2014 IL App (1st) 120101-U

SIXTH DIVISION
August 22, 2014

No. 1-12-0101

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 4295
	)	
DERRICK PRUDE,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

O R D E R

¶ 1 ***Held*****:** We vacated certain fees assessed against defendant but affirmed his conviction where there was no ineffectiveness for counsel's failure to pursue a futile motion to suppress a lineup identification and agreement for admission of testimony pertaining to an officer's conversation with a victim which was part of the investigative process.

¶ 2 Following a bench trial, defendant Derrick Prude was convicted of theft under section 16-1(a)(4) of the Criminal Code of 1961 (the Code) (720 ILCS 5/16-1(a)(1) (West 2010)), and sentenced to four years in prison. On appeal, defendant argues trial counsel was ineffective for failing to move to suppress an identification of defendant which was the product of an overly suggestive lineup, and stipulated to, otherwise, inadmissible hearsay which linked defendant to

the vehicle used in the crime. Defendant also argues the trial court incorrectly assessed certain fees. We vacate a quasi-criminal fee and DNA analysis fee imposed against defendant and, otherwise, affirm defendant's conviction.

¶ 3 Defendant was originally charged with two counts of aggravated robbery under section 18-5(a) of the Code (720 ILCS 5/18-5(a) (West 2010)), for allegedly taking the property of Gelacio Ramirez, Jr. and Gelacio Ramirez, Sr. in their presence, while using or threatening to use force, and while armed with a dangerous weapon.

¶ 4 At trial, Gelacio Ramirez, Jr. testified that on February 18, 2011, at around 5:30 p.m., he and his father, Gelacio Ramirez, Sr., drove to a pawn shop on 1800 West Howard Street in Chicago to pawn his 50-inch television. The men parked their truck almost two blocks from the shop. As they began to unload the television, a woman approached them and said: "I'm going to take that TV." Mr. Ramirez, Jr. did not attempt to stop her because he was afraid she was armed with a weapon. Mr. Ramirez, Jr., however, never observed a weapon nor did the woman ever allude to having one. As the woman proceeded to take the television, a large vehicle pulled up behind the Ramirezs' truck. Defendant exited the vehicle from the front-passenger side. Another female was driving the vehicle. Defendant came within three feet of Mr. Ramirez, Jr. Defendant and the woman took the television and placed it into the backseat of the vehicle and drove off. Mr. Ramirez, Jr. wrote down the license plate number and called the police. He and his father then went to the police station where he gave the police the vehicle's license plate number and a physical description of defendant.

¶ 5 On February 21, 2011, Mr. Ramirez, Jr. returned to the police station and identified defendant in a photographic array. Before viewing the photographic array, Mr. Ramirez, Jr. read and signed a lineup advisory form which was printed in Spanish. The advisory form informed

Mr. Ramirez, Jr. that he was going to view a photographic lineup, but he was not obligated to identify anyone.

¶ 6 On February 28, 2011, Mr. Ramirez, Jr. identified defendant after viewing a physical lineup at the police station. Before viewing the lineup, he again read and signed a lineup advisory form which was printed in Spanish. Defendant was also identified by Mr. Ramirez, Jr. in court.

¶ 7 Mr. Ramirez, Sr., in his testimony, described the incident in a manner consistent with his son's testimony. He saw defendant's face when defendant was four feet away. On February 28, 2011, Mr. Ramirez, Sr. identified defendant in a lineup at the police station. Before viewing the lineup, Mr. Ramirez, Sr. read and signed a lineup advisory form which was printed in Spanish. He also identified defendant in court during his testimony. Mr. Ramirez, Sr. could not recall defendant's height, nor what defendant was wearing on the day of the robbery, except for a baseball cap. Mr. Ramirez, Sr. never saw the woman or defendant with a weapon.

¶ 8 The parties stipulated that Chicago police officer Mary Espinoza would testify that she took the police report regarding the incident, and that Mr. Ramirez, Jr. gave her a license plate number of A154435. The parties also stipulated Detective Brian Chebbers would testify that: (1) he used the license plate number given to him by Officer Espinoza and, after an investigation, determined the vehicle was registered to defendant; (2) defendant was arrested on February 27, 2011, while inside the vehicle, which bore the license plate number A154435; and (3) Detective Chebbers conducted physical lineups where both victims separately identified defendant. Finally, the State admitted into evidence a certified copy of a 2011 Illinois registration identification showing that an automobile with license plate number A154435 was registered to defendant.

¶ 9 Because there was no evidence defendant was armed with a firearm and did not threaten the victims, the trial court found defendant guilty of the lesser-included offense of theft of property from a person not exceeding $500. The trial court denied defendant's motion for a new trial and sentenced defendant to four years in prison. Defendant timely appealed.

