2013 IL App (1st) 102023-U

FOURTH DIVISION
February 14, 2013

No. 1-10-2023

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. 09 CR 1112
	)	
WILLIE ROBERSON,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction for being an armed habitual criminal is affirmed where trial counsel's failure to move for a *Franks* hearing to challenge the search warrant and failure to file a motion to suppress defendant's statements to police did not constitute ineffective assistance.

¶ 2 Following a bench trial, defendant Willie Roberson was convicted of being an armed habitual criminal and sentenced to 20 years' imprisonment. On appeal, defendant contends his trial counsel rendered ineffective assistance because he failed to file a pretrial motion for a *Franks* hearing to challenge the veracity of the allegations in the complaint for the search warrant. Defendant also claims counsel was ineffective because he failed to file a pretrial motion to suppress defendant's statements to police. We affirm.

¶ 3 On December 12, 2008, Chicago police officer Daniel Kasper and an informant identified as J. Doe (Doe) filed a complaint for a search warrant to search defendant and apartment 2A at 1318 West 92nd Street. The items being searched for included heroin, drug paraphernalia, records of illegal drug transactions, money and any documents establishing residency. Doe had informed Officer Kasper that he knew defendant for about six months, and for the last six months, defendant had possessed heroin in apartment 2A. Earlier that day, Doe went to defendant's apartment to buy heroin. Defendant invited Doe inside, went to another room and returned with a clear plastic bag containing approximately 20 clear Ziploc plastic bags, which each contained a white powdery substance Doe believed was heroin. Doe gave defendant $20 in exchange for 1 of the 20 clear plastic bags. Doe snorted a small amount of the substance he purchased from defendant and experienced the same euphoric high he previously experienced when snorting heroin during the past three years. Doe stated that he purchased heroin from defendant at that apartment more than 60 times in the past six months. Doe also stated that defendant conducts sales 24 hours a day, 7 days a week. Defendant told Doe that if he needed to buy more "blows," the street term for heroin, defendant always has "blows" for sale.

¶ 4 In the complaint, Officer Kasper further stated that following their conversation, he and Doe drove to 92nd Street, and Doe pointed to a red brick apartment building with the address 1318. Doe also pointed out a brown wooden door to an apartment on the second floor of the building with the number 2A on it. Doe told Officer Kasper that this was the location where he had purchased heroin from defendant earlier that day and more than 60 times in the past six months. Doe also identified defendant in a police photograph. The complaint indicates that both Officer Kasper and Doe appeared before the circuit court to request the search warrant. The search warrant was issued by the court and executed by police that same day. During the search of the apartment, police recovered several grams of a white powdery substance and a gun.

¶ 5 Defendant was charged with being an armed habitual criminal, unlawful use of a weapon by a felon, and possession with intent to distribute a look-alike substance. Six months before trial, defense counsel filed a motion to quash the search warrant and suppress all evidence seized during the search due to an improper warrant. In the motion, counsel argued that Doe lacked credibility and reliability, and claimed that none of Doe's prior purchases were verified as reliable. Counsel also asserted that the apartment number in the warrant, 2A, was incorrect, and that the actual apartment number was 2W. Counsel argued that this error undermined the credibility of Doe and Officer Kasper.

¶ 6 In response, the State argued that Doe personally appeared before the circuit court which allowed the court to observe Doe and assess his credibility. The State argued that Doe described an on-going narcotics business run by defendant, and noted that Doe saw additional bags of suspect narcotics in the same bag from which defendant gave Doe the suspect heroin. The State further argued that Officer Kasper verified the address by taking Doe to the apartment, and Doe identified defendant in a photograph. In addition, the State expressly argued that defendant was not entitled to a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), because he made only "loose allegations" that Doe was not credible, and did not show that Doe and Officer Kasper knowingly or intentionally made false statements in the affidavit supporting the warrant.

¶ 7 At the hearing on defendant's motion to quash the search warrant, defense counsel argued that the warrant was insufficient to search defendant's apartment because, although the body of the affidavit for the warrant referred to apartment 2A, the last paragraph of the complaint asked to search apartment 2C. In addition, the mail the police recovered from inside the apartment during the search for proof of residency was addressed to defendant at apartment 2W.

