2017 IL App (1st) 150353-U

No. 1-15-0353

September 27, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 12966
	)	
TODD HICKS,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's claim of ineffective assistance of counsel must fail when he cannot establish that he was prejudiced by counsel's failure to raise an entrapment defense at trial.

¶ 2 Following a bench trial, defendant Todd Hicks was found guilty of delivery of a controlled substance and possession of a controlled substance. He was sentenced, because of his

criminal background, to a Class X sentence of six years in prison for the delivery of a controlled substance conviction and to a concurrent three-year sentence for the possession of a controlled substance conviction. On appeal, he contends that he was denied the effective assistance of counsel when trial counsel "allowed" him to testify that he delivered heroin to an undercover police officer without raising an entrapment defense. We affirm.

¶ 3 At trial, Officer Richard Bolton testified that on June 25, 2015, he was acting as a "buy officer." At one point, he was approached by defendant who asked for money. After Bolton gave defendant 50 cents, they discussed the "purchasing of narcotics." Defendant said that he wanted to go buy "some blow." Bolton understood "blow" to mean heroin. During their discussion, defendant said he would take Bolton to a location to buy heroin. Defendant got into Bolton's car and gave him directions. Once there, Bolton gave defendant $10 and defendant told him to stay in the car. Bolton observed defendant walk across the street, give a black male currency and receive "unknown items" in exchange. Defendant then reentered the car and gave Bolton one "clear dark tinted Ziploc baggy" with skull logos containing suspect heroin. After dropping defendant off, Bolton informed fellow officers of a "positive" narcotics transaction and provided a description of defendant and his last known location. Bolton identified defendant after he was taken into custody. Later, at a police station, the suspect heroin was inventoried.

¶ 4 During cross-examination, Bolton testified that defendant did not "solicit unlawful business;" rather, defendant approached and asked for money. Bolton did not hear defendant saying "blows" or "any other type of street term for drugs to anybody else." During their conversation, defendant stated that "he was going to get him a blow." Bolton then asked defendant where he was "getting it from" and defendant offered to take Bolton to "get it." It was

at this point that Bolton informed defendant that he also wanted heroin and defendant told Bolton that he would take Bolton to get the drugs. They drove approximately four or five blocks. Once there, Bolton gave defendant money to purchase a "blow" for him. Bolton did not give defendant any other money, and he did not give defendant money after defendant got back into the car as a reward for taking Bolton to purchase drugs.

¶ 5 Officer Arletta Kubik testified that she performed a search of defendant after he was taken into custody and recovered one Ziplock bag with gold skulls containing suspect heroin. Later, at a police station, Bolton gave her an "identical Ziplock bag." She inventoried both bags.

¶ 6 The parties stipulated that if called to testify forensic scientist Tina Joyce would testify that the two inventoried items weighed .5 grams and tested positive for the presence of heroin.

¶ 7 After the State rested, defense counsel made a motion for a directed verdict arguing that Bolton gave defendant money that defendant used to buy drugs. In other words, the State had not met the burden to show that defendant was actually a "dealer." The trial court denied the motion.

¶ 8 Defendant then testified that he was walking when a car approached and a "black man" asked him if he knew where "to get some dope from." Defendant said yes. He then asked if this man would "look out for me." He explained that "look out for me" meant "you buy them one." The man agreed, so defendant got into his car. At the first spot defendant took the man to, "they wasn't working," which meant they had no drugs. At the next spot, "[t]hey was working," so the man gave defendant $20, enough for two packets, and defendant purchased two bags of heroin. When defendant got back into the car, he gave one bag to the man and kept the other. After the man dropped him off, defendant snorted two-thirds of the contents of his packet. He had about $5 worth of heroin left. It was at this point that he was picked up by the police. Defendant got

into the car because he wanted to "get high." He was a heroin addict. During cross-examination, defendant testified that he gave the man one bag of heroin.

¶ 9 In closing argument, the State argued that defendant was charged with the delivery of heroin and he admitted that he delivered the heroin. The defense responded that the "purpose of the statute" was to get "dealers and pushers" and that in this case, the "purpose of the statute is frustrated in trying to get a possessor or an addict into a delivery charge." The defense further argued that it made "no sense" for defendant to get into the car to take a person to get drugs and "get nothing from it;" rather, defendant "received a benefit," *i.e.*, "he could use as well." The defense concluded that defendant was therefore only guilty of possession.

¶ 10 The trial court found defendant guilty of delivery of a controlled substance and possession of a controlled substance. Defendant was sentenced, because of his criminal background, to a Class X sentence of six years in prison for the delivery of a controlled substance conviction. He was also sentenced to a concurrent three-year sentence for the possession of a controlled substance conviction.

¶ 11 On appeal, defendant contends that he was denied the effective assistance of counsel when trial counsel failed to raise an entrapment defense at trial. Specifically, defendant argues that trial counsel's decision to allow defendant to testify without offering an entrapment defense amounted to a failure to subject the State's case to meaningful adversarial testing.

¶ 12 A defendant's claim of ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that,

but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Henderson*, 2013 IL 114040, ¶ 11. With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy rather than incompetence. *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010). With regard to the second prong, the defendant must establish that, "but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *Id.* If, as defendant argues here, counsel " '*entirely*' " failed to subject the State's case to meaningful adversarial testing, prejudice is presumed. (Emphasis in original.) *People v. Johnson*, 128 Ill. 2d 253, 266 (1989) (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)). A defendant's failure to establish either prong of the *Strickland* test is fatal to his claim. *Henderson*, 2013 IL 114040, ¶ 11.

