2017 IL App (1st) 143156-U
No. 1-14-3156

THIRD DIVISION
May 3, 2017

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. 13 CR 13916
	)	
TYREESE McSWINE,	)	Honorable
	)	Gregory Robert Ginex,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant cannot establish trial counsel's ineffectiveness for withdrawing motion to quash his arrest and suppress evidence, and further, that claim is better suited for a postconviction proceeding. Moreover, defendant did not demonstrate error in the trial court's ruling that a witness was not impeached. His conviction on one count of aggravated UUW must be vacated pursuant to *People v. Aguilar*, 2013 IL 112116.

¶ 2 Following a bench trial, defendant Tyreese McSwine was convicted of aggravated unlawful use of a weapon (aggravated UUW), unlawful use or possession of a weapon by a felon (UUWF) and defacing the identification marks of a firearm. On appeal, defendant contends his trial counsel was ineffective for withdrawing a motion to quash his arrest and suppress evidence,

asserting the motion had a reasonable probability of success. He further argues that the trial court erred in finding that a police officer's testimony was not impeached at trial. Defendant also asserts that his conviction on one count of aggravated UUW must be vacated because the underlying statute was found facially unconstitutional by the Illinois Supreme Court in *People v. Aguilar*, 2013 IL 112116, and *People v. Burns*, 2015 IL 117387.

¶ 3 Defendant was charged with two counts of aggravated UUW under section 24-1.6(a)(1) of the Criminal Code of 2012 (the Code) (720 ILCS 5/24-1.6(a)(1) (West Supp. 2013)). Count 1 of the indictment alleged that defendant knowingly carried a firearm in a vehicle in violation of section 24-1.6(a)(1), (a)(3)(A) of the Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West Supp. 2013)). Count 2 alleged that defendant committed that act and had not been issued a valid Firearm Owner's Identification (FOID) card in violation of section 24-1.6(a)(1), (a)(3)(C) of the Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West Supp. 2013)). Counts 3 and 4 charged defendant with knowingly carrying a firearm on a public street under section 24-1.6(a)(2) of the Code (West Supp. 2013).

¶ 4 Counts 5 through 8 of the indictment charged defendant with UUWF under section 24-1.1(a) of the Code (720 ILCS 5/24-1.1(a) (West 2012)). Count 5 and Count 6 alleged that defendant knowingly possessed a weapon and possessed ammunition having previously committed the felony offense of UUW in case No. 10 C4 40550. The indictment indicated that as to those counts, the State would "seek to sentence [defendant] as a Class 2 offender pursuant to section 24-1.1(e) in that he was on parole or mandatory supervised release at the time of the offense." Similarly, Count 7 and Count 8 charged defendant with UUWF under section 24-1.1(a) (720 ILCS 5/24-1.1(a) (West 2012)) based on his knowing possession of a weapon and

ammunition, having previously committed the felony offense of defacing identification marks of a firearm in case No. 08 C4 41646. Count 9 charged defendant with defacing the identification marks of the firearm in the instant case (720 ILCS 5/24-5 (West 2012)).

¶ 5 Before trial, defense counsel filed a motion to quash defendant's arrest and suppress evidence. Counsel filed an amended motion on November 13, 2013, which asserted police lacked a reasonable suspicion that neither defendant nor the vehicle in which he was sitting was subject to seizure. The motion argued, *inter alia*, that defendant's act of "flicking his shirt up and down" prior to his detention did not give the officer reasonable suspicion to conduct a "pat-down" search for a weapon.

¶ 6 On November 15, 2013, counsel withdrew the motion to quash arrest and suppress evidence. About a month later, defendant and counsel appeared in court seeking a status date. Defendant addressed the court, stating: "I wanted to hear the motion. You said we could hear the motion. She's taking it off without my consent." The court told defendant that counsel was his attorney and he had "to listen to her about motions." Counsel stated she had "discussed this with [defendant] last time and withdrew our motion" and that she and co-counsel addressed the motion with defendant "numerous times."

¶ 7 At defendant's bench trial, Maywood police officer George Adamidis testified he had been a gang and narcotics investigator in that department for three years and was familiar with the major gangs and their territories in the Maywood area. Officer Adamidis testified that the Black P. Stone Nation controlled the area on 17th Avenue from South Maywood Drive to Harrison and from Harrison to 25th Avenue. He further testified that the Gangster Disciples controlled the area near 17th Avenue and Madison Street, the Four Corner Hustlers "have most

of Maywood on lockdown" and the Mafia Insane Vice Lords claimed an area near "20th and St. Charles into Bellwood."

¶ 8 Officer Adamidis testified that on June 23, 2013, he and his partner were in the area of 17th Avenue and South Maywood Drive in an unmarked vehicle responding to a radio call of a man with a gun. Both officers were in plain clothes, which Officer Adamidis described as "cargo pants, t-shirt, police body armor with police markings and badge."

