2014 IL App (1st) 120509-U

THIRD DIVISION
MARCH 31, 2014

No. 1-12-0509

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 22132
	)	
ERICK SERNA,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial counsel was not ineffective for failing to file a futile motion to suppress in light of the totality of the circumstances showing the existence of probable cause justifying the seizure of the cocaine that defendant dropped in plain view of the police officer.

¶ 2 Following a bench trial, defendant Erick Serna was found guilty of possession of a controlled substance and sentenced to 30 months' probation. On appeal, defendant contends that

his trial counsel was ineffective for failing to file a motion to suppress evidence because the seizure of the cocaine he allegedly dropped was not justified under the plain view doctrine.

¶ 3 At trial, Chicago police officer Kevin Deeren testified that about 2:20 a.m. on November 21, 2010, he and his partners, Officers McKenna and Tuman, were on routine patrol in plain clothes and an unmarked vehicle, when he observed a minivan idling in the middle of the alley behind 2431 South Drake Avenue. Officer Deeren exited his vehicle, walked to the driver's side of the minivan and asked the driver, whom he identified in court as defendant, for his driver's license and insurance card. Defendant responded that he did not have a driver's license, and Officer Deeren asked him to step out of the minivan. Before defendant did so, however, Officer Deeren observed defendant reach underneath his left thigh and remove a small baggie, which he then dropped onto the floorboard as he exited. Officer Deeren recovered the baggie and described its contents as "a knotted, clear plastic baggie containing green leafy substance, suspect cannabis, and then also a small knotted baggie containing a white powder substance, suspect cocaine." The contraband remained in his constant care, custody, and control until he handed it to Officer Tuman, who inventoried it at the police station. Officer Deeren also testified that he believed there was a front seat passenger in the minivan.

¶ 4 On cross-examination, Officer Deeren identified Defense Exhibit One as a photograph of the sliding gate behind 2431 South Drake Avenue and testified that the minivan was parked "almost right in front of it." He also viewed two additional photographic exhibits, which he guessed were the "opposite view of the same [gated] driveway," and acknowledged that he did not recall the presence of more than three officers at the scene.

¶ 5 After the parties stipulated to the chain of custody of the recovered substances and forensic analysis of the white powder, which tested positive for cocaine, the State rested and the trial court denied defendant's motion for a directed finding.

¶ 6 Jose Vidal, defendant's brother-in-law and neighbor, testified that about 2:30 a.m. on November 21, 2010, he and defendant returned home from work with a coworker who used to share a ride with them. They drove into the alley behind defendant's residence and pulled into the gated driveway where they encountered the landlord's son outside the adjacent garage. The landlord's son asked to borrow defendant's spare garage key and defendant went inside to retrieve it. Meanwhile, the police arrived on the scene, removed Vidal and his coworker from the minivan and searched them. When defendant returned, the police "grabbed" him, went inside defendant's residence for about 20 minutes, and then arrested him.

¶ 7 Maria Serna, defendant's wife, testified through an interpreter that she was awakened by one female and three male police officers and asked to sit in the living room while they searched the residence for about 15 or 20 minutes.

¶ 8 Defendant testified in his own behalf and acknowledged that he had two prior felony drug convictions from 2004. He identified Defense Exhibit One as a photograph of the alley and sliding gate behind his residence. He identified Defense Exhibit Two as a photographic view from "inside the gate," where he parks his vehicle, and Defense Exhibit Three as another photograph of the parking space. Defense Exhibits One and Two were later admitted into evidence without objection.

¶ 9 As to his encounter with the police, defendant testified that on the date in question, he drove home from work with his brother-in-law and "one of the guys." After he pulled into the

gated parking space behind his residence, he went inside briefly to retrieve something. When he came back outside, he saw the police, who approached and handcuffed him. The police then went inside his residence for about 20 minutes and arrested him without explanation. Defendant further testified, on cross-examination, that he had a driver's license and insurance on the date in question.

¶ 10 Following the arguments of counsel, the trial court found defendant guilty of possession of a controlled substance. In reaching that determination, the trial court noted that this case "boils down to an issue of credibility" and stated that it believed the officer's testimony. Defendant filed a motion for a new trial, which the trial court denied.

¶ 11 In this court, defendant solely contends that trial counsel was ineffective for failing to file a motion to suppress evidence. Citing *People v. Garcia*, 2012 IL App (1st) 102940, ¶¶ 13-16, defendant argues that there is a reasonable probability that a motion to suppress would have succeeded based on Officer Deeren's mere observation of a plastic bag, which has many innocent uses, and "the credible defense testimony" showing that the minivan was parked in a private, enclosed driveway on which Officer Deeren had no lawful reason to intrude.