¶ 8 The State responded that apartment 2C was a scrivener's error as it was used only once, while the complaint referred to apartment 2A seven times. The State also noted that Doe had

pointed out the apartment door to Officer Kasper. The State argued that the fact that the mail recovered from the apartment was addressed to apartment 2W was not relevant to the sufficiency of the complaint for the search warrant. It further asserted Doe's reliability was established when Doe appeared before the court where he was sworn to the facts in the complaint, and the court had an opportunity to assess his credibility. The parties agreed that Officer Kasper was one of the officers who executed the warrant.

¶ 9 The trial court noted that this court previously held in *People v. Gorosteata*, 374 Ill. App. 3d 203 (2007) and *People v. Smith*, 372 Ill. App. 3d 179 (2007), that when an informant appears before the court issuing the search warrant, there is no need for additional evidence to support the credibility or reliability of the informant because the issuing court has the opportunity to question the informant regarding the information being sworn to. The court acknowledged that in *People v. Caro*, 381 Ill. App. 3d 1056 (2008), another division of this court disagreed with the holding in *Gorosteata*. The trial court pointed out, however, that in *Caro*, the defendant submitted affidavits that contradicted the informant's claims, which did not occur in the instant case. Accordingly, the trial court found that the holdings in *Gorosteata* and *Smith* applied here. In addition, the trial court found that the complaint referred to apartment 2A throughout, and the search warrant itself also referred to apartment 2A. Furthermore, Officer Kasper, the affiant officer who was also involved in the execution of the warrant, knew specifically which apartment was to be searched because Doe had pointed out the apartment door to him. Based on these findings, the trial court denied defendant's motion to quash the search warrant.

¶ 10 At trial, Chicago police sergeant Martin Murphy testified that at 7:26 p.m. on December 12, 2008, he and a team of 16 officers executed a search warrant on the second floor of 1318 West 92nd Street. Defendant, the party named in the search warrant, was in the living room with four other people when the police entered the apartment and detained all of them. Sergeant

Murphy asked defendant if there were any large sums of money, other valuables or contraband in the apartment that the police should know about before they began their search. When the prosecutor asked Sergeant Murphy for defendant's response, defense counsel objected on a "[c]onstitutional basis," arguing that defendant was detained and had not been advised of his rights. The State responded that defendant was not being interrogated, but instead, he gave the police information related to the execution of the search warrant. However, the State offered to move forward and abandoned the question. Sergeant Murphy testified that he searched defendant's bedroom and found a loaded handgun between two mattresses. The police also recovered several grams of a substance believed to be suspect heroin. In addition, the police found four letters which they recovered for proof of residency. One letter was addressed to "Willie Roberson," one was addressed to "Willie Mae Roberson," and two were addressed to "Willie M Roberson." Sergeant Murphy acknowledged that the letters were addressed to apartment 2W, not 2A, but testified that apartment 2A was on the west side of the building. There was no number or letter on the apartment door.

¶ 11 Chicago police officer Mohammad testified that he participated in the execution of the search warrant and was present when Sergeant Murphy initially spoke with defendant at the apartment. Officer Mohammad interviewed defendant with Officer Kasper at the police station. After Officer Kasper advised defendant of his *Miranda* rights, defendant stated that he bought the gun from "a dude" for $25.

¶ 12 Chicago police officer Kasper testified that about 12:30 a.m. on December 12, 2008, he entered the apartment building at 1318 West 92nd Street with John Doe. The men walked up the stairs to the second floor where there were two apartments, and Doe pointed to the apartment door that was marked 2A on the west side of the floor. Officer Kasper returned to the building later that evening with a team of police officers to execute a search warrant and knocked on that

same apartment door. When the police entered the apartment, Officer Kasper saw defendant. Sergeant Murphy asked defendant a question, and defendant responded that he had no narcotics in the apartment, but he did have a gun.

¶ 13 Defense counsel then objected, arguing that Sergeant Murphy did not testify to that statement. The prosecutor responded that it was irrelevant whether Sergeant Murphy testified to the statement because it was a pre-custodial admission by defendant, and Officer Mohammad had already testified to defendant's custodial admission. The trial court sustained the objection based upon a lack of foundation as to whether defendant was in custody at this point.

¶ 14 Officer Kasper then testified that when the police entered the apartment, defendant was there with four other people. The police detained everyone present, and Officer Kasper went directly to the dining room and stopped defendant. About 30 seconds later, Sergeant Murphy asked defendant a question with Officers Kasper and Mohammad present. At this point, no contraband had been found in the apartment. Defense counsel again objected and argued that defendant had been stopped and not advised of his *Miranda* rights. The trial court found that defendant had been detained, nothing had been recovered, and he had not been arrested at this point. Accordingly, the trial court overruled the objection. Thereafter, Officer Kasper testified that defendant told Sergeant Murphy that he had a gun under his mattress in his bedroom, which the police then recovered. Officer Kasper acknowledged that the substance recovered from defendant's apartment tested negative for drugs.