¶ 9 When Officer Adamidis and his partner arrived at the 1200 block of 18th Avenue, he observed a vehicle occupied by two people and parked on the west side of the street. Noting the car was parked a half-block from the area noted in the radio call, the officer looked at the vehicle and saw the individual in the passenger seat "look in my general direction and slouch down in the seat." The officer testified he "felt suspicious" and got out of the unmarked police car.

¶ 10 Officer Adamidis testified that as he approached the passenger side of the vehicle, he recognized the person seated in the vehicle as defendant. He testified that he knew defendant through his own prior contact with gang members and his knowledge of gangs. The officer had known defendant for six years and had as many as 10 contacts with defendant per year. He had learned four years earlier through his street contacts that defendant was a member of the Four Corner Hustlers, and he had seen defendant together with other known members of the Four Corner Hustlers. The area in which defendant was seen was part of the Black P. Stone Nation's "territory."

¶ 11 When Officer Adamidis saw defendant on the day in question, it was the third time he had come into contact with defendant that summer, and the previous two encounters involved

loitering groups of active gang members. The officer testified that on the day of these events, he was aware that defendant had been "just recently paroled for a weapons offense."

¶ 12 Officer Adamidis asked defendant to step out of the vehicle. Officer Adamidis's partner, who had approached the driver's side of the vehicle, asked the woman in the driver's seat to get out of the vehicle. Defendant remained seated in the car and replied, "Come on, man." Defendant gestured to his waistband area and was "flicking his shirt." When ordered out of the vehicle a second time, defendant again gestured toward his waist.

¶ 13 At that point, Officer Adamidis reached into the car and lifted defendant's shirt to reveal the butt of a semi-automatic handgun protruding from defendant's waistband. The officer told defendant to keep his hands up and removed the weapon, which was loaded with 12 rounds of ammunition, from defendant's clothing. Officer Adamidis identified the weapon in court.

¶ 14 Defendant was read his *Miranda* rights. Officer Adamidis testified that while placing defendant in custody, he asked defendant why he was in the Stones territory, and defendant replied, "You know we're going at it with the Stones." When asked more specifically what defendant said, Officer Adamidis replied, "I believe he said, 'Stones are out here' or 'this is Stones territory,' something of that nature." The officer understood defendant's statement to mean that defendant carried a weapon for protection.

¶ 15 On cross-examination, Officer Adamidis testified he saw defendant in the vehicle "maybe a few minutes" after he received the police dispatch. Upon seeing the officer, defendant "looked in my general direction and then slouched in the seat." Based on defendant's actions, the officer suspected he might be armed.

¶ 16 The officers announced themselves as police as they approached the vehicle and neither had a weapon drawn. Officer Adamidis said he and defendant spoke for about a minute before he asked defendant to get out of the car. Defendant wore a short-sleeved shirt that buttoned down the front and was flicking the "bottom portion" or the flaps on the shirt front. Defendant gestured in that manner a few times after each of the officer's two requests that he get out of the vehicle.

¶ 17 Also on cross-examination, defense counsel asked the officer if, about two hours after defendant's arrest, he told Assistant Cook County State's Attorney Pat Turnock with the felony review division that defendant had made an oral statement to him. The State objected to the defense's attempt to introduce the contents of the officer's conversation with ASA Turnock, and the trial court overruled that objection.

¶ 18 Officer Adamidis was asked if he told ASA Turnock that defendant was advised of his rights and denied possessing a gun, telling the officer to "f*** off" and that he was not talking. Officer Adamidis replied that he could not recall the contents of his conversation with ASA Turnock. Defense counsel attempted to impeach Officer Adamidis with his prior grand jury testimony that defendant told him he carried a gun because he was in "Stones territory." The State objected, asserting that statement did not impeach the officer's trial testimony. The trial court sustained that objection.

¶ 19 The State presented testimony from an Illinois State Police lab technician that the weapon's serial number was defaced. The State introduced into evidence a certification from the Illinois State Police that defendant had never been issued a FOID card as of September 2013.

¶ 20 The State sought leave to introduce into evidence certified statements of defendant's prior convictions for defacing a firearm in case No. 08 C4 41646 and for UUW in case No. 10 C4

40550. The certified statement of defendant's prior conviction for UUW in case No. 10 C4 40550 indicated that defendant was found guilty of that offense on September 14, 2010. That certified statement further indicated that defendant was sentenced to three years in prison for that offense, to be followed by a one-year period of mandatory supervised release (MSR), formerly known as parole, and that defendant received 132 days of credit for time served. Defense counsel stipulated to the entry of the certified statement of conviction for case No. 10 C4 40550.