¶ 10 On appeal, defendant first argues trial counsel was ineffective for failing to move to suppress Mr. Ramirez, Sr.'s identification of defendant in the lineup. Defendant contends the lineup was overly suggestive because defendant was the only participant in the lineup wearing an orange sweater. Defendant further maintains the State would not have met its burden of proving Mr. Ramirez, Sr.'s in-court identification had a reliable independent basis. We reject these arguments.

¶ 11 To establish a claim of ineffective assistance of counsel, defendant must show that: (1) trial counsel's performance fell below an objective standard of reasonableness; and (2) trial counsel's deficient performance resulted in prejudice to the defense. *Strickland v. Washington,* 466 U.S. 668, 687-88, 694. Both prongs of *Strickland* must be satisfied to prevail on a claim of ineffective assistance of counsel. *People v. Flores,* 153 Ill.2d 264, 283 (1992). "Where the facts surrounding the ineffective assistance claim are undisputed and the claim was not raised below, this court's review is *de novo*." *People v. Wilson*, 392 Ill. App. 3d 189, 197 (2009).

¶ 12 A decision as to whether to file a motion to suppress is generally considered a matter of trial strategy which will "typically not support a claim of ineffective representation." *People v. Henderson*, 2012 IL App (1st) 101494, ¶ 8 (citing *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 70)). "In order for a defendant to establish that he was prejudiced by counsel's failure to file a motion to suppress, he must show a reasonable probability that the motion would have been granted and that the outcome of the trial would have been different if the evidence at issue

had been suppressed." *Henderson*, 2012 IL App (1st) 101494, ¶ 8 (citing *People v. Patterson*, 217 Ill. 2d 407, 438 (2005)). If the motion would have been futile, a decision not to file a motion to suppress will not amount to incompetent representation. *Henderson*, 2012 IL App (1st) 101494, ¶ 8.

¶ 13 In a motion to suppress identification testimony, the defendant bears the burden of proving that the pretrial identification procedure was impermissibly suggestive. *People v. Gabriel*, 398 Ill. App. 3d 332, 348 (2010). " 'Only where a pretrial encounter resulting in an identification is 'unnecessarily suggestive' or 'impermissibly suggestive' so as to produce 'a very substantial likelihood of irreparable misidentification' is evidence of that and any subsequent identification excluded by law under the due process clause of the 14th Amendment.' " *People v. Love*, 377 Ill. App. 3d 306, 311 (2007) (quoting *People v. Moore*, 266 Ill. App. 3d 791, 796-97 (1994)). The law does not require the participants in a lineup to be nearly identical, nor to exactly match the descriptions given by eyewitnesses. *Love*, 377 Ill. App. 3d at 311. The suggestibility of a lineup depends on " 'the strength of the suggestion made to the witness' " and, whether, through " 'some specific activity on the part of the police, the witness is shown an individual who is more or less spotlighted by the authorities.' " *People v. Gabriel*, 398 Ill. App. 3d 332, 349 (quoting *People v. Johnson*, 149 Ill. 2d 118, 147 (1992)). Courts must examine the totality of the circumstances in determining whether a defendant has met the burden of showing the identification procedure was impermissibly suggestive. *People v. Prince*, 362 Ill. App. 3d 762, 771 (2005). If a defendant satisfies this burden of proof, only then will the burden shift to the State to show, by clear and convincing evidence, an independent basis of reliability for a later identification. *Id*.

¶ 14 Here, defendant has not established that Mr. Ramirez, Sr.'s lineup identification was impermissibly suggestive. The photograph of the physical lineup shows four men sitting on a bench; defendant was the second man from the left. Contrary to defendant's argument, the other three men who were in the lineup do not appear to be "grossly dissimilar in appearance to the suspect." The lineup photograph shows the other three men who participated in the lineup to be the same approximate age as defendant and possessed a similar skin tone. Two of the other men also possessed similar facial hair to defendant. All of the men, as they were seated on the bench, had their hands on their laps. Because they were seated, there is not a marked difference in their heights. Only one man wore a stocking cap and an outer jacket.

¶ 15 Defendant argues his orange sweater immediately draws the attention of the viewers and sets him apart from the other three men in the lineup who all wore darker clothing. This court has held that a lineup is not suggestive merely because the defendant is the only person wearing a specific item of clothing, even where that piece of clothing was purportedly worn by the offender at the time of the offense. See, e.g., *Gabriel*, 398 Ill. App. 3d at 349 (lineup not overly suggestive where the defendant was the only one wearing a white T-shirt); and *People v. Peterson*, 311 Ill. App. 3d 38, 49 (1999) (lineup not unduly suggestive when the defendant was the only one present wearing a gray sweatshirt). Defendant does not contend the orange sweater connects him to the crime in any way. Furthermore and, most importantly, there is no evidence here that the identification procedures were impermissibly suggestive. Mr. Ramirez read and signed the lineup advisory form which informed him in Spanish he was not required to make an identification. Defendant does not argue that the police forced him to wear orange, nor engaged in any specific activity to spotlight defendant. See *Gabriel*, 398 Ill. App. 3d at 349.