¶ 15 The State submitted certified copies of defendant's prior convictions for burglary and possession of a stolen motor vehicle. The trial court granted defendant's motion for a directed finding as to the charge of possession with intent to distribute a look-alike substance. The court then found defendant guilty of being an armed habitual criminal and unlawful use of a weapon by

a felon. The court merged the convictions and sentenced defendant to a term of 20 years' imprisonment as an armed habitual criminal.

¶ 16 On appeal, defendant first contends that his trial counsel rendered ineffective assistance because he failed to file a pretrial motion for a *Franks* hearing to challenge the veracity of the allegations in the complaint for the search warrant. Defendant argues that Doe's claim that defendant was selling drugs 24 hours a day was false because defendant did not have any actual heroin when he was arrested. Defendant further argues that Doe's claim that he bought drugs from defendant during the last six months was false because defendant spent 37 days in jail during that time period. Defendant asserts that these two claims show that Doe gave false information, and thus, there is a reasonable likelihood a *Franks* hearing would have been granted. Defendant further argues that his *Franks* motion would have been successful and the warrant would have been quashed.

¶ 17 The State argues that defendant would not have been granted a *Franks* hearing because such hearings are not conducted where the informant personally appears before the court and swears to the truth of his allegations, as Doe did here. Alternatively, the State argues that a *Franks* motion would not have been successful because Doe's allegations were true.

¶ 18 Claims of ineffective assistance of counsel are evaluated under the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that counsel's representation was deficient, and as a result, he suffered prejudice. *Strickland*, 466 U.S. at 687; *Petrenko*, 237 Ill. 2d at 496. 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. *Petrenko*, 237 Ill. 2d at 496. 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). Counsel's failure to file a motion is not considered ineffective assistance where such motion would have been futile. *Givens*, 237 Ill. 2d at 331.

¶ 19 In *Franks v. Delaware*, 438 U.S. 154 (1978), the United States Supreme Court held that a defendant has a limited right to a hearing to challenge the veracity of statements made by a governmental affiant in a complaint for a search warrant where the defendant makes a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and that such statement was "necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-56. A defendant makes a "substantial preliminary showing" where he offers proof that is "somewhere between mere denials on the one hand and proof by a preponderance on the other." *People v. Lucente*, 116 Ill. 2d 133, 151-52 (1987). The *Franks* court noted that the affidavit or complaint supporting the search warrant is presumed to be valid. *Franks*, 438 U.S. at 171. To qualify for a hearing, the defendant's challenge "must be more than conclusory," and his claim that false statements were deliberately made must be supported by an offer of proof. *Franks*, 438 U.S. at 171. The court further instructed that the only impeachment being permitted was that of the governmental affiant, "not of any nongovernmental informant." *Franks*, 438 U.S. at 171.

¶ 20 The purpose of allowing a *Franks* hearing is to deter police misconduct. *People v. Gorosteata*, 374 Ill. App. 3d 203, 212 (2007). Where a nongovernmental informant appears before the court when a request for a search warrant is presented, it is not necessary for the police to corroborate the informant's allegations because the magistrate issuing the warrant has an opportunity to question the informant to determine the basis of his knowledge. *Gorosteata*, 374 Ill. App. 3d at 214. The informant appears under oath, and the magistrate is able to personally observe his demeanor and assess his credibility, which renders additional evidence regarding his

reliability unnecessary. *People v. Smith*, 372 Ill. App. 3d 179, 182 (2007). Therefore, where an informant appears before the magistrate and is available for questioning regarding the allegations in the complaint for the search warrant, the case falls outside the scope of *Franks*. *Gorosteata*, 374 Ill. App. 3d at 215.

¶ 21 As acknowledged by the trial court in the case at bar, in *People v. Caro*, 381 Ill. App. 3d 1056 (2008), another division of this court disagreed with the holding in *Gorosteata*. The *Caro* court found that "[c]ontrary to *Gorosteata*'s holding, *Franks* simply contains no language precluding an attack on the warrant affidavit when a nongovernmental informant testifies before the issuing judge." *Caro*, 381 Ill. App. 3d at 1066.

