2013 IL App (1st) 112210-U

FIRST DIVISION
September 16, 2013

No. 1-11-2210

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 17385
	)	
ANDRE GRANDBERRY,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver; counsel was not ineffective for failing to file a motion to quash arrest and suppress evidence; defendant's sentence is not excessive; and the imposed term of mandatory supervised release is proper. The fines and fees order is corrected.

¶ 2 Following a bench trial, defendant Andre Grandberry was convicted of possession of a controlled substance with intent to deliver and sentenced to 13 years in prison. On appeal, defendant contends that: (1) the State failed to prove intent to deliver beyond a reasonable doubt; (2) trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence where the police had no probable cause to arrest him; (3) his sentence is excessive; (4) he is entitled to a

reduction in the fines and fees assessed against him; and (5) his term of mandatory supervised release (MSR) must be reduced.

¶ 3 For the reasons that follow, we affirm defendant's conviction and sentence and order the fines and fees order corrected.

¶ 4 At trial, Chicago police officer Nicholas Masters testified that on September 2, 2010, he and his partner, Officer Steve Jaglarski, were conducting surveillance of a pawn shop at 21 North Pulaski Road. The officers were observing the address from an elevated position across the street about 200 feet away. About 2 p.m., Officer Masters, using binoculars, saw defendant in front of the pawn shop. Over the next 20 minutes, defendant was approached by a pedestrian on two separate occasions. Each time, the man gave defendant "an unknown amount of United States currency or what appeared to be United States currency." Defendant would take the money, put it in his pocket, retrieve a small white object from his left pocket, and give the object to the man. After the second transaction, a car pulled up to the pawn shop and parked. A man got out of the car, walked over to defendant, and handed him a small plastic bag containing several small items. Defendant put the bag into his left pocket, took money from his right pocket, and gave the money to the man. The man got back into the car and drove away.

¶ 5 Officer Masters testified that at this point, he and his partner broke surveillance and approached defendant. About two minutes passed between the time the car left and the officers approached defendant in front of the pawn shop. After defendant was detained, Officer Masters observed his partner recover a clear plastic baseball-sized bag from defendant. The bag, which appeared to be the same bag defendant received from the man in the car, contained 36 mini-Ziploc baggies, each containing suspect heroin.

¶ 6 On cross-examination, Officer Masters acknowledged that he did not know what the "small white item" was that defendant gave to the men who approached him. When asked whether he could tell what denomination of currency was given to defendant, Officer Masters stated, "No. It was folded and it appeared to be United States currency." Defense counsel asked, "But you're not sure?"

and the officer answered, "No." Officer Masters also acknowledged that he lost sight of defendant briefly when he broke surveillance. However, he stated on redirect that defendant was the person he had observed during surveillance.

¶ 7 Chicago police officer Steve Jaglarski testified that he and Officer Masters conducted narcotics surveillance of the pawn shop for about 20 to 25 minutes. Because Officer Jaglarski did not have binoculars, he could not see as many details as Officer Masters could. Officer Masters would relay what he was seeing through the binoculars. After the officers saw what they "believed to be a narcotics transaction between the defendant and a few other people," they approached defendant and detained him. Officer Jaglarski felt a "big bulge" in defendant's left pocket. In that pocket, he found a knotted baggie containing 36 Ziploc baggies of a white powder substance he suspected to be heroin. Officer Jaglarski also recovered 14 loose mini-Ziploc baggies of suspect heroin from the same pocket. Later, during a custodial search, Officer Jaglarski recovered $19 from defendant's person. He did not recover any weapons, scales, or business records from defendant.

¶ 8 The parties stipulated that a forensic chemist tested the contents of 25 of the 50 baggies recovered from defendant. The 25 baggies, which weighed 5.6 grams, tested positive for the presence of heroin. The total weight of the 50 baggies was 11.2 grams. The parties further stipulated that a proper chain of custody was maintained at all times.

¶ 9 Defendant did not testify or offer any evidence on his own behalf. Following arguments, the trial court convicted defendant of possession of a controlled substance with intent to deliver.

¶ 10 At sentencing, the parties agreed that defendant would receive a Class X mandatory term due to his criminal background. In aggravation, the State recited defendant's prior convictions. In mitigation, defense counsel noted that the presentence investigation (PSI) report detailed defendant's "long history of heroin addiction," and argued that defendant had never received drug treatment despite requesting it. Counsel also stated that defendant had a close relationship with his mother and siblings. When given an opportunity to speak on his own behalf, defendant asked the court for drug treatment.