¶ 21 At the close of the State's case, defense counsel moved for a directed verdict as to the counts in which the State had alleged defendant was within an MSR period when this offense took place on June 23, 2013. Counsel argued that no evidence had been presented as to defendant's recent MSR status other than Officer Adamidis's testimony as to that fact. The State responded the officer's testimony was sufficient to show that defendant was in his MSR period for the purposes of sentencing defendant as a Class 2 offender. The trial court granted the defense motion for a directed verdict as to Counts 5 and 6, finding the certified statements of conviction did not indicate whether defendant had completed his MSR period as to either previous offense.

¶ 22 The defense called ASA Turnock as its sole witness. ASA Turnock testified that on the night in question, he was assigned to the felony review unit and had a conversation with Officer Adamidis. When asked if Officer Adamidis told him that at 5:56 p.m., defendant was advised of his rights and denied possessing a gun and told him to "f*** off" and that he was not talking, ASA Turnock replied yes.

¶ 23 In finding defendant guilty on the seven remaining counts, the trial court stated that it found Officer Adamidis to be a credible witness. The court found ASA Turnock's testimony did

not constitute impeachment of the officer's testimony, saying the two remarks were not "diametrically opposed statements." The court found defendant's statement as testified to by ASA Turnock was consistent with the officer's testimony that defendant told him he was in "Stones territory." Furthermore, the court found it could consider that statement together with the officer's testimony that he knew from "prior contacts" that defendant belonged to the Four Corner Hustlers as evidence of whether defendant possessed a weapon. The court also noted the officer saw defendant "flicking his shirt" and saw the handle of a gun.

¶ 24 The defense filed a motion for a new trial, which the trial court denied. The trial court merged all counts into Count 1 and sentenced defendant to 4 1/2 years in prison.

¶ 25 On appeal, we first address defendant's contention that his trial counsel was ineffective for withdrawing the motion to quash his arrest and suppress his statement. Defendant asserts that the motion, if pursued, would have been meritorious because the facts did not support a reasonable suspicion of criminal activity that allowed the officer to detain him while he was seated in the car.

¶ 26 As the State points out on appeal, individuals serving a period of MSR or probation have a greatly diminished expectation of privacy regarding a police search and may be searched without a reasonable suspicion of criminal activity. See 730 ILCS 5/3-3-7(a)(10) (listing as a condition of MSR the "consent to a search of his or her person, property, or residence under his or her control"); *People v. Wilson*, 228 Ill. 2d 35, 52 (2008); *People v. Coleman*, 2013 IL App (1st) 130030, ¶ 12. As to this case, the State notes that Officer Adamidis recognized defendant and testified he was "just recently paroled for a weapons offense."

¶ 27 Defendant responds that sufficient proof of his status as a parolee was not presented so as to support a suspicionless search in this case. Defendant relies on *People v. Vasquez*, 388 Ill. App. 3d 532, 543 (2009), to argue that the State was required to supplement the officer's testimony by introducing into evidence both: (1) a certified copy of his prior conviction for which he was on MSR (which we note was introduced as to case No. 10 C4 40550); and (2) a certified copy of the conditions of his MSR. *Vasquez* involved a fully litigated motion to quash arrest and suppress evidence. Here, defense counsel elected to withdraw the motion.

¶ 28 Defense counsel's failure to file a motion to suppress or, as occurred here, the withdrawal of a previously filed motion, does not demonstrate incompetent representation if pursuing the motion would have been futile. *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 70, citing *People v. Givens*, 237 Ill. 2d 311, 331 (2010). To establish ineffective assistance of counsel, a defendant must allege facts that show that counsel's representation was both objectively unreasonable and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Enis*, 194 Ill. 2d 361, 376 (2000). To demonstrate that counsel's representation was deficient, defendant must overcome a strong presumption that counsel's conduct was rooted in trial strategy, as opposed to incompetence. *People v. Pecoraro*, 175 Ill. 2d 294, 319-20 (1997).

¶ 29 Although the record indicates that defense counsel discussed this matter with defendant, an attorney's decision whether to file a motion to suppress is generally a matter of trial strategy that is entitled to great deference. *People v. Tayborn*, 2016 IL App (3d) 130594, ¶ 17. It cannot be determined with certainty from this record whether defense counsel employed reasonable trial strategy in withdrawing the motion, as the record was not fully developed as to defendant's MSR

status at the time of this offense or the conditions of defendant's MSR or as to all relevant facts preceding the point of defendant's arrest. Although the State did not introduce proof of the conditions of defendant's MSR, there is no indication in the record whether it would have been unable to do so had the motion been litigated. Where a defendant's claim of ineffective assistance of counsel requires consideration of matters that are not included in the record on appeal, a postconviction proceeding is better suited to resolve that claim, and the appellate court may properly decline to consider the defendant's claim on direct appeal. *People v. Phillips*, 383 Ill. App. 3d 521, 544 (2008); *People v. Millsap*, 374 Ill. App. 3d 857, 862-63 (2007) (where defendant argued that his trial counsel was ineffective in failing to file a motion to suppress his statements to police, appellate court declined to address the claim on direct appeal because it was "not clear the record contain[ed] all the evidence that could have been presented in regard to the seizure"). See also *People v. Scott*, 2016 IL App (1st) 141456, ¶¶ 25-29 (declining to reach the merits of defendant's similar claim, noting such an analysis involves a "fact-intensive inquiry requiring us to consider the totality of the circumstances surrounding the interaction between the police and the defendant").

