2017 IL App (1st) 143693-U

SIXTH DIVISION
Order filed: June 23, 2017

No. 1-14-3693



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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County |
| | ) | |
| v. | ) | No. 11 CR 17786 |
| | ) | |
| RICKY SCHOEN, | ) | Honorable |
| | ) | John Joseph Hynes, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held*: The defendant's conviction and sentence are affirmed where (1) defense counsel was not ineffective for failing to request a *Frye* hearing regarding historical cell-site analysis; and (2) the trial court did not abuse its discretion in sentencing the defendant to 50 years' imprisonment.

¶ 2 Following a bench trial, the defendant, Ricky Schoen, was found guilty of first-degree murder (720 ILCS 5/9-1(a)(3) (West 2010)) and sentenced to 50 years' imprisonment. On appeal, he argues that (1) his trial counsel was ineffective for failing to request a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) to test the admissibility of expert

testimony regarding historical cell-site analysis, and (2) the trial court abused its discretion by sentencing him to 50 years' imprisonment. For the reasons that follow, we affirm.

¶ 3 In October 2011, the State charged the defendant and codefendant, Matthew Lamotte, with, *inter alia*, the first-degree murder (720 ILCS 5/9-1(a)(3) (West 2010)) of Oscar Solorzano and the attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)) of Daniel Reynoso. In August 2014, the matter proceeded to simultaneous but severed trials.

¶ 4 At trial, the evidence established that, in May 2010, there was an ongoing conflict between two rival street gangs, the Almighty Saints and the Latin Kings. The defendant and Lamotte are members of the Almighty Saints gang. In response to two shootings, in which an Almighty Saint and the brother of an Almighty Saint had been shot, the defendant called a meeting of his gang. At the meeting, the defendant complained that nothing was being done about the recent shootings and said that "somebody had to die," referring to the Latin Kings. Edwin Rolnicki, a former Almighty Saint, testified that he was at the meeting and recalled that the defendant was "thirsty for blood" and everyone "was pissed off."

¶ 5 Thereafter, on May 25, 2011, the defendant took his older brother's red Ford Explorer without permission and drove to Summit, Illinois where he picked up Lamotte and Gustavo Garcia. Around 10:40 p.m., the three men were traveling westbound on 61st Street in Summit, which was described as the "center" of Latin King territory. As they approached Archer Avenue, they abruptly stopped and started shooting at two men, later identified as Solorzano and Reynoso, who were in the process of entering Solorzano's vehicle. Reynoso, a Latin King, testified that he immediately ran away and escaped without being shot. Solorzano, who was not affiliated with any gang, died as a result of two gunshot wounds. Eyewitnesses to the shooting

testified that the shots were fired from the passenger side window of the red Explorer and that the vehicle turned south onto Archer Avenue and sped away.

¶ 6 Shortly after hearing a radio dispatch regarding the shooting, a Summit police officer, Mel Ortiz, observed the Explorer and a high-speed chase ensued. Eventually, the Explorer came to a stop at 5216 South Neva Avenue in Chicago. The defendant exited the vehicle through the driver's door and ran in a northwest direction, while Lamotte and Garcia exited the front passenger door and ran east. Officer Ortiz broadcast a description of the suspects over the radio, chased the two passengers, and detained Garcia who had tripped and fell. Lamotte jumped a fence and continued to run.

¶ 7 David Wheeler, the defendant's older brother, testified that he received a call from the defendant around 10:30 or 11 p.m., demanding that he report his vehicle stolen. Wheeler stated that the defendant sounded panicked and out of breath. After Wheeler reported the vehicle stolen, he called the defendant back to discuss what happened. The defendant told Wheeler that he borrowed his vehicle to meet some friends in Summit and that he shot someone after getting into an argument at a gas station. The defendant stated that he had to abandon the vehicle and that he would make it up to Wheeler.

¶ 8 Meanwhile, phone records show that various phone calls were made from Lamotte's phone between 10:43 p.m. and 11:49 p.m. Rolnicki testified that he and Michael Gallardo were driving in his black GMC Sierra when Lamotte called Gallardo and stated that he was in trouble and needed to be picked up. Rolnicki and Gallardo drove to a residential neighborhood near Harlem and Archer and located Lamotte who ran up to them and entered the truck. Rolnicki testified that Lamotte was sweating and breathing hard "like he had run ten miles." Lamotte

stated that "they lit up some Kings;" that "[the defendant] did it, stupid as hell;" and that "[the defendant] just shot a guy, just did; stupid as hell; just shot the guy."

