No. 2—09—0651
Order filed March 9, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CF—716
ALBERTO P. FLORES,	)	Honorable George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: Where the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of possession with intent to deliver 400 or more but less than 900 grams of cocaine; defendant failed to establish a reasonable probability that a motion to quash arrest and suppress evidence would have been granted; and the trial court's decision not to appoint counsel to represent defendant on his pretrial *pro se* claims of deficient representation was not manifestly erroneous, defendant's convictions were affirmed.

Following a May 5, 2009, bench trial, defendant was convicted of one count of possession with intent to deliver 400 or more but less than 900 grams of cocaine (720 ILCS 570/401(a)(2)(C) (West 2008)), one count of possession with intent to deliver 100 or more but less than 400 grams of cocaine (720 ILCS 570/401(a)(2)(B) (West 2008)), and one count of unlawful possession of a

weapon by a felon (720 ILCS 5/24—1.1(a) (West 2008)). Defendant appeals, challenging the sufficiency of the evidence on count one, claiming ineffective assistance of counsel, and claiming that the trial court failed to appoint counsel in response to defendant's pretrial *pro se* claims of deficient representation. For the reasons that follow, we affirm.

BACKGROUND

Defendant's convictions resulted from a large-scale investigation of a cocaine distribution ring in Du Page County. Defendant was indicted on one count of possession with intent to deliver 400 or more but less than 900 grams of cocaine (count one), one count of unlawful delivery of 100 grams or more but less than 400 grams of cocaine (count two), one count of possession with intent to deliver 100 or more but less than 400 grams of cocaine (count three), criminal drug conspiracy (counts four and five), and one count of unlawful possession of a weapon by a felon (count six). The State nol-prossed counts four and five alleging criminal drug conspiracy.

Pretrial Proceedings

Prior to trial, defendant complained to the trial court about his appointed assistant Public Defender's representation. At a status hearing on May 27, 2008, defendant told the trial court, "I don't think he [the assistant Public Defender] believes in me ***." The trial court advised defendant that the assistant Public Defender "is going to represent you. He has to review all disclosure and discovery, and it's voluminous, and his job is to give you adequate representation as best he possibly can." On December 2, 2008, the assistant Public Defender and defendant advised the trial court that defendant sought to hire his own attorney. Specifically, defendant advised the trial court: "I want to talk to my family because what they're saying about me is not right. They indicted me wrong at the beginning. I asked [the assistant Public Defender] to file my case several times to put motions,

and he doesn't want to do them, you know." The trial court continued the case to January 6, 2009, for a status on defendant's retention of a private attorney.

On January 6, 2009, the assistant Public Defender advised the trial court that defendant had not hired a private attorney but wished to discuss with the trial court the assistant Public Defender's representation. The following colloquy ensued:

"DEFENDANT: Yes, your Honor. I would like to excuse my lawyer from this case. The reason is because I have been asking him to fill out a motion for this case, he doesn't want to do it. He has been lying to me and —

THE COURT: I'm sorry, you asked him to do what?

DEFENDANT: Motion this case, your Honor.

THE COURT: You want him to file a motion?

DEFENDANT: Yes.

THE COURT: What kind of a motion?

DEFENDANT: To suppress evidence, your Honor.

THE COURT: Okay. And he has indicated to you that he is not going to do that; is that correct?

DEFENDANT: Yes, sir.

THE COURT: Okay. And the reason for that, Counsel?

MR. MARA [Assistant Public Defender]: Your Honor, I don't believe there is a basis to file any sort of motion to suppress either statements or evidence.

THE COURT: Okay.

MR. MARA: After reviewing the discovery, there is just not.

THE COURT: There has to be a good-faith basis to file such a motion. Your attorney is the one who makes that decision. If he doesn't feel there is such a basis, then that's his trial decision, his strategic decision not to file such a motion. That doesn't entitle you to have a new lawyer. If you want to file your own motions, you can represent yourself. Now, having said that, what are we doing with the case?

MR. MARA: Your Honor, I don't know the answer. [Defendant] wanted to see what your Honor's answer was before continuing to discuss the case.

THE COURT: Okay. Well, I'm not going to give you a new lawyer as far as on that basis.

DEFENDANT: Because your Honor — because I think he is pressing me to take this time, he is pushing me. He has been lying to me. Every time we see each other, we start arguing to each other. And I don't think he is representing me right.

THE COURT: Again, you have to give me some reason. You say he is not representing you right. You have told me one thing, that you want him to file a motion to suppress. He feels there is no basis to do that. That's his call to make. What else is there?

DEFENDANT: I think I'm going to trial in this case, your Honor, because what the State is saying about me, they are wrong. If you knew —

THE COURT: Do you want to go to trial?

DEFENDANT: — what they were saying about me —

THE COURT: Are you saying you won't — are you willing to take the case to trial?

MR. MARA: Am I willing to take the — certainly, your Honor.