¶ 30 During the course of his appeal, we granted defendant's motion to cite *People v. Thomas*, 2016 IL App (1st) 141040, as additional authority. In *Thomas*, this court held that a *Terry* stop was not justified where officers stopped the defendant after receiving a citizen's tip that he was armed. *Id.* at ¶ 5. However, in that case there was no suggestion that the defendant was a parolee, and thus it is clearly distinguishable.

¶ 31 Defendant's next contention on appeal is that the trial court erred in finding Officer Adamidis's trial testimony was not impeached by ASA Turnock's testimony that the officer later

told him defendant denied possession of the weapon. He argues the officer's trial testimony reflected an admission by defendant that he possessed the gun that was impeached by the officer's later statement to ASA Turnock.

¶ 32 Initially, defendant asserts this court should review the trial court's ruling *de novo* because the court found the statement to be not impeaching as a matter of law. The State responds that an abuse of discretion standard applies to a ruling on witness credibility and that even if the second statement constituted impeachment of Officer Adamidis's testimony, the trial court was still free to find defendant guilty based on the entirety of the officer's testimony.

¶ 33 ASA Turnock's testimony was offered pursuant to the hearsay exception allowing the admission of prior inconsistent statements to impeach the credibility as a testifying witness. See *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 33. Officer Adamidis testified at trial that after placing defendant in custody, he asked why he was in Stones territory, and defendant replied, "You know we're going at it with the Stones." In the defense case, ASA Turnock testified that when Officer Adamidis contacted felony review about the case, the officer reported defendant had denied possessing the weapon and told the officer to "f*** off" and that he was not talking.

¶ 34 The trial court found that the officer's statement to ASA Turnock did not impeach his trial testimony. The determination of whether a witness's prior statement is inconsistent with his present testimony is left to the sound discretion of the trial court. *People v. Billups*, 318 Ill. App. 3d 948, 957 (2001), citing *People v. Flores*, 128 Ill. 2d 66, 87-88 (1989). Prior testimony does not need to directly contradict trial testimony to be found inconsistent; the prior statement is inconsistent "when it has even a tendency to contradict the trial testimony." *Billups*, 318 Ill. App. 3d at 957; see also *Flores*, 128 Ill. 2d at 87 ("inconsistency is not limited to direct

contradictions but may be found in evasive answers, silence or changes in position") (internal quotations omitted). If the statement to ASA Turnock could be found to impeach the officer's trial testimony that defendant had acknowledged current gang activity, this court must still defer to the trial court's overall finding of Officer Adamidis's credibility. Furthermore, even without the admission of defendant's statement that a battle was going on between his gang and the Stones gang, the trial court could find that the evidence was sufficient to establish defendant's knowing possession of the weapon that was recovered from his waistband.

¶ 35 Because we have found no infirmity as to the facts supporting defendant's convictions, we address his contention that his conviction for aggravated unlawful use of a weapon on Count 1 should be vacated in light of the Illinois Supreme Court's holding in *Burns* that the underlying statute violates the rights of individuals to keep and bear arms under the second amendment to the United States Constitution (U.S. Const., amend. II). Defendant asserts that judgment should be entered on Count 2, which charged him with aggravated unlawful use of a weapon for not having a valid FOID card, pointing out that section of the statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West Supp. 2013)) does not violate the second amendment. See *People v. Mosley*, 2015 IL 115872, ¶ 36 (the FOID card requirement is consistent with the ability to subject firearms possession to "meaningful regulation"). The State correctly concedes that defendant's conviction on Count 1 should be vacated on that basis. The parties further agree that remand for resentencing is not required. Accordingly, judgment is entered on Count 2 of the indictment.

¶ 36 In summary, defendant's contention that his trial counsel was ineffective for withdrawing the motion to quash arrest and suppress evidence of the weapon cannot be adjudicated in this direct appeal. Moreover, the trial court did not err in finding that ASA Turnock's testimony did

not contain impeachment of the officer's trial testimony. Defendant's conviction on Count 1 is vacated pursuant to *Aguilar*.

¶ 37 Accordingly, defendant's conviction on Count 1 for aggravated UUW is vacated. The circuit court's judgment is affirmed in all other respects.

¶ 38 Affirmed in part, vacated in part.