleeing and eluding police. At the police station, the officers admonished defendant of his *Miranda* rights, and defendant agreed to speak with them. Defendant initially denied living at the address the officers questioned him about, but then admitted that he lived in that apartment and gave them consent to search it. The officers found more cocaine in the apartment.

¶ 8 Defendant testified that he was driving to a local barbershop and talking on his cell phone on the morning of October 7, 2010. The barbershop was next to the gas station so he pulled

through the station to park in front of the shop. He testified that he stopped at the pump to let another car go through and that he did not see a police vehicle or flashing lights when he pulled into the station. Once the car in front of him passed, he pulled out of the station. He testified that he was laughing and talking on the phone and that he did not see or hear anyone who identified himself as an officer. He did not realize that the people in the Trailblazer were police officers until they pulled in front of him and exited the vehicle. Defendant testified that he got out of the car after officers opened the door.

¶ 9 The trial court denied defendant's motion. The court found that defendant's act of crossing the center line was sufficient for the stop of improper lane usage and that the officers had probable cause to search defendant's vehicle based on "the uncontradicted testimony of the police of the defendant's furtive movement coupled with the drive off." The court also concluded that consent to search the apartment was given voluntarily after defendant received his *Miranda* warnings. Defendant's motion to reconsider was denied.

¶ 10 The testimony at trial was similar to the testimony at the suppression hearing. Lawrence testified that as he followed defendant, defendant's vehicle crossed the center line. He further testified that after defendant's arrest, he admitted that he lived at the address listed on a utility bill found in the vehicle. Defendant then gave the officers his key and consented to the search of his apartment. A forensic scientist also testified that the substances found in the car and in the apartment contained cocaine.

¶ 11 During trial, defense counsel continuously objected to the State's presentation of evidence relating to the recovered cocaine. At the conclusion of the State's case, defense counsel rested. The trial court found defendant guilty of possession and sentenced him to four-and-a-half years in prison.

¶ 12

ANALYSIS

¶ 13

Defendant argues that the trial court erred in denying the motion to suppress because the search of his car was not supported by probable cause and the officers took advantage of the illegal search to obtain consent to search his apartment.

¶ 14

I. Forfeiture

¶ 15

Defendant acknowledges that he did not file a posttrial motion raising this issue. However, he claims the issue is not forfeited because he litigated the motion to suppress, filed a motion to reconsider and consistently renewed objections to any evidence subject to the motion to suppress at trial. In the alternative, defendant claims counsel was ineffective for failing to properly preserve the motion to suppress issue for an appeal.

¶ 16

It is well settled that an objection and a written posttrial motion are required to preserve an issue for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant argues that *People v. Segoviano*, 189 Ill. 2d 228 (2000) (untimely filed posttrial motion) and *People v. Burnfield*, 295 Ill. App. 3d 256 (1998) (failed to file a posttrial motion), support his claim that courts have relaxed the rules of forfeiture and that issues not included in a posttrial motion may be addressed if they were litigated and argued in a pretrial motion. However, since those cases, the Illinois Supreme Court has reasserted that the failure to include the issue of a trial court's denial of a motion to suppress in a posttrial motion results in forfeiture. See *People v. Cosby*, 231 Ill. 2d 262, 271 (2008). Here, defendant forfeited the motion to suppress issue by failing to include it in a posttrial motion.

¶ 17

II. Ineffective Assistance of Counsel

¶ 18

In the alternative, defendant argues that trial counsel provided ineffective assistance by failing to properly preserve the motion to suppress issue for review.

¶ 19 Claims of ineffective assistance of counsel are evaluated through the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984) (adopting *Strickland*). To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance was objectively unreasonable, and (2) it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. The failure to establish either prong is fatal to an ineffectiveness claim. *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 20 Here, the underlying issue we must consider in the context of defendant's ineffective assistance claim is whether the trial court erred in denying defendant's motion to suppress. A motion to suppress involves mixed questions of law and fact. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). Because the trial court is in a superior position to determine the credibility of witnesses, findings of fact will be upheld on review unless they are against the manifest weight of the evidence. *Id.* The ultimate legal ruling as to whether the evidence should be suppressed is reviewed *de novo*. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006).

¶ 21 A warrantless search and seizure is considered *per se* unreasonable and is prohibited unless it falls within a specific delineated exception. *People v. Stroud*, 392 Ill. App. 3d 776, 803 (2009). Automobile searches are one such exception. Pursuant to the automobile exception, a police officer may conduct a warrantless search of a vehicle if he or she has probable cause to believe the stopped vehicle contains evidence of criminal activity. *Id.* Probable cause to search without a warrant exists where the facts and circumstances within the officer's knowledge would cause a reasonable person to believe that a crime has been committed and that evidence of that crime is located in the automobile. *People v. Parker*, 354 Ill. App. 3d 40, 45 (2004). Furtive

movements may provide probable cause to search when combined with other circumstances that tend to show probable cause, such as open contraband or suspicious objects in plain view. *People v. Trisby*, 2013 IL App (1st) 112552, ¶ 16. The scope of an automobile exception warrantless search extends to every part of the vehicle and its contents that may conceal the object of the search. *Stroud*, 392 Ill. App. 3d at 803.

¶ 22 In this case, the totality of the facts and circumstances gave the officers probable cause to search defendant's vehicle. Both Officer Lawrence and Officer Linthicum testified that they observed defendant making furtive movements toward the driver's seat floorboard as they followed his vehicle. Lawrence testified that defendant appeared to be placing something under the driver's seat with his left hand. Both officers testified that defendant repeatedly looked in the rearview mirror while they were behind him. After the officers stopped defendant's car at the gas station and as they approached defendant's vehicle, defendant smiled at Lawrence and drove away. The officers pursued defendant and stopped him a second time. They asked him to step out of his vehicle; he continued to talk on his cell phone and did not comply with the officers' request. In light of defendant's improper lane usage, his furtive movements, his act of fleeing the gas station and his failure to acknowledge the officers' instructions, Lawrence and Linthicum had probable cause to believe that the vehicle contained evidence of criminal activity that they were entitled to seize. Thus, the trial court properly relied on the automobile exception to the warrant requirement in determining that the search of the driver's seat was justified.

¶ 23 Because defendant was not prejudiced by counsel's failure to preserve the issue in a posttrial motion, his ineffective assistance claim must fail. See *Albanese*, 104 Ill. 2d at 526-27.

¶ 24 CONCLUSION

¶ 25 The judgment of the circuit court of Peoria County is affirmed.

Affirmed.