¶ 11 The trial court imposed a sentence of 13 years. In the course of doing so, the court stated it was taking into consideration the PSI report, the matters in aggravation and mitigation, and defendant's statement in allocution.

¶ 12 On appeal, defendant first contends that the State failed to prove beyond a reasonable doubt that he intended to deliver the controlled substance in his possession. He argues that the 11.2 grams of heroin found on him is an amount contemplated for personal use, and that the packaging of the drugs in 50 loose baggies is insufficient to support an inference of intent to deliver, as heroin is commonly sold on the street in small packets and he was an addict who could have been simply replenishing his own supply of heroin. Defendant further argues that he had no other items on his person that would suggest he was engaged in the sale of drugs, such as weapons, large amounts of cash, scales, cell phones, or beepers.

¶ 13 To sustain a conviction for possession of a controlled substance with intent to deliver, the State must prove beyond a reasonable doubt that the defendant knew the controlled substance was present, was in immediate possession or control of the drugs, and intended to deliver the controlled substance. 720 ILCS 570/401(c)(1) (West 2010); *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). Direct evidence of intent to deliver is rare; therefore, circumstantial evidence is commonly used to prove intent. *Robinson*, 167 Ill. 2d at 408. As outlined by our supreme court in *Robinson*, 167 Ill. 2d at 408, many different factors have been considered as probative of intent to deliver, including whether the quantity of controlled substance in the defendant's possession is too large to be viewed as being for personal consumption; the purity of the recovered drugs; the manner in which the substance is packaged; and the possession of weapons, large amounts of cash, police scanners, beepers or cellular telephones, and drug paraphernalia. *Robinson*, 167 Ill. 2d at 408. A court determines whether the inference of intent to deliver is sufficient on a case-by-case basis. *Robinson*, 167 Ill. 2d at 412-13.

¶ 14 Officer Masters testified that on two occasions during a 20-minute period, he observed a man approach defendant on foot and give him money. Both times, after defendant received the money,

he took a small white object from his pocket and gave it to the man who had tendered the money. After the second transaction, a car pulled up and parked near defendant. A man got out of the car, walked over to defendant, and handed him a small plastic bag containing several small items. Defendant put the bag into his left pocket, took money from his right pocket, and gave the money to the man. The man got into the car and drove away. Officer Masters and Officer Jaglarski thereafter detained defendant and recovered from his left pocket 50 baggies of heroin, 36 of which were within another plastic bag.

¶ 15 This evidence was sufficient to prove defendant intended to deliver the controlled substance. See, *e.g.*, *People v. Bush*, 214 Ill. 2d 318, 327 (2005) (evidence sufficient where the defendant accepted money from two individuals and handed them unknown items in exchange); *People v. Clark*, 349 Ill. App. 3d 701, 705 (2004) (evidence sufficient where the defendant accepted money from two individuals and the codefendant then gave them small items); *People v. Bell*, 343 Ill. App. 3d 110, 121 (2003) (evidence sufficient where the defendant accepted money from several individuals and handed them small items). Defendant's reliance on the absence of other factors considered probative of intent to deliver, such as possession of amounts of narcotics inconsistent with personal use, weapons, large amounts of cash, scales, cell phones, or beepers, as outlined in *Robinson*, 167 Ill. 2d at 408, is unpersuasive.

¶ 16 In *Robinson*, the police arrested the defendant based on suspected drug activity in a house, and the State presented no eyewitness testimony that the defendant had been observed engaging in alleged drug transactions. *Robinson*, 167 Ill. 2d at 405-07. Accordingly, the *Robinson* court examined other circumstantial factors indicating an intent to deliver. Here, unlike in *Robinson*, the State presented Officer Masters's eyewitness testimony that he actually observed, on two occasions, defendant accept money and deliver a small white object in exchange. Defendant then received a bag of items from another individual and put the bag in his pocket. From that pocket, the police recovered 50 baggies of heroin. Given these circumstances, the absence of *Robinson* factors is not dispositive. See *Bush*, 214 Ill. 2d at 328; *Clark*, 349 Ill. App. 3d at 706; *Bell*, 343 Ill. App. 3d at 120-

21. A reasonable trier of fact could have found the elements of possession of a controlled substance with intent to deliver based on the evidence presented. Defendant's challenge to the sufficiency of the evidence thus fails.