¶ 22 While it is true *Franks* contains no such language, we find that *Caro* misinterpreted the holding of *Gorosteata* and the application of *Franks*. *Gorosteata* did not hold that *Franks* contained precluding language. *Gorosteata* analyzed the purpose of allowing a *Franks* hearing and held that *Franks* does not apply when an informant personally appears before a magistrate. We agree with *Gorosteata*.

¶ 23 It is significant to note that the *Franks* court never considered the situation where a nongovernmental informant personally appears before a magistrate with a police officer who is requesting a search warrant. As *Gorosteata* pointed out, the purpose of allowing a *Franks* hearing is to deter *police* misconduct. *Gorosteata*, 374 Ill. App. 3d at 212. Even *Caro* noted, the *Franks* court was concerned with the consequences " 'if a *police officer* was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worth while.' " (Emphasis added.) *Caro*, 381 Ill. App. 3d at 1066, quoting *Franks*, 438 U.S. at 168. The *Franks* court expressly stated "[t]he deliberate falsity or reckless disregard whose impeachment is permitted today is

only that of the affiant, *not of any nongovernmental informant*." (Emphasis added.) *Franks*, 438 U.S. at 171.

¶ 24 Following the express language of the Supreme Court, a *Franks* hearing is allowed only to challenge the veracity of the affiant police officer. When a police officer appears before a magistrate and requests a search warrant based on information he claims was told to him by a confidential informant, and the informant does not appear before the magistrate, the magistrate presumes the affidavit is valid and accepts the officer's allegations as true without any method of verifying that information. If a defendant can show that the officer deliberately made false statements in the affidavit to secure the search warrant, he can request a *Franks* hearing to impeach the officer. On the other hand, when a confidential informant appears before the magistrate with the affiant police officer requesting the search warrant, the magistrate then has the opportunity to question the informant directly to determine the credibility of the allegations prior to issuing the warrant. The police officer's credibility and the concern with police misconduct is no longer at issue because the informant, who is the source of the criminal allegations, is personally present before the magistrate. Accordingly, we agree with the holding in *Gorosteata* that *Franks* does not apply when an informant appears before the magistrate.

¶ 25 In this case, Doe, the informant who told Officer Kasper that defendant was engaged in criminal conduct, appeared before the court with Officer Kasper when the complaint for a search warrant was filed. Consequently, the court did not have to presume that Officer Kasper's allegations in the affidavit were valid. The court had the opportunity to question Doe about his relationship with defendant, his observations in defendant's apartment, and the basis of Doe's knowledge for believing defendant possessed a large amount of heroin in the apartment. The court was able to personally observe Doe's demeanor and assess his credibility. Any concern that Officer Kasper had deliberately made false claims in the affidavit was alleviated by Doe's

personal appearance before the court. In light of Doe's appearance in court and his availability for questioning regarding the allegations in the complaint for the search warrant, we find that this case falls outside the scope of *Franks*. It therefore follows that a motion for a *Franks* hearing would have been futile as such motion would not have been granted. Accordingly, trial counsel's failure to file a motion for a *Franks* hearing did not constitute ineffective assistance.

¶ 26 In addition, we also agree with the State's alternative argument that, had trial counsel filed a *Franks* motion, it would not have been successful because defendant could not show that the affidavit contained false statements that were knowingly and intentionally made, or made with reckless disregard for the truth. Defendant challenges two allegations in the affidavit. He first argues that Doe's claim that defendant was selling drugs 24 hours a day was false because defendant did not have any actual heroin when he was arrested. Defendant further asserts that Doe's claim that he bought drugs from defendant during the last six months was false because defendant was in jail for 37 days during that time period.

¶ 27 In *Franks*, the court noted that the fourth amendment requires a truthful factual showing of probable cause to issue a warrant. *Franks*, 438 U.S. at 164-65. The court explained, however, that "[t]his does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, * * * [b]ut surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Franks*, 438 U.S. at 165.

¶ 28 Here, the affidavit stated that Doe went to defendant's apartment to buy heroin, and after entering the apartment, Doe saw defendant with a clear plastic bag containing several clear plastic bags of a white powdery substance Doe believed was heroin. Doe purchased one of the bags, sampled a small amount of the substance, and experienced the same high he previously experienced when using heroin during the past three years. It is undisputed that during the search of defendant's apartment, the police recovered several grams of a white powdery substance they

believed to be heroin. The substance subsequently tested negative for drugs. However, the fact that the substance ultimately was not heroin does not negate the truthfulness of the allegation in the affidavit that Doe believed it was heroin. The police also believed the substance was heroin. Accordingly, the allegation in the affidavit that defendant was selling drugs was not a false statement that was intentionally and knowingly made. Doe and the police believed it to be true.