¶ 13 It is not *per se* ineffective assistance of counsel whenever defense counsel concedes a defendant's guilt when there is overwhelming evidence of that guilt. *Johnson*, 128 Ill. 2d at 269. "[A] reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344 (2007). Even if trial counsel errs in a matter of trial strategy, counsel's performance is not necessarily constitutionally defective. *Id*. at 355. Rather, ineffective assistance of counsel occurs "[o]nly if counsel's trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the State's case." *Id*. at 355-56. See also *People v. Fuller*, 205 Ill. 2d 308, 331 (2002) ("the fact that another attorney might have pursued a different strategy, or that the strategy chosen by counsel

has ultimately proved unsuccessful, does not establish a denial of the effective assistance of counsel").

¶ 14 To support the conviction for delivery of a controlled substance, the State had to establish beyond a reasonable doubt that defendant had: (1) knowledge of the presence of a controlled substance, (2) the controlled substance within his immediate control, and (3) the intent to deliver it. *People v. Rivas*, 302 Ill. App. 3d 421, 429 (1998). In the case at bar, Officer Bolton testified that during a conversation with defendant about the "purchasing of narcotics," defendant stated that he wanted to go buy "some blow," and would take Bolton to buy heroin. Defendant then got into Bolton's car, and gave him directions to a location where defendant purchased suspect heroin with $10 that Bolton gave him. Defendant gave Bolton a bag of heroin and a second bag of heroin was recovered from defendant when he was taken into custody. The evidence at trial therefore established that defendant knew where to purchase heroin, obtained it and delivered it to Bolton, thus satisfying the elements of the offense of delivery of a controlled substance.

¶ 15 To defend against this evidence, counsel elicited testimony from defendant that he was a heroin addict who wanted to get high and testimony from Bolton that defendant did not have any drugs on him when they first met; rather, defendant took Bolton to a place where drugs could be purchased. Trial counsel's strategy was to characterize defendant as an addict who would do anything for heroin, not a "dealer or a pusher." Counsel further argued that the "purpose of the [delivery] statute is frustrated in trying to get a possessor or an addict into a delivery charge." Counsel's apparent strategy was to garner the trial court's sympathy for defendant's substance abuse problem and to frame the delivery as occurring only because defendant believed that Bolton was going to reward him with narcotics for coordinating the transaction. Given the

evidence against defendant, counsel's strategy of appealing to the trial court's sympathy was entirely reasonable. Furthermore, although ultimately unpersuasive, arguing the "purpose" of the statute or legislative intent did not encompass defendant's conduct provided the trial court a legal basis for according defendant that sympathy.

¶ 16 Defendant, however, argues that there was enough evidence to establish entrapment and that counsel was ineffective when he failed to raise this defense. Defendant argues that the evidence shows that he was not actually soliciting drug buyers when Bolton asked him where to get heroin, that he was an addict, and that he only took Bolton to buy heroin after receiving an assurance that Bolton would buy him heroin as well. He contends that this evidence established that his conduct was incited or induced by a public officer, thus warranting an entrapment defense.

¶ 17 Under the defense of entrapment:

> "A person is not guilty of an offense if his * * * conduct is incited or induced by a public officer * * * for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was pre-disposed to commit the offense and the public officer * * * merely affords to that person the opportunity of facility for committing an offense." 720 ILCS 5/7-12 (West 2014).

¶ 18 However, even if counsel had raised an entrapment defense, defendant cannot show a reasonable probability that the outcome of the trial would have been any different. In the case at bar, the evidence established that defendant knew where to purchase heroin, agreed to take Bolton to purchase heroin, told Bolton to stay in the car, completed the transaction and gave a bag of heroin to Bolton. Moreover, in order to establish entrapment, a defendant must show that

he was induced to commit the offense and was not otherwise predisposed to commit the crime. *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 60. Here, defendant cannot make such a showing.

¶ 19 Predisposition is generally established by proof that the defendant was ready and willing to commit the crime without persuasion and before his initial exposure to government agents. *People v. Criss*, 307 Ill. App. 3d 888, 897 (1999). In assessing predisposition in drug cases, factors to be considered include, *inter alia*, the defendant's initial reluctance or willingness to commit the crime, his familiarity with drugs, his willingness to accommodate the needs of drugs users, his current or prior drug use, and his ready access to a supply of drugs. *People v. Glenn*, 363 Ill. App. 3d 170, 173 (2006).

¶ 20 In the case at bar, the evidence at trial established that defendant was predisposed to commit the offense. Bolton testified that after he gave defendant some change, they discussed purchasing narcotics and defendant stated that he wanted to go buy some "blow." After Bolton asked defendant where defendant was going to purchase his drugs, defendant offered to take Bolton get drugs, got into the car and directed Bolton to the location were defendant purchased drugs for Bolton. Bolton asked defendant once where defendant purchased drugs and defendant responded by offering to take Bolton to that location. Although defendant testified that he was a heroin addict and agreed to take Bolton to buy drugs after Bolton indicated that Bolton would also buy him drugs, Bolton denied offering defendant anything in order to facilitate the transaction. It was for the trier of fact, in this case the trial court, to determine the credibility of the witnesses and resolve any conflicts in the evidence. See *People v. Bradford*, 2016 IL 118674, ¶ 12. Here, the trial court was presented with two versions of events, and, given the trial court's

guilty finding, it found Bolton's version of events more credible than the one presented by defendant. Accordingly, defendant has failed to establish that the outcome of the trial would have been different if counsel had raised the defense of entrapment. See *Clendenin*, 238 Ill. 2d at 317 (to establish prejudice, a defendant must show that "but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different"). Because defendant cannot establish prejudice, his claim of ineffective of counsel must fail. *Henderson*, 2013 IL 114040, ¶ 11 (the failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective assistance of counsel).

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.