2013 IL App (1st) 110597-U

FIRST DIVISION
MAY 20, 2013

No. 1-11-0597

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. 10 CR 17045
	)	
WILLIAM GARRETT,	)	Honorable
	)	John T. Doody,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Trial counsel was not ineffective for failing to file a futile motion to quash arrest and suppress evidence in light of the totality of the circumstances showing the existence of probable cause justifying the search and seizure of a plastic bag in the defendant's sock.

¶ 2 Following a bench trial, defendant William Garrett was found guilty of possession of a controlled substance and sentenced to an extended term of four years' imprisonment. On appeal, the defendant contends that his trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence based on a lack of probable cause to arrest or search him.

¶ 3 At trial, Chicago police officer Patrick Mulkerrin (Officer Mulkerrin) testified that at 12:20 p.m. on August 26, 2010, he and his partner Officer Peter Babich (Officer Babich), were on routine patrol in plain clothes and an unmarked vehicle. At that point, he saw the defendant on the sidewalk near 416 South Lotus Avenue. Officer Mulkerrin testified that the defendant retrieved an unknown

item from his shoe as an individual approached him with an unknown denomination of money. Based on his training and experience, Officer Mulkerrin believed that he was about to observe a narcotics transaction. When Officer Mulkerrin and Officer Babich turned the corner onto Lotus Avenue, the defendant looked in their direction and placed the unknown item back into his shoe. Officer Mulkerrin then approached the defendant and noticed a clear plastic bag sticking out from that same shoe. Officer Mulkerrin "asked [the defendant] what was in his shoe and he said nothing." Officer Mulkerrin "recovered" the clear plastic bag which contained 11 packets, each of which held two tinfoil packets of suspect heroin. A custodial search of the defendant at the police station produced $56.

¶ 4 On cross-examination, Officer Mulkerrin stated that he did not know what the item was that the defendant had retrieved from his shoe, nor could he hear any conversation that may have occurred between the defendant and the individual who approached the defendant with money. On redirect examination, Officer Mulkerrin clarified that the tip of the clear plastic bag was sticking out of the defendant's sock.

¶ 5 The State then presented a written stipulation, signed by both parties, regarding the chain of custody and chemical analysis of the 5.4 grams of heroin recovered from the defendant, and rested its case-in-chief. The defendant moved for a directed finding, which the trial court denied.

¶ 6 The defendant's sister, Ernestine Coleman, testified that at 12:22 p.m. on August 26, 2010, she was in the vicinity of 416 South Lotus Avenue with her mother, her daughter, and family friend John Young. Coleman knew the defendant was in the area, having spoken to him earlier, and she told him that she would be at a nearby convenience store. She encountered the defendant as he was leaving that convenience store, and he agreed to accompany everyone back inside. Meanwhile, Coleman saw two unmarked vehicles, which she recognized as "detective cars." One of the officers grabbed the defendant, patted him down, and found nothing. The defendant was searched again in a nearby alley and an officer picked up something from the ground, but Coleman could not see what

it was from her vantage point. The defendant was brought out of the alley in handcuffs and placed in a police car. On cross-examination, Coleman acknowledged that neither she nor the defendant lived near 416 South Lotus Avenue or the convenience store.

¶ 7 John Young testified that he was walking with the defendant and the defendant's family when uniformed officers in a detective car pulled up and told them to get on the wall. The defendant complied but everyone else kept walking. Like Coleman, Young could not see what was happening in the alley from his vantage point across the street. Young further testified that he told Investigator Clarence Travis (Investigator Travis) of the Cook County State's Attorney's Office that an individual he knew only as "Dude" was also stopped, but then released.

¶ 8 In rebuttal, Investigator Travis testified that he interviewed Young and Coleman, and they both reported that the defendant was searched a single time in the alley. On cross-examination, Investigator Travis acknowledged that the entry in his report of his interview with Coleman indicated that the defendant was searched twice.

¶ 9 Following closing arguments, the trial court found the defendant guilty of possession of a controlled substance, as a lesser-included offense of possession of the same with intent to deliver. The defendant then filed a motion for a new trial, which the trial court denied.

¶ 10 On appeal, the defendant solely contends that trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence. The defendant does not dispute that the police initially had reasonable suspicion to make a valid investigatory stop pursuant to *Terry v. Ohio,* 392 U.S. 1 (1968). However, the defendant asserts that there is a reasonable probability that the motion would have been granted where, at the time of the warrantless seizure of the heroin, the police did not have probable cause to search or arrest him, the plain view exception to the warrant requirement did not apply, and the search of his sock exceeded the scope of a weapons frisk.