¶ 17 Defendant's second contention on appeal is that his trial counsel was ineffective for failing to file motions to quash arrest and suppress evidence where the police had no probable cause to arrest him. Defendant acknowledges that the police observed him exchange something with two men on the street in front of the pawn shop as well as the man in the car, but argues that the officers were unsure of what was exchanged. He asserts that the totality of the circumstances, including a lack of testimony regarding the officers' training or expertise, the reputation of the location, or physical descriptions of the men with whom defendant interacted, raises substantial questions as to whether the officers had probable cause to arrest him. Defendant argues that a motion to quash arrest and suppress evidence bore a reasonable probability of success on the merits and that no sound trial strategy explains counsel's failure to file such a motion. He asserts that he was prejudiced by counsel's failure because had a motion to quash and suppress been granted, the State would have lacked any drug evidence and "a strong question" exists as to whether the prosecution would have gone forward.

¶ 18 As an initial matter, we note the State's argument that defendant's claim of ineffectiveness would be better raised on collateral review than in a direct appeal, since the record was not developed for the purpose of his argument and provides some, but not all, evidence that would be necessary for a determination of probable cause. It is true that in some cases, the trial record is insufficient to assess the propriety of a search when a defendant challenges his trial counsel's failure to file a motion to quash and suppress. See *People v. Vasser*, 331 Ill. App. 3d 675, 681-82 (2002). However, as explained below, we find that the evidence at trial was sufficient to establish a finding of probable cause. Accordingly, we need not address the State's reviewability issue. See *Vasser*, 331 Ill. App. 3d at 682.

¶ 19 The standard for a claim of ineffective assistance of counsel has two prongs: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. In order to establish this prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶ 20 Generally, the decision whether to file a motion to suppress evidence is considered a matter of trial strategy that is immune from ineffective assistance claims. *People v. Deloney*, 359 Ill. App. 3d 458, 466 (2005). To succeed on a claim of ineffectiveness based on the failure to file a motion to quash and suppress, a defendant must demonstrate a reasonable probability both that the motion would have been granted and that the outcome of the trial would have been different if the evidence had been suppressed. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000).

¶ 21 Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the suspect has committed a crime. *People v. Jackson*, 232 Ill. 2d 246, 275 (2009). The existence of probable cause depends upon the totality of the circumstances at the time of the arrest. *People v. Love*, 199 Ill. 2d 269, 279 (2002). The standard for determining whether probable cause exists is probability of criminal activity, not proof beyond a reasonable doubt. *People v. Lee*, 214 Ill. 2d 476, 485 (2005).

¶ 22 Here, Officer Masters testified that through binoculars, he observed two separate individuals approach defendant on the sidewalk outside the pawn shop. Each time, the pedestrian would give defendant an unknown amount of what appeared to be United States currency, after which defendant would retrieve a small white object from his left pocket and give the object to the man. Shortly after these two transactions, a car pulled up to the pawn shop. A man exited from the car, walked over to defendant, and handed him a small plastic bag containing several small items. Defendant put the

bag into his left pocket, took money from his right pocket, and gave the money to the man. After the man got into the car and drove away, Officer Masters and Officer Jaglarski approached defendant and detained him.

¶ 23 We are mindful that Officer Masters could not tell what denomination of currency the pedestrians gave defendant, and did not know what the small white items were that defendant tendered to them in exchange. Nevertheless, taking into consideration the totality of the circumstances as described by Officer Masters, we find that at the time of arrest, a reasonably cautious person would believe that defendant had committed a crime. Therefore, at the time Officer Jaglarski searched defendant, there was probable cause to arrest defendant and the search of defendant's person was a lawful search incident to arrest. Defendant has not demonstrated a reasonable probability that a motion to quash arrest and suppress evidence would have been granted. In light of defendant's failure to make this showing, we need not consider whether the trial's outcome would have been different had motion been granted.

¶ 24 A motion to quash arrest and suppress evidence would not have succeeded here. Accordingly, defense counsel was not ineffective for failing to file and pursue what would have been a futile motion. See *People v. Rucker*, 346 Ill. App. 3d 873, 889 (2004); *Rodriguez*, 312 Ill. App. 3d at 926. Defendant has not overcome the strong presumption that counsel's decision not to file a motion to quash and suppress was the product of sound trial strategy. Because defendant has failed to establish that trial counsel's performance was deficient, we need not consider whether prejudice resulted from counsel's actions. See *Rodriguez*, 312 Ill. App. 3d at 926.