¶ 9 Chicago police officer Joseph McElligott testified that he was on patrol when he received a radio call from dispatch regarding the shooting and that a concerned citizen reported seeing a man run out of someone's yard and jump into a black pickup truck. About two minutes later, Officer McElligott observed a black pickup truck, activated his lights, and pulled the vehicle over. The three occupants, later identified as Rolnicki, Gallardo, and Lamotte, were placed in separate police cars and transported to the scene of the abandoned Explorer. There, Officer Ortiz viewed the three men and identified Lamotte as the individual who exited the passenger side of the Explorer. Lamotte, Gallardo, and Rolnicki, as well as Garcia whom Officer Ortiz detained following the foot chase, were taken to the police station for questioning, but were later released without being charged or arrested.

¶ 10 During the investigation, the police recovered three spent nine-millimeter cartridge casings and a spent .380 caliber cartridge casing from the scene of the murder. Officers also canvassed the area near the abandoned Explorer and recovered a nine-millimeter semiautomatic handgun with a live round in the chamber lying on the ground just outside the driver's side door. In addition, they found four spent nine-millimeter cartridge casings inside the vehicle and observed a small bullet hole in the rear passenger window. The police also recovered surveillance video from a liquor store located across the street from the shooting. The video shows Reynoso and Solorzano exiting the store at 10:40 p.m. and walking across the street to a parked car. Seconds later, the red Explorer approaches the parked vehicle, comes to an abrupt stop, and then drives away.

¶ 11 An autopsy performed by a forensic pathologist revealed that Solorzano died from a gunshot wound to the right side of his back and right thigh. A nine-millimeter bullet was recovered from Solorzano's right bicep and submitted to the Illinois State Police crime lab for analysis. Forensic testing revealed that the nine-millimeter bullet recovered from Solorzano's body was fired from the semiautomatic handgun that was recovered from the Ford Explorer. The nine-millimeter cartridge casings recovered from the murder scene and the Ford Explorer were also fired from that handgun.

¶ 12 The State also presented the testimony of Joseph Raschke, a special agent with the Federal Bureau of Investigation (FBI), who testified as an expert in the field of historical cell-site analysis. Agent Raschke explained that historical cell-site analysis is a technique that uses cell phone records and cell tower locations to determine a cell phone's approximate location at a particular time. He explained that a cell phone is essentially a two-way radio that uses a cellular network to communicate. Each cell tower covers a certain geographic area. In urban areas, for example, the towers "are designed to handle small areas." When a cell phone user makes a call, the phone generally connects to the cell site with the strongest signal, although adjoining cell towers provide some overlap in coverage. Agent Raschke explained that the proximity of the user is a significant factor in determining the cell tower with which the cell phone connects, but it is not the only factor. Other factors include the towers' technical aspects, including geography and topography of the surrounding land, the direction each sector of the tower points, and obstructions, such as tall buildings.

¶ 13 Using the defendant's cell phone records and a map of the locations of Sprint towers on May 25, 2010, Agent Raschke traced the towers used by the defendant's phone. He testified that, from 12:54 a.m. to 6:24 p.m., calls placed from the defendant's phone utilized Tower 304, which

is located across the street from his brother's residence in Joliet, Illinois. At 10:27 p.m., an outgoing call placed from the defendant's phone engaged Tower 234, which is located near the scene of the shooting. At 10:46 p.m., six minutes after the shooting occurred, the defendant's phone activated Tower 235, which is also located near the shooting scene. Agent Raschke further testified that three more calls were placed from the defendant's phone at 10:48 p.m., 11:00 p.m., and 11:29 p.m. and these calls engaged towers on the north side of Summit. During his trial testimony, Agent Raschke did not attempt to identify the exact locations or addresses from where the calls from the defendant's phone had been made. Instead, he emphasized that he did not know the specific location of the defendant's cell phone at those times and made general references to the towers and sectors that had been used during the calls. On cross-examination, Agent Raschke acknowledged that his analysis did not place individuals in specific locations, only the cell phones.

¶ 14 Detective Robert Mase of the Summit Police Department testified that Lamotte was arrested on August 11, 2011, and the defendant was arrested a month later on September 29, 2011. The detective did not testify to the circumstances surrounding the arrest of either the defendant or Lamotte. Detective Mase further stated that he has not been able to locate Garcia, though he continues to search for him.

¶ 15 After the State rested, the defendant did not testify or present any evidence. Following closing arguments, the trial court found the defendant guilty of first-degree murder of Solorzano and not guilty of the attempted murder of Reynoso.

¶ 16 The matter proceeded to a sentencing hearing in October 2014. At that hearing, the trial court stated that it received the presentence investigation (PSI) report, which reflected various criminal offenses consisting of burglary, mob action, possession of a stolen motor vehicle, and

possession of a firearm. The PSI further revealed that the defendant became a member of the Almighty Saints street gang in 2000, at the age of 17, and was on mandatory supervised release (MSR) when he committed the instant offense. After hearing the State's and defense counsel's arguments, the defendant made a statement in allocution wherein he stated that he is "sorry to the victim's family" and "hope[s] one day they can really find out what happened to their loved one."