THE COURT: Okay. Is that what you want to do?

DEFENDANT: All I want him is to work with me. That's all —

THE COURT: All right. He will work with you. If you're going to go to trial, if that's what you want to do.

DEFENDANT: Yes, sir.

THE COURT: Do you want to set a trial date?

MR. MARA: Your Honor, we could set a trial date. If we could also set a status date. I don't know about Mr. Marchese's schedule, that's the only question. So maybe —

MR. O'CONNOR [Assistant State's Attorney]: If we could pass it before we set the trial. Mr. Marchese [assigned Assistant State's Attorney] is on the way.

* * * [case passed]

MR. MARA: Your Honor, I spoke to [defendant] in the back. I believe he has a misunderstanding about what the Court indicated to him. He informed me in the back he intends to file his own motions.

THE COURT: [Defendant], let me explain to you: You can't file your own motions unless you want to represent yourself. If you want to represent yourself, then you can file whatever motions you want. But as long as you're represented by an attorney, only the attorney can file motions on your behalf and that is his decisions [*sic*] to make. If you want to represent yourself, be your own attorney, that's up to you.

DEFENDANT: I just don't understand, your Honor. Why, if I am asking for a different PD, you got someone to give to me.

THE COURT: Because the reason you gave me, the request to why you want a different PD, is not a sufficient basis to change him. That's why.

DEFENDANT: Every time we see each other in the little room back there, your Honor, we start arguing. We don't get no where.

THE COURT: Well, what do you argue about?

DEFENDANT: I don't think he is representing me right.

* * *

THE COURT: Okay. Well, we have gone through this. You've told me the reason why you don't think he is. I have told you that that's his decision to make. So that's not a basis. If you've got something else to tell me, then tell me now.

DEFENDANT: First, the State is doing me wrong, saying that I am in this conspiracy case, that I know people. I don't even know them people.

THE COURT: Well, that's something that should be decided at trial.

DEFENDANT: I want to go to trial."

The court set a trial date.

However, on April 9, 2009, the parties appeared before the trial court for the entry of a plea. At that time, defendant's counsel advised the trial court that defendant no longer wished to enter a plea. Defendant again complained of deficient representation, in particular, that his attorney refused to call certain witnesses. Defendant's attorney explained that he did not think the witnesses would be helpful. The trial court advised defendant that the determination of which witnesses to call is a matter of trial strategy. The trial court set a May 5, 2009, trial date.

On May 5, 2009, prior to commencement of trial, the trial court again explored defendant's complaints of deficient representation:

"THE COURT: Yesterday we talked briefly about [defendant's] concerns and perhaps for the record we should perhaps discuss those in more depth than we did yesterday so the record is complete. But maybe we should do it now.

[Defendant], yesterday you told me some concerns you had. I want you to tell me again what it is that you wanted your attorney to do that he does not want to do?

DEFENDANT: I want him to file motions to preserve evidence since the —

THE COURT: The first thing, a motion to suppress evidence?

DEFENDANT: Yes.

THE COURT: And anything besides that?

DEFENDANT: That's what I want him to do, to file it for me.

THE COURT: Is that what you want him to do?

DEFENDANT: Yes.

THE COURT: Mr. Mara, tell me why you didn't want to file it?

MR. MARA: [Defendant] is correct. He has been asking since the beginning for a motion to suppress. In reviewing the police reports and also in what [defendant] has told me, I don't believe, one, that the motion to suppress would be successful. I don't believe, two, that I'm not sure that it's not a frivolous motion based on what I've been informed of. And I just don't believe it's appropriate to file in this case.

THE COURT: Was it a motion to suppress the evidence itself or was it a motion to quash arrest?

MR. MARA: It would have taken the form of a motion to suppress evidence and then quash arrest potentially. The state might have been able to proceed even if the motion

were to be granted based on other evidence. And, actually, I think they would on certain counts.

THE COURT: You reviewed that and it was your determination you felt there was no basis to do that?

MR. MARA: That's correct.

I spoke with [defendant] about that motion a lot of times.

THE COURT: [Defendant], besides that, is there anything else?

DEFENDANT: I want to put a motion in. They went to my house with a search warrant and I was already handcuffed by DA people.

THE COURT: Beside the motion to suppress, is there anything else that you are asking him to do?

DEFENDANT: Just file it for me, your Honor.

THE COURT: All right.

I think again, as I indicated yesterday, the decision to file the motion to suppress addressed with the attorneys are as trial strategy decisions that would not be a basis to appoint new counsel."

The case proceeded to trial.