¶ 16 Because defendant has not shown that the lineup was impermissibly suggestive, we need not address defendant's argument regarding the State's supposed inability to show an independent basis of reliability for Mr. Ramirez, Sr.'s in-court identification of defendant.

¶ 17 Accordingly, under the performance prong of *Strickland*, we find that trial counsel was not ineffective for failing to file a motion to suppress Mr. Ramirez Sr.'s identification because such a motion would have been futile. See *People v. Lundy*, 334 Ill. App. 3d 819, 830 (2002) (holding that a trial counsel's failure to file a motion to suppress does not establish incompetent representation when that motion would be futile, as it is a matter of trial strategy to file such a motion, trial counsel's decision will be accorded great deference). Additionally, under the prejudice prong of *Strickland*, we find that defendant was not prejudiced by trial counsel's performance because there is no reasonable probability that the motion would have been granted. Further, the State presented overwhelming evidence at trial as to defendant's participation in the robbery to support defendant's conviction, even if Mr. Ramirez Sr.'s lineup identification had been suppressed, Mr. Ramirez Jr. identified defendant in a photographic array, lineup, and in court. The vehicle involved in the incident had a license plate number which was assigned to a vehicle registered to defendant and defendant was arrested in that vehicle. We conclude the outcome of the proceedings would not have been different, even if the motion to suppress had been brought and granted. We, thus, find defendant has not proved ineffective assistance of counsel under either prong of the *Strickland* test as to a failure to move to suppress Mr. Ramirez, Sr.'s lineup identification of defendant.

¶ 18 Defendant next argues that he received ineffective assistance of counsel because trial counsel stipulated that Officer Espinoza's testimony would be that Mr. Ramirez, Jr. gave her the license plate number A154435 when she was taking her report. We disagree.

¶ 19 Hearsay is an out-of-court statement offered to establish the truth of the matter asserted. *People v. Williams*, 181 Ill. 2d 297, 312-13 (1998). Hearsay is generally not admissible in evidence. *Id*. Trial counsel's failure to object to hearsay testimony "may be a matter of sound trial strategy, and does not necessarily establish deficient performance." *People v. Evans*, 209 Ill 2d 194, 221 (2004). An exception to the hearsay rule allows a police officer to testify as to a conversation for the purpose of establishing how the investigation was conducted. *People v. Feazell*, 386 Ill. App. 3d 55, 65 (2007). The exception cannot be used to place into evidence the substance of any conversations offered for the truth of their contents. *Id.*

¶ 20 Officer's Espinoza's testimony was offered merely to establish the course of the investigation and not as substantive evidence to prove defendant was seen in a vehicle with the same license plate number at the scene of the robbery. The stipulation as to Officer Espinoza's conversation with Mr. Ramirez, Jr. was admitted to show Officer Espinoza received information—a license plate number—which led to Detective Chebbers' investigation of vehicle registration records and his discovery that the license plate number belonged to defendant's vehicle. Further, even if the stipulated testimony was hearsay, we note that defendant was convicted after a bench trial. We "must presume that a trial judge knows and follows the law unless the record demonstrates otherwise." *People v. Jordan*, 218 Ill. 2d 255, 269 (2006). There has been no showing that the trial judge relied on this testimony for an improper purpose. Therefore, this claim of ineffectiveness fails to pass the two-prong *Strickland* test.

¶ 21 Finally, the parties correctly agree that defendant was improperly assessed a $25 quasi-criminal fee imposed under section 4-2002.1(a) of the Counties Code (55 ILCS 5/4-2002.1(a) (West 2010)), which applies where a person violates the vehicle code or similar municipal ordinances, and a $200 DNA ID System fee imposed under section 5-4-3(j) of the Unified Code

of Corrections (730 ILCS 5/5-4-3(j) (West 2010)). As this case did not involve a vehicular offense, we vacate defendant's $25 quasi-criminal fee. See *People v. Willis*, 409 Ill. App. 3d 804, 818 (2011). Additionally, because defendant was already in the DNA database due to a prior conviction, we vacate his $200 DNA analysis fee. 730 ILCS 5/5-4-3(j) (West 2010); *People v. Marshall*, 242 Ill. 2d 285, 303 (2011).

¶ 22 For the foregoing reasons, we affirm defendant's conviction and modify the order for fines, fees and costs as stated.

¶ 23 Affirmed; fines and fees order corrected.