¶ 17 In sentencing the defendant, the trial court stated that it had considered the PSI report, counsel's arguments, evidence in aggravation and mitigation, and the defendant's statement in allocution. The aggravating factors included the defendant's prior criminal history, his membership in a gang, and the fact that he was on MSR when he committed the present offense. The court noted that the defendant "was not rehabilitated" and emphasized the need to deter others from committing similar crimes. Finding that no mitigating factors applied to the defendant, the court sentenced him to 50 years' imprisonment, which included a 15-year enhancement for being armed with a firearm.

¶ 18 In November 2014, the defendant filed a motion to reconsider his sentence, which the trial court denied. This appeal followed.

¶ 19 The defendant's first contention on appeal is that his trial counsel was ineffective for failing to request a *Frye* hearing to test Agent Raschke's expert testimony regarding historical cell-site analysis.

¶ 20 To establish a claim of ineffective assistance of counsel, the defendant must satisfy the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that his trial counsel's performance was objectively deficient. *Id.* at 688. Second, the defendant must show that a reasonable probability

exists that, but for counsel's unprofessional errors, the result of the trial would have been different. *Id*. In cases where trial counsel's alleged deficiency relates to the failure to request a *Frye* hearing, the *Strickland* analysis requires the defendant to show that, had defense counsel filed a motion requesting a *Frye* hearing, there is a "reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial could have been different had the evidence been [excluded]." *People v. Bew*, 228 Ill. 2d 122, 128-29 (2008). We review *de novo* the question of whether counsel's failure to request a *Frye* hearing supports a claim of ineffective assistance of counsel. *Morris*, 2013 IL App (1st) 111251, ¶ 116.

¶ 21 The *Frye* test is codified in Illinois Rule of Evidence 702, which provides in relevant part, as follows:

> "Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs." Ill. R. Evid. 702 (eff. Jan. 1, 2011).

"General acceptance" does not mean universal acceptance, and it does not require that the methodology in question be accepted by unanimity, consensus, or even a majority of experts. *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 78 (2002). Rather, it is sufficient that the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field. *Id*. at 77. In determining whether a scientific principle or methodology is generally accepted, a reviewing court is free to consider "prior judicial decisions or technical writings on the subject." *People v. McKnown*, 226 Ill. 2d 245, 254 (2007).

¶ 22 The defendant asserts that "there is an ongoing controversy surrounding the accuracy and usefulness of historical cell site analysis in criminal trials ***." He maintains that "[t]he relevant scientific community does not generally accept the idea that *** historical cell site analysis is an accurate way to determine a phone's location." We disagree.

¶ 23 This court recently observed that "the use of cell phone location records to determine the general location of a cell phone is not 'new' or 'novel' and has been widely accepted as reliable by numerous courts throughout the nation." *People v. Fountain*, 2016 IL App (1st) 131474, ¶ 59 (collecting cases); see also *United States v. Hill*, 818 F. 3d 289, 297 (7th Cir. 2016) (noting that federal district courts have uniformly rejected challenges to historical cell-site analysis). In *Hill*, the Seventh Circuit concluded that the "science and methods upon which historical cell-site analysis is based are understood and well documented." *Hill*, 818 F. 3d at 297. The court explained:

> "Historical cell-site analysis can show with sufficient reliability that a phone was in a general area, especially in a well-populated one. It shows the cell sites with which the person's cell phone connected, and the science is well understood. [*United States v. Evans*, 892 F. Supp. 2d 949, 956 (N.D. Ill. 2012)] (noting that methods of 'historical cell site analysis can be and have been tested by scientists'). The technique *** has been subjected to publication and peer criticism, if not peer review. [Citations]. The advantages, drawbacks, confounds, and limitations of historical cell-site analysis are well known by experts in the law enforcement and academic communities." *Id*. at 298.

¶ 24 Nevertheless, the defendant relies upon *Evans*, 892 F. Supp. 2d at 956-57, to argue that Agent Raschke's historical cell-site analysis is unreliable and not generally accepted within the

scientific field. In *Evans*, the Government sought to rely upon the testimony of a cell-site expert to show that the defendant was in a specific building where a kidnapping took place. *Id*. at 951. The court explained that the expert sought to apply a theory of granulization, which involved: (1) identifying the cell tower, sector, and sector-coverage direction used by the phone during the relevant time period; (2) estimating "the range of each [sector's] coverage based on the proximity of the tower to other towers in the area," and (3) predicting "where the coverage area of one tower will overlap with the coverage area of another." *Id*. at 952. Applying the granulization theory to the facts in *Evans*, the Government's expert intended to testify that the defendant's cell-phone used two towers at the time of the kidnapping and that "[t]he building where the victim was held [fell] squarely within the coverage overlap of [those] two towers." *Id*. The court found that one significant problem was that the expert's granulization theory assumed that the defendant's phone "used the towers closest to it at the time of the calls" without accounting for the possibility that the phone might have connected to other towers because of signal obstruction or network traffic. *Id*. at 956. The court also reasoned that "the granulization theory remains wholly untested by the scientific community, while other methods of historical cell site analysis can be and have been tested by scientists." *Id*. "Given that multiple factors [could] affect the signal strength of a tower and that [the expert's] chosen methodology ha[d] received no scrutiny outside the law enforcement community," the court concluded that the Government had not carried its burden in establishing that the granulization method was reliable. *Id*. at 957.

