2014 IL App (1st) 121794-U

No. 1-12-1794

SIXTH DIVISION
February 21, 2014

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 7405
	)	
DERRICK ALEXANDER,	)	The Honorable
	)	John Thomas Doody,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶ 1 *HELD*: Defendant failed to demonstrate his counsel's alleged errors caused him prejudice where the evidence established his constructive possession of narcotics.

¶ 2 Following a bench trial, defendant, Derrick Alexander, was found guilty of possession of a controlled substance with the intent to deliver and sentenced to 75 months in prison. On appeal, defendant contends he received ineffective assistance of counsel where his counsel failed to request the suppression of illegally obtained evidence and failed to investigate available

exculpatory evidence. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 On February 4, 2011, a search warrant was issued for the basement of a building located at 851 N. Drake Avenue in Chicago, Illinois. The warrant instructed seizure of the following: "heroine, to wit a controlled substance, and any documents showing residency, any paraphernalia used in the weighing and cutting or mixing of illegal drugs. Any money, any records detailing illegal drug transactions."

¶ 5 At trial, Chicago Police Officer Beckman testified that, at 8:54 p.m. on February 4, 2011, he and eleven other officers executed the search warrant at 851 N. Drake Avenue. Defendant was not present during the execution of the warrant. The residence was a one level, single-family home with a basement. According to Officer Beckman, the officers entered the residence through the front door and walked through the first floor to the rear of the home. The basement could not be accessed from the interior of the residence. The officers then exited the rear of the home to an attached rear porch where, on a small dresser, Officer Beckman observed a letter and a Chicago Police inventory slip both addressed to defendant at 851 N. Drake Avenue. The officers seized the letter and inventory slip before exiting the attached rear porch and entering an exterior door that led to the basement.

¶ 6 Officer Beckman[1] testified that, upon entering the basement, the officers discovered a small hallway that contained a crawl space on both sides. Officer Beckman stated that the remaining basement beyond the hallway contained a small bedroom with some dressers, a

[1]Officer Beckman's first name does not appear in the record.

bathroom, and a small wall in the middle of the basement. According to Officer Beckman, he observed a gray storage bin in the left-side crawl space and searched it. Inside the storage bin, Officer Beckman recovered six blue-taped tin foil packets of suspected heroin. Officer Beckman further testified that Officer Lipka[2] recovered a plastic bag from the top of a support beam in the basement. The plastic bag contained 72 blue and purple-taped tin foil packets of suspected heroin. During the basement search, defendant's 2003-2004 high school identification card[3] was found in a dresser drawer, as well as "Batman logo" narcotics packaging and mini plastic bags used for narcotics packaging. In addition, on a shelving unit, an officer discovered two letters addressed to defendant at the 851 N. Drake residence. Officer Beckman testified that he issued an investigative alert for defendant after having discovered the suspected narcotics and proof of residency.

¶ 7 The parties stipulated that, if called, a forensic chemist would testify that the 78 tin foil packets contained 17.7 grams of heroin.

¶ 8 The inventory slip placed in evidence provided that defendant's personal property was recovered on December 17, 2010. The recovered envelope placed in evidence contained a return address from an attorney, but did not bear a postmark. Photographs submitted as evidence by the State did not show any clothing in the basement of the residence. One photograph contained a

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[2]Officer Lipka's first name does not appear in the record.

[3]Defendant reported that the identification card was for the 2001-2002 school year; however, our review of the record reveals the identification card was for the 2003-2004 school year and defendant's name was spelled "Darrick Alexander" on the card.

stack of diapers on a shelving unit. The two letters found in the basement were not postmarked; however, our review of the record reveals that one letter related to a class action lawsuit requiring a response by March 1, 2011, and the other letter was a solicitation dated December 29, 2010.

¶ 9 Officer Gallagher[4] testified that, on April 14, 2011, he and his partner performed a traffic stop on a vehicle being driven by defendant. During the traffic stop, defendant produced an identification card bearing the 851 N. Drake address. Defendant was placed in custody pursuant to the investigative alert. A search incident to defendant's arrest revealed one plastic bag containing three knotted plastic bags which held a total of 38 tin foil packets, each containing a white powder substance of suspected heroin. Officer Gallagher then placed defendant into his police vehicle and transferred him to the police station. Once at the station, $695 were found on defendant's person subsequent to a custodial search.

¶ 10 The parties stipulated that, if called, a forensic chemist would testify that the 38 tin foil packets recovered on April 14, 2011, contained 9.8 grams of heroin.

¶ 11 Defendant was found guilty of two counts of possession of a controlled substance with the intent to deliver, one count for 15 or more grams but less than 100 grams of heroin and one count for one or more grams but less than 15 grams of heroin.