¶ 29 We also find that defendant cannot show that Doe's claim that he bought drugs from defendant during the last six months was false. In his brief, defendant claims he was in jail for 37 days during that time period. Defendant states that he included documentation of this detention in the appendix of his brief, but he did not. Regardless, even if defendant was in jail for 37 days, it does not render Doe's allegation false. Doe stated in the affidavit that he bought heroin from defendant at the apartment more than 60 times in the past six months. Doe did not specify any particular dates for his purchases. It is entirely possible that Doe bought heroin from defendant prior to and after his detention in jail. Because defendant cannot show that these allegations are false, a *Franks* motion would not have been successful, and thus, trial counsel's failure to file a motion for a *Franks* hearing did not constitute ineffective assistance.

¶ 30 Defendant next contends that trial counsel was ineffective because he failed to file a pretrial motion to suppress defendant's statements to police. Defendant argues that a motion to suppress his statement made in his apartment to Sergeant Murphy that he had a gun under the mattress in his bedroom would have been granted because he was in custody at the time he made the statement and had not been advised of his *Miranda* rights. Defendant notes that counsel tried to prevent admission of the statement by objecting during trial, but argues that the challenge to the statement was too complex to be resolved with a trial objection. Defendant also argues that a motion to suppress his statement at the police station that he bought the gun from "a dude" for $25 would have been granted under *Missouri v. Seibert*, 542 U.S. 600 (2004). Defendant asserts

that the police elicited a confession from him in his apartment without giving him *Miranda* warnings, subsequently advised him of his *Miranda* rights at the police station, and thereafter elicited an "apparently admissible" confession from him, violating *Seibert*.

¶ 31 The State argues that counsel was not ineffective because motions to suppress defendant's statements would not have been granted. The State argues that defendant was not under arrest, nor was he interrogated, when he made the statement inside his apartment; therefore, there was no *Miranda* violation. The State further argues that there is no evidence that the police engaged in an "ask first, warn later interrogation" in violation of *Seibert*.

¶ 32 To establish that he was prejudiced by trial counsel's failure to file a motion to suppress his statements, defendant must show that a reasonable probability exists that the motion would have been granted, and that the outcome of the trial would have been different if the statements had been suppressed. *Givens*, 237 Ill. 2d at 331. If a motion to suppress would have been futile, then counsel's failure to file that motion does not constitute ineffective assistance. *Givens*, 237 Ill. 2d at 331. Determining whether or not to file a motion to suppress is a matter of trial strategy, and thus, counsel's decision is given great deference and is generally immune from claims of ineffective assistance. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004).

¶ 33 *Miranda* warnings are required to insure that any inculpatory statement made by defendant was not due to " 'the compulsion inherent in custodial surroundings.' " *People v. Slater*, 228 Ill. 2d 137, 149 (2008), quoting *Yarborough v. Alvarado*, 541 U.S. 652, 661 (1994), quoting *Miranda v. Arizona*, 384 U.S. 436, 458 (1966). Therefore, to constitute a *Miranda* violation, it is essential to find that defendant was in custody when he was compelled to make an incriminating statement. *Slater*, 228 Ill. 2d at 149. To determine whether defendant was in custody, and thus, whether the police were required to advised him of his *Miranda* rights, the court must consider the circumstances surrounding the interrogation, and in light of those circumstances, whether a

reasonable person would have felt he could terminate the interrogation and leave. *Slater*, 228 Ill. 2d at 150. The factors relevant for determining 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 questioning; (3) whether there was any indicia of a formal arrest, such as the use of handcuffs, fingerprinting, or a show of weapons or force; (4) the manner in which defendant arrived at the place of questioning; (5) the defendant's age and intelligence; and (6) whether defendant's family or friends were present. *Slater*, 228 Ill. 2d at 150. No single factor is dispositive, and the court should consider all of the circumstances in the case. *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 37.