¶ 12 To succeed on a claim of ineffective assistance of counsel, 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)). In order to establish prejudice where an ineffectiveness claim is based on counsel's failure to file a suppression motion, defendant "must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *People v. Henderson*, 2013 IL 114040, ¶ 15.

Counsel's failure to file a motion to quash arrest and suppress evidence does not constitute ineffective assistance when the motion would have been futile. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 13 In this case, Officer Deeren testified that he saw defendant drop the baggie containing the contraband to the floorboard of the minivan after he failed to produce a driver's license and was asked to exit the vehicle. The plain view doctrine allows a police officer to seize an object without a search warrant provided that the officer is lawfully located in the place where he observed the object, the object is in plain view, and the object's incriminating nature is immediately apparent. *Garcia*, 2012 IL App (1st) 102940, ¶ 4. The immediately apparent or probable cause element, however, does not require a police officer to know that the item is contraband or evidence of a crime. *People v. Jones*, 215 Ill. 2d 261, 277 (2005).

¶ 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 People v. Jones*, 215 Ill. 2d 261, 272 (2005). There is also no reasonable expectation of privacy in a container that is "not closed," or "transparent," or when its "distinctive configuration proclaims its contents," and the contents thereof can be deemed in plain view. *Jones*, 215 Ill. 2d at 279 (and cases cited therein).

¶ 15 Here, the record shows that Officer Deeren had probable cause under the plain view doctrine to seize the cocaine that defendant dropped onto the floorboard as he stepped out of the driver's side of the minivan. Officer Deeren was in a place where he lawfully had a right to be and he observed evidence of a crime in plain view. *People v. Woodrome*, 2013 IL App (4th)

130142, ¶ 28. The trial court credited Officer Deeren's testimony that the minivan was idling in the middle of the alley behind defendant's residence when he approached it, despite defendant's assertion that the minivan was parked inside the gated driveway, and we will not substitute our judgment therefor. *People v. Evans*, 296 Ill. App. 3d 1, 10 (1997).

¶ 16 That Officer Deeren did not testify that he had observed any indications of drug activity before he approached the minivan is of no moment because defendant's initial encounter with the police was consensual. *People v. Lopez*, 2013 IL App (1st) 111819, ¶¶ 26-30. "[A] police officer does not violate the fourth amendment merely by approaching a person in public to ask questions if the person is willing to listen" (*People v. Luedemann*, 222 Ill. 2d 530, 549 (2006)), and "[i]n the absence of otherwise limiting circumstances, a driveway on private property, like the entrance to a private home, can be considered a public place" (*People v. Scott*, 249 Ill. App. 3d 597, 603 (1993), *cited in Woodrome*, 2013 IL App (4th) 130142, ¶ 24). The record further establishes that, regardless of whether Officer Deeren had sufficient facts to justify an investigatory stop, defendant was not seized until after he dropped "a small knotted baggie containing a white powder substance, suspect cocaine" in plain view of the officer. *People v. Lockett*, 311 Ill. App. 3d 661, 670 (2000).

¶ 17 Although defendant argues that here, as in *Garcia*, 2012 IL App (1st) 102940, the incriminating nature of the plastic bag was not immediately apparent because this type of container has many innocent uses and there was nothing to indicate that the plastic bag he supposedly dropped contained contraband, the evidence adduced at trial shows otherwise. Here, unlike in *Garcia*, where the police observed two or three inches of a plastic bag sticking out of defendant's pocket and seized it, Officer Deeren observed the transparent plastic bag and its

contents when defendant dropped it onto the floorboard of the minivan, after reaching under his left thigh and removing it. He described the incriminating nature of the contents of the plastic bag as a white powdery substance that looked like cocaine. Under these circumstances, Officer Deeren had probable cause to believe the item was evidence of a crime. *People v. House*, 141 Ill. App. 3d 298, 302 (1986).

¶ 18 Defendant nonetheless argues the inherent implausibility of Officer Deeren's "dropsy" testimony. "A 'dropsy case' is one in which a police officer, to avoid the exclusion of evidence on fourth amendment grounds, falsely testifies that the defendant dropped the narcotics in plain view (as opposed to the officer's discovering the narcotics in an illegal search)." *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004). Although defendant would have us find otherwise, we will not disturb the trial court's credibility determination regarding Officer Deeren's testimony. *People v. Webb*, 3 Ill. App 3d 1012, 1014 (1971). "Far from being contrary to human experience, cases which have come to this court show it to be a common behavior pattern for individuals having narcotics on their person to attempt to dispose of them when suddenly confronted by authorities." *People v. Henderson*, 33 Ill. 2d 225, 229 (1965).

¶ 19 In light of the above, we conclude that a motion to suppress the cocaine would not have been granted and, accordingly, that defendant cannot satisfy his burden under *Strickland*. *Henderson*, 2013 IL 114040, ¶ 51. We therefore reject defendant's claim that his trial counsel was ineffective, and affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.