¶ 12 Defense counsel filed a posttrial motion for a new trial pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), arguing that defendant was entitled to a new trial where the State failed to admit as evidence a prescription bottle belonging to defendant's brother with his stated address as 851 N. Drake. The prescription bottle appeared in one of the photographs admitted into

[4]Officer Gallagher's first name does not appear in the record.

evidence, but the bottle itself was not admitted. According to defense counsel, his defense strategy would have been different had he been aware at the time of trial that a prescription was recovered belonging to someone other than defendant. Instead, defense counsel only learned of the prescription bottle from defendant's uncle and mother after the conclusion of trial. The court denied defendant's motion, finding there was proof defendant resided at the address in question. The court stated, "whether there was proof that there was a pill bottle belonging to his brother, the Court frankly doesn't know that that [*sic*] would have made any difference in light of the evidence that was received at trial showing that he resided there." Defendant subsequently was sentenced to concurrent terms of 75 months in prison on each count. This timely appeal followed.

¶ 13 DECISION

¶ 14 At the outset, we note that defendant only challenges his conviction related to the drugs recovered at the residence on Drake Avenue. Defendant does not challenge his conviction related to the drugs recovered incident to the traffic stop. Defendant contends his trial counsel was ineffective for failing to file a motion to suppress evidence illegally obtained outside the scope of the search warrant, namely, the letter and inventory slip found on the rear porch of the residence, and for failing to recognize and further investigate exculpatory evidence, namely, the prescription pill bottle. The State responds that trial counsel provided competent representation and the outcome of defendant's trial would not have been altered had the letter and inventory slip been suppressed or had evidence been admitted that the prescription bottle belonged to defendant's brother.

¶ 15 To present a successful claim of ineffective assistance of trial counsel, a defendant must allege facts demonstrating that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome of the trial, *i.e.*, that the defense counsel's deficient performance rendered the result of trial unreliable or the proceeding fundamentally unfair. *Id*. at 694. A defendant must satisfy both prongs of the *Strickland* test to establish ineffective assistance. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984). However, if a defendant cannot demonstrate sufficient prejudice, a court need not decide whether counsel's performance was deficient. *People v. Evans*, 186 Ill. 2d 83, 94 (1999).

¶ 16 In order to sustain defendant's convictions for unlawful possession of a controlled substance with the intent to deliver, the State was required to prove, *inter alia*, beyond a reasonable doubt that defendant had knowledge of the controlled substance and that it was in his immediate and exclusive control. *People v. Minniweather*, 301 Ill. App. 3d 574, 578 (1998). The State was not required to prove actual possession when constructive possession could be inferred from the facts. *Id*. "Control of the premises is not required for a finding of constructive possession." *Id*. Rather, " '[c]onstructive possession may exist even where an individual is no longer in physical control of the drugs, provided he once had physical control of the drugs with intent to exercise control in his own behalf, and he has not abandoned them and no other person has obtained possession.' " *Id*. (quoting *People v. Adams*, 161 Ill. 2d 333, 345 (1994)). Hiding or

disposing of the drugs to avoid detection does not constitute abandonment. *People v. Adams*, 161 Ill. 2d 333, 345 (1994). Moreover, "[h]abituation in or rental of the premises where narcotics are discovered is sufficient evidence of control to constitute constructive possession." *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999).

¶ 17 I. Failure to File A Motion to Suppress Evidence

¶ 18 Defendant argues that his counsel's failure to file a motion to suppress the letter and inventory slip found on the rear porch caused him prejudice because the State would not have been able to prove constructive possession without the improperly retrieved evidence.

¶ 19 To establish ineffective assistance of counsel for failing to file a motion to suppress, a defendant must demonstrate that the motion would have been granted and the trial outcome would have been different had the evidence been suppressed. *People v. Ayala*, 386 Ill. App. 3d 912, 917 (2008).

¶ 20 In attempting to show that a motion to suppress the letter and inventory slip would have been granted, defendant argues that the officers acted outside of the scope of the warrant by entering the main residence at 851 N. Drake where the warrant was limited to the inspection of the basement. Because the officers had no authority to search the main floor of the residence, defendant argues that the letter and inventory slip were improperly retrieved. The State responds that the evidence was properly seized pursuant to the plain view exception to the warrant requirement.

¶ 21 Both the Illinois and United States Constitutions govern the conduct of police officers in performing warrantless arrests and searches and protect individuals from unreasonable searches

and seizures. U.S. Const. amend. IV, XIV; Ill. Const. 1970, art. I, § 6. Pursuant to the plain view doctrine, evidence may be seized without a warrant when: (1) the initial intrusion providing the plain view to the officers was lawful; (2) the evidence was discovered inadvertently; and (3) the incriminating nature of the evidence was immediately apparent. *People v. Berry*, 314 Ill. App. 3d 1, 8 (2000).

¶ 22 Turning to the first requirement for application of the exception, we conclude that the officers were lawfully on the rear porch when the evidence was found in plain view. Defendant fails to establish, and our review of the record does not reveal, any evidence or testimony demonstrating the officers knew the basement could only be accessed through a rear exterior door. A photograph of the house provides no indication of means of ingress into the basement. Moreover, Officer Beckman testified that the officers did not conduct a search of the main floor; rather, they merely walked through the residence in route to the basement where their authorized search was conducted. Therefore, the officers were on the rear porch for a lawful purpose. *Cf. People v. Freeman*, 121 Ill. App. 3d 1023, 1031-32 (1984) (where the evidence seized was found in a garage 30-40 feet away from the house, which was the subject of the warrant, and there was no reason the officers needed to pass the garage in order to execute the warrant).