¶ 11 To succeed on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *People v.*

Bailey, 232 Ill. 2d 285, 289 (2009) (citing *Strickland v. Washington,* 466 U.S. 668 (1984)). Performance must be evaluated from counsel's perspective at the time the contested action, or lack thereof, was taken, and will be considered constitutionally deficient only where objectively unreasonable under prevailing professional norms. *Bailey,* 232 Ill. 2d at 289. As to prejudice with regard to counsel's failure to seek the suppression of evidence, the defendant must " 'show that the unargued suppression motion was meritorious and that there is a reasonable probability that the verdict would have been different without the excludable evidence.' " *Bailey,* 232 Ill. 2d at 289 (quoting *People v. Harris,* 182 Ill. 2d 114, 146 (1998)). If a motion to quash arrest and suppress evidence would have been futile, counsel's failure to file that motion does not constitute ineffective assistance. *People v. Givens,* 237 Ill. 2d 311, 331 (2010).

¶ 12 The fourth amendment right to be free from unreasonable searches and seizures generally requires a warrant supported by probable cause. *People v. Sanders,* 2013 IL App (1st) 102696, ¶ 13. However, "[p]ursuant to *Terry*, a police officer may, under appropriate circumstances, briefly detain a person for investigatory purposes if the officer reasonably believes that the person has committed, or is *about to commit*, a crime." (Emphasis added.) *People v. Daniel,* 2013 IL App (1st) 111876, ¶ 32. Here, the parties agree that the defendant was subject to a valid *Terry* stop when Officer Mulkerrin approached him on suspicion that he was in possession of drugs that he was about to deliver to an individual approaching him with money. The parties, however, disagree about the propriety of the subsequent seizure of the plastic bag from the defendant's sock.

¶ 13 During a *Terry* investigative stop, police may seize an object without a warrant, pursuant to the plain view doctrine, when the following requirements are satisfied: (1) the officers are lawfully in a position from which they view the object; (2) the incriminating character of the object is immediately apparent; and (3) the officers have a lawful right of access to the object. *People v. Jones,* 215 Ill. 2d 261, 271 (2005) (citing *Minnesota v. Dickerson,* 508 U.S. 366, 374-75 (1993) (and cases cited therein)). The defendant argues that where, as here, the incriminating nature of the plastic

bag was not immediately apparent, police lacked probable cause to believe that it contained contraband. The State argues that the defendant cannot establish a reasonable probability that a motion to quash arrest and suppress evidence would have been granted where the seizure of the heroin in plain view of the officer was proper.

¶ 14 The "seizure of *property* in plain view involves no invasion of privacy *and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity*." (Emphasis in original.) (Internal quotation marks omitted.) *Texas v. Brown,* 460 U.S. 730, 741-42 (1983) (plurality op.) (quoted in *Jones*, 215 Ill. 2d at 272). Simply, "plain view" requires probable cause to justify a seizure. *Jones,* 215 Ill. 2d at 272. "However, if police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object, *i.e.*, if the incriminating character of the object is not immediately apparent, the plain view doctrine cannot justify the seizure." *Jones*, 215 Ill. 2d at 272 (citing *Dickerson,* 508 U.S. at 374-75).

¶ 15 In this case, Officer Mulkerrin did not observe the plastic bag until he approached the defendant and then, only observed the tip of the plastic bag sticking out of his sock, but not its contents. Innocuous objects such as plastic bags, spoons, mirrors, and straws are often used in the narcotics trade, but the mere possession of a clear plastic bag sticking out of a person's sock does not constitute probable cause to seize the bag, absent some additional evidence of illicit activity. *People v. Garcia,* 2012 IL App (1st) 102940, ¶ 16. However, probable cause in narcotics cases is not conditioned on prior visual identification of a narcotic substance. *People v. Rucker,* 346 Ill. App. 3d 873, 889 (2003).

¶ 16 That said, "[a] warrantless search is permissible if there is probable cause to believe that a crime has been committed and that a search of a particular place or thing will disclose evidence or fruits of the offense." *People v. Jones,* 214 Ill. App. 3d 256, 258 (1991). What constitutes probable cause for searches and seizures is governed by the totality of the facts and circumstances in each case (*People v. Hanna,* 42 Ill. 2d 323, 328-29 (1969)); and is determined from the standpoint of the

arresting officer, with his skill and knowledge, rather than that of an average citizen under the same circumstances (*Jones,* 214 Ill. App. 3d at 258 (citing *People v. Stout,* 106 Ill. 2d 77, 86 (1985)).

¶ 17 Here, Officer Mulkerrin's initial observations of the defendant's conduct led him to reasonably believe that the defendant was about to complete a narcotics transaction and justified his initial investigation. This suspicion was intensified by the defendant's subsequent act of placing the item initially being tendered to the potential purchaser back into his shoe, upon noticing the presence of police. See *Jones,* 214 Ill. App. 3d at 260. At this point, the officer observed the plastic bag in the defendant's sock and continued his inquiry. Based on the defendant's response and the totality of the circumstances, Officer Mulkerrin could reasonably conclude that the defendant was concealing contraband in the plastic bag (*People v. Love,* 199 Ill. 2d 269, 280 (2002)), which provided probable cause to seize and search the plastic bag (*Jones,* 214 Ill. App. 3d at 261). Under these circumstances, a motion to quash arrest and suppress evidence would have been futile, and the defendant's claim that trial counsel was ineffective for not filing such a motion fails.

¶ 18 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.