¶ 34 After considering the above factors and all the circumstances in this case, we find that defendant was not subjected to a custodial interrogation when he informed the police that he had a gun under his mattress. A significant factor in this case is the location, time, length, mood and mode of the questioning. Defendant was in the living room of his own apartment with four other people present when Sergeant Murphy asked defendant if there were any large sums of money, other valuables or contraband in the apartment that the police should know about before they began their search. That is all defendant was asked. Defendant was not in an unfamiliar or intimidating environment, nor was he alone. The question took only a few seconds and was not asked in a coercive or threatening tone. Instead, the question was posed in a protective mode. Defendant could have had valuable items he did not want damaged during the search, or he could have had money or other valuables which he could have later claimed the police took during the search. There also could have been contraband in the apartment, such as weapons, which could have posed a danger to police during the search. We find that the question posed here, under the circumstances in this case, was not an interrogation, but instead, falls within the category of preliminary on-the-scene questions that do not require *Miranda* warnings. See *People v. Kilfoy*,

122 Ill. App. 3d 276, 288 (1984) (where police were executing a search warrant and asked the defendant a question, and she replied that she lived in the house, the court found it was a preliminary on-the-scene question that was non-coercive and did not require *Miranda* warnings). See also *People v. Stansberry*, 47 Ill. 2d 541 (1971) (where police executed a search warrant for the defendant and an office and asked the defendant if some clothes were his, the question was a "normal and ordinary inquiry" with no danger of compulsion or intimidation, and *Miranda* warnings were not required); *People v. Fischetti*, 47 Ill. 2d 92 (1970) (no *Miranda* violation when police executing search warrant asked the defendant and his brother "Whose coat?").

¶ 35 The remaining factors also weigh in favor of finding that defendant was not in custody at the time of the questioning. The record shows that, although there were several officers at the apartment to conduct the search, only Sergeant Murphy and two other officers were present when the question was asked. There is no indication that defendant was handcuffed or that the police displayed any weapons during the search, and thus, there were no indicia of a formal arrest. Defendant was already present in his apartment when the police arrived and had not been transported to another location at the time of this question. Finally, there is no indication that defendant's age or intelligence had any effect on his understanding of what was occurring. Defendant had prior convictions, and therefore, had prior contact with the police. Based on our analysis of the factors, we find that defendant was not subjected to a custodial interrogation in his apartment. Accordingly, there was no violation of *Miranda*, and a motion to suppress defendant's statement would have been denied.

¶ 36 We further note that defense counsel attempted to prevent defendant's statement from being admitted at trial by objecting during the testimony and arguing that defendant had not been advised of his rights. Counsel first objected during Sergeant Murphy's testimony. The State then abandoned the question, and thus, counsel's objection was successful. Counsel later objected

during Officer Kasper's testimony. The trial court sustained the objection based upon a lack of foundation as to whether defendant was in custody when he made his statement. As Officer Kasper's testimony continued, counsel again objected arguing that defendant had not been advised of his *Miranda* rights. The trial court then found that at the time of the statement, defendant had been detained, no contraband had yet been recovered, and defendant had not been arrested at that point. Based on its findings, the court overruled the objection. Consequently, we find that if counsel had submitted a motion to suppress defendant's statement, that motion would have been denied. It therefore follows that because a motion to suppress defendant's statement would have been futile, counsel was not ineffective for failing to file such motion.

¶ 37 In addition, we find that even if we would have determined that defendant's *Miranda* rights were violated, and his statement should have been suppressed, defendant still would not have been able to show that he was prejudiced by counsel's failure to file a motion to suppress because the result of the trial would not have been different. Defendant's contention in a motion to suppress would be that if he had not made the inculpatory statement, the police would not have known he had a gun. In this case, however, the police had a valid search warrant to search defendant and his apartment for heroin, drug paraphernalia, money, records of illegal drug transactions and residency documents. Undoubtedly, the police would have found the gun under the mattress during their search of the apartment. Thus, defendant still would have been charged and convicted of being an armed habitual criminal.

¶ 38 Finally, we reject defendant's argument that counsel was ineffective for failing to file a motion to suppress defendant's statement at the police station that he bought the gun from "a dude" for $25. Defendant contends that the police elicited a confession from him in his apartment without giving him *Miranda* warnings, subsequently advised him of his *Miranda* rights at the police station, and thereafter elicited an admissible confession from him, violating

Seibert. In adopting *Seibert*, our supreme court held that where there is no evidence that the police deliberately engaged in a question first, warn later technique while interrogating the defendant, the *Seibert* analysis ends. *People v. Lopez*, 229 Ill. 2d 322, 360 (2008). As explained above, defendant was not subjected to a custodial interrogation at his apartment. Accordingly, *Seibert* does not apply to this case. *Beltran*, 2011 IL App (2d) 090856, ¶ 53. Based on our findings, we conclude that trial counsel did not render ineffective assistance when he failed to file motions to suppress defendant's statements to police.

¶ 39 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 40 Affirmed.