¶ 23 Turning to the second requirement for application of the exception, while on the way to the basement, Officer Beckman observed the letter and inventory slip on the rear porch. The discovery of the evidence was inadvertent and not during an unauthorized search of the first floor or the porch.

¶ 24 Turning to the third requirement for application of the exception, the search warrant was issued to retrieve evidence establishing possession of a controlled substance. Specifically, the warrant instructed the officers to seize evidence establishing residency. As stated, possession may be constructive (*Minniweather*, 301 Ill. App. 3d at 578) and may be inferred when narcotics are discovered at an individual's home (*Cunningham*, 309 Ill. App. 3d at 828). Accordingly, the letter and inventory slip bearing defendant's name and the Drake address provided evidence establishing defendant's residence, which was immediately apparent.

¶ 25 In sum, the letter and inventory slip were retrieved within the plain view exception to the Fourth Amendment warrant requirement. *Cf. People v. Alexander*, 272 Ill. App. 3d 698, 705 (1995) (where the evidence seized was not the subject of a search warrant and did not fall within the exception for a search incident to a lawful arrest). The evidence was admissible and, therefore, defendant cannot demonstrate that a motion to suppress would have been successful. As a result, defendant cannot show his counsel was ineffective for failing to file a motion to suppress the evidence.

¶ 26 Alternatively, even had the letter and inventory slip been suppressed, the outcome of the trial would not have been different. The remaining evidence, namely, the letters found in the basement, defendant's school identification card found in the basement, and defendant's identification bearing the Drake address submitted upon his arrest, sufficiently established defendant's constructive possession of the contested heroin.

¶ 27 II. Failure to Investigate and Discover Exculpatory Evidence

¶ 28 Defendant next argues that his counsel's failure to investigate and discover the

exculpatory prescription bottle belonging to his brother caused him prejudice because the evidence could have weakened the State's case by demonstrating defendant did not have exclusive control of the basement.

¶ 29 In denying defendant's posttrial *Brady* motion, the trial court stated that admission of the prescription bottle with proof that it belonged to defendant's brother would not have been sufficient to undermine the totality of the evidence demonstrating defendant's constructive possession of the heroin. We agree.

¶ 30 "Proof that others shared the quarters, or that one other than the defendant was the primary occupant of the premises, is insufficient to overcome a finding that the defendant exercised control and dominion over the premises." *People v. Williams*, 98 Ill. App. 3d 844, 848 (1981).

¶ 31 As stated, the police retrieved multiple pieces of evidence establishing defendant's constructive possession of the heroin in the basement at the Drake address, namely, his school identification and pieces of mail found in the basement bearing his name with the Drake address, as well as the letter and inventory slip properly seized from the rear porch under the plain view exception also bearing his name and the Drake address. Moreover, defendant presented identification bearing the Drake address when he was arrested. Importantly, the arrest was *after* the search warrant was executed. Therefore, although defendant argues on appeal that he no longer lived at the residence when the narcotics were seized and all the pieces of mail were presumably received by defendant weeks before the warrant was executed, he continued to present the Drake address as his residence over two months after the search warrant was

executed. See *Cunningham*, 309 Ill. App. 3d at 828 (where the evidence demonstrated residency at the subject address because the address was on the defendant's driver's license, the defendant's mail was delivered to the address, the defendant gave the address to the police at the time of his arrest, and the defendant had keys to the residence).

¶ 32 In addition, review of the photograph containing the prescription bottle provides no indication of the patient's name, the address of the patient, or the date the prescription was dispensed. Therefore, contrary to defendant's argument on appeal, unlike the evidence showing defendant's residency, there was no evidence whatsoever demonstrating his brother lived in the basement. Accordingly, defendant cannot demonstrate that, but for his counsel's failure to investigate and introduce the pill bottle, the result of his trial would have been different.

¶ 33 Based on the foregoing, we conclude defendant cannot demonstrate that he suffered prejudice due to his counsel's failure to investigate and introduce the prescription bottle.

¶ 34 III. Cumulative Error

¶ 35 Defendant finally contends he is entitled to a new trial where the cumulative impact of his counsel's inactions caused him prejudice.

¶ 36 As we have concluded, defendant has not demonstrated that his counsel was ineffective for failing to suppress the letter and inventory slip and failing to introduce the prescription bottle. Moreover, the State was not required to establish that defendant had physical control over the basement (*Minniweather*, 301 Ill. App. 3d at 578) nor that defendant was the sole occupant of the basement (*Williams*, 98 Ill. App. 3d at 848). The evidence established that defendant resided at 851 N. Drake at the time in question. Most notably, defendant himself provided 851 N. Drake as

his residence when he submitted his identification at the time of his arrest, two months after execution of the warrant and seizure of the heroin. We, therefore, find no cumulative error.

¶ 37 CONCLUSION

¶ 38 We conclude that defendant cannot establish sufficient facts demonstrating he received ineffective assistance of counsel. We, therefore, affirm the judgment of the trial court.

¶ 39 Affirmed.