¶ 25 Here, Agent Raschke did not use a "granulization theory" to identify the precise locations from where the defendant's calls had been made. Rather, he used historical data from the defendant's cell phone records to locate the towers that the defendant's phone had actually activated. In his trial testimony, Agent Raschke emphasized that the defendant's cell phone's

use of a cell site did not mean that the defendant was at that tower or at any particular spot near that tower. Moreover, Agent Raschke made clear that cell phones do not always connect to the closest tower and he identified various factors that could cause a phone to connect to other towers. Accordingly, the defendant's reliance on *Evans* is unavailing. See *Fountain*, 2016 IL App (1st) 131474, ¶ 61 (rejecting the defendant's reliance on *Evans* where the State's expert used historical data to identify the towers that the defendant's cell phone had actually activated).

¶ 26 Based upon the general acceptance of historical cell-site analysis, we cannot say that a reasonable probability exists that the trial court would have granted defense counsel's request to exclude Agent Raschke's testimony. See *People v. Luna*, 2013 IL App (1st) 07253, ¶ 88 ("The failure to file a motion does not establish incompetent representation when the motion would have been futile."). Thus, the defendant cannot establish a claim of ineffective assistance of counsel.

¶ 27 Also, even if defense counsel's motion would have been granted, the defendant cannot establish that he suffered prejudice since the evidence against him was overwhelming and the exclusion of Agent Raschke's testimony would not have changed the outcome of the trial. The evidence showed that the defendant was "thirsty for blood" and sought retaliation against members of a rival gang. The defendant took his brother's red Ford Explorer without permission, picked up Lamotte and Garcia, and drove to the south-side of Summit where they shot and killed Solorzano. The defendant led police on a high-speed chase, subsequently abandoned the vehicle, and fled on foot. He then called his brother, told him to report his vehicle stolen, and admitted that he shot someone. The State also introduced Lamotte's statement that "they lit up some Kings" and "[the defendant] just shot a guy ***." Agent Raschke's testimony regarding the defendant's cell phone's location merely corroborated the State's other evidence

and, as a result, we cannot say that the outcome at trial would have been different had his testimony been excluded. We conclude, therefore, that the defendant's trial counsel did not provide ineffective assistance by failing to request a *Frye* hearing on the admissibility of historical cell-site analysis.

¶ 28 The defendant next contends that his 50-year sentence for first-degree murder is excessive in light of his potential for rehabilitation. The State responds that the trial court did not abuse its discretion where it entered a sentence within the statutory range after considering the appropriate sentencing factors.

¶ 29 "A reviewing court gives substantial deference to the trial court's sentencing decision because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36. A sentence within the statutory limits is presumed to be proper and will not be disturbed absent an abuse of discretion. *Id*. "An abuse of discretion will be found where the sentence is greatly at variance with the spirit and purpose of the law[] or manifestly disproportionate to the nature of the offense. [Citations.]" (Internal quotation marks omitted.) *Id*.

¶ 30 After reviewing the record, we conclude that the trial court did not abuse its discretion in sentencing the defendant to 50 years' imprisonment, which is within the sentencing range of 35 to 75 years. See 730 ILCS 5/5-4.5-20(a) (West 2010) (providing range of 20 to 60 years); 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2010) (firearm add-on of 15 years). The record demonstrates that the court properly considered the PSI report, the defendant's statement in allocution, counsel's arguments, and the aggravating and mitigating factors. The aggravating factors included the defendant's prior criminal history, membership in a gang, and the fact that he was on MSR when

he committed the present offense. Based upon the defendant's criminal history, which spanned eight years, the court specifically found that the defendant had "not learn[ed] his lesson" and "was not rehabilitated." The court also emphasized the need to deter others. Given the significant aggravating factors and the lack of any factors in mitigation, we cannot say that the sentence of 50 years' imprisonment for first-degree murder is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. See *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Here, the sentencing judge adequately considered the mitigating and aggravating factors, and it is not our duty to reweigh the factors involved in his sentencing decision. We find no abuse of discretion.

¶ 31 For the reasons stated herein, we affirm the defendant's first-degree murder conviction and his 50-year prison sentence.

¶ 32 Affirmed.