¶ 25 Next, defendant contends that his sentence is excessive in light of his history of drug addiction and desire for treatment, his close relationship with his family, and the nonviolent nature of the offense. He argues that the 13-year sentence imposed by the trial court does not adequately reflect his rehabilitative potential, the mitigation weighing in his favor, or the constitutional directive of restoring offenders to useful citizenship. Defendant asks that this court reduce his sentence or, alternatively, remand for resentencing.

¶ 26 Sentencing decisions are entitled to great deference on appeal because the trial court is in a superior position to fashion an appropriate sentence based on firsthand consideration of relevant sentencing factors, including the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). We will not disturb a sentencing determination absent an abuse of discretion. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007). Sentences within the permissible statutory range may be deemed the result of an abuse of discretion only where they are "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 27 Here, the record indicates that the trial court was well aware of the mitigating factors identified by defendant on appeal, including the nature of the offense and defendant's history of heroin addiction, desire for drug treatment, and close relationship with his mother and siblings. Not only was the information regarding defendant's close familial relationships and 25-year history of heroin addiction included in the PSI report considered by the trial court, but in addition, defense counsel noted these factors at sentencing. Moreover, defendant expressed his desire for drug treatment when he was given the opportunity to address the trial court directly. Where mitigating evidence has been presented, it is presumed that the trial court considered it. *People v. Sven*, 365 Ill. App. 3d 226, 242 (2006).

¶ 28 In contrast to the mitigation presented, in aggravation, the State noted defendant's criminal background, which, according to the PSI report, included a federal conviction for unlawful possession of a firearm, two convictions for possession of a controlled substance, a conviction for delivery of a controlled substance, a conviction for possession of a stolen motor vehicle, and a conviction for attempted armed robbery.

¶ 29 The trial court sentenced defendant within the permissible statutory range for a Class X felony, 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (West 2010). The record indicates that the trial court properly considered the evidence in aggravation and mitigation. Given the facts presented, the

interests of society, and the trial court's consideration of relevant aggravating and mitigating factors, we cannot find that defendant's sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210. Accordingly, we find no abuse of discretion.

¶ 30 Defendant's fourth contention on appeal is that he is entitled to a reduction in the fines and fees assessed against him. Specifically, defendant argues that due to a mathematical error, he was overcharged $50; that he should not have been ordered to pay a $200 DNA assessment because he is already registered in the DNA database; and that he is entitled to $1,585 worth of $5-per-day credit against the assessed fines for the 317 days he spent in presentence custody. The State concedes all three issues. We accept the State's concession, vacate the DNA fee (see *People v. Marshall*, 242 Ill. 2d 285, 302-03 (2011) (an order imposing a duplicative DNA analysis fee is void and must be vacated, as it exceeds statutory authority)), and order the clerk of the circuit court to enter a modified fines, fees, and costs order to reflect a $1,585 credit toward the assessed fines. The parties agree that recalculation of the amount owed yields a total of $875.

¶ 31 Finally, defendant contends that his MSR term must be reduced. He argues that the proper MSR term is the two-year term applicable to Class 1 felonies, not the three-year term applicable to Class X felonies.

¶ 32 This court has clearly and repeatedly held that a defendant sentenced as a Class X offender receives the Class X MSR term of three years. *E.g.*, *People v. Lenoir*, 2013 IL App (1st) 113615, ¶¶ 22-25; *People v. Wade*, 2013 IL App (1st) 112547, ¶¶ 36-38; *People v. Davis*, 2012 IL App (5th) 100044, ¶ 34; *People v. Brisco*, 2012 IL App (1st) 101612, ¶¶ 60-62, *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶¶ 47-49; *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. McKinney*, 399 Ill. App. 3d 77, 80-83 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010); *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009); *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995). We decline defendant's invitation to abandon these well-reasoned cases, which specifically addressed the MSR statute, in

favor of *People v. Pullen*, 192 Ill. 2d 36 (2000), which addressed the consecutive sentencing statute, or *People v. Olivo*, 183 Ill. 2d 339 (1998), which addressed the extended-term sentencing statute. Defendant's contention fails.

¶ 33 For the reasons explained above, we affirm defendant's conviction and sentence and order the fines and fees order corrected.

¶ 34 Affirmed; fines and fees order corrected.