Trial

At defendant's bench trial, Timothy Oko, a Drug Enforcement Administration (DEA) special agent, testified that he was assigned to the Du Page Metropolitan Enforcement Group (DUMEG) and in early 2008, was involved in Operation Scratch Off — an investigation of a cocaine distribution ring in Du Page County. As part of that investigation, the DEA obtained a wire tap to

listen to the telephone conversations of Santino Ceolla. Agent Oko testified that in conjunction with listening to Ceolla's telephone conversations, "[w]e conducted numerous surveillance available to incorporate the activity we were hearing on the phone and would conduct a surveillance so it would corroborate on what Santino Ceolla was actually doing and that was distributing to numerous clients everyday cocaine in small amounts and large amounts." Agent Oko described Ceolla as a "cocaine hub."

Based on hearing one of Ceolla's March 13, 2008, telephone conversations, the DEA knew that Ceolla was going to be meeting with one of his suppliers the next day (March 14) at approximately 9:30 a.m. at the Wendy's restaurant on Rohlwing and Thorndale Roads. Agent Oko testified that at 9:10 a.m. on March 14, 2008, while he was stationed at the Wendy's restaurant, he observed a white Hyundai driven by Ceolla and a black Ford Explorer Sport Trac driven by an individual he knew to be Roberto Gomez with a passenger whom he later identified as defendant. Both cars parked in the Wendy's parking lot. Agent Oko testified that Gomez exited the Explorer and entered the Hyundai where Gomez sat in the passenger seat and met with Ceolla for a short period of time. Gomez returned to the Explorer, and both cars drove away.

Agent Oko testified that he maintained surveillance on the Hyundai that Ceolla was driving and followed the car to a house at 289 Catalpa in Wood Dale, Illinois. According to Agent Oko, "[w]e identified that house as a stash house used by Santino Ceolla and James Drugis who was the occupant of that residence." Agent Oko explained that Drugis was the owner of the house at 289 Catalpa in Wood Dale, and Ceolla lived "off Wicker Will" in Roselle, Illinois. Agent Oko testified that Ceolla pulled the Hyundai into the driveway, exited the driver's side, and entered the front door of the house. Agent Oko did not observe Ceolla carrying any objects, bags, or anything. Agent Oko

testified that Ceolla remained in the house for approximately 15 minutes, and "I then observed him exit the residence carrying like a white Jewel grocery bag, small bag." Ceolla returned to his car and proceeded to drive by numerous houses for sale. Agent Oko testified that he was present "[s]ometime later" when Ceolla was interviewed. Agent Oko responded no when specifically questioned whether nine ounces of cocaine were found on Ceolla, in his car, or in his house "off Wicker Will" in Roselle.

On cross-examination, Agent Oko testified that during the surveillance at Wendy's, he never saw defendant exit the car. Rather, defendant "remained in the passenger's side."

DEA Task Force Officer John Cosmowski testified that on March 14, 2008, he was assigned to the surveillance team for the address of 337 Popular Avenue in Bensenville, Illinois, which was defendant's house, as part of an ongoing investigation. According to Officer Cosmowski, "agents had informed us that a target was going to arrive to that address and we were going to monitor that." At approximately 8:24 a.m. on March 14, Officer Cosmowski observed Gomez drive into the driveway. Officer Cosmowski testified that he observed defendant exit the house and enter the passenger side of Gomez's car. After a short period of time, defendant and Gomez both entered the house. Approximately 20 minutes later, defendant and Gomez left the house and reentered Gomez's car. Gomez drove the car away from the house.

Officer Cosmowski testified that about an hour later, at approximately 9:24 a.m., he was still at 337 Popular when Gomez and defendant "pulled into the driveway." At that time, Gomez and defendant were arrested. Officer Cosmowski testified that nothing was "found on [defendant's] person."

DEA Special Agent Donald Charles Wood testified that on the morning of March 14, 2008, he assisted in the surveillance of Gomez's house in Berwyn, Illinois because DEA had "received information that an individual by the name of Gomez was to conduct a drug transaction that day." Agent Wood testified that at 7:40 a.m. on March 14, he observed Gomez exit his house, enter a black Ford Sport Trac, and drive away. Agent Wood and other agents maintained surveillance on Gomez "and then he went to the residence, the residence in Bensenville."

Agent Wood testified that at approximately 9:24 a.m., Gomez and defendant were arrested "in front of the residence at 337 Popular [defendant's house]." Agent Wood testified as to his conversation with defendant regarding a search of his residence:

"Q: Did you have occasion to speak with the defendant regarding a search of his residence?

A: Yes.

Q: How did that start?

A: I asked [defendant] if there was any illegal contraband in his residence and any drugs, guns, or anything else illegal. [Defendant] stated there was. He stated that there was a gun in the house and some drugs and that it was his.

Q: Did you ask him if you could search the house and look for them?

A: Yes.

Q: How did you do that?

A: I asked him if he would grant us permission to search the residence and he did at which point I obtained an intent to search form indicating explaining [*sic*] to him that if he

was giving us permission to search the residence and that his signature on the form would show that he granted us permission.

Q: And did he sign that form?

A. Yes."

Agent Wood testified that he assisted in searching defendant's house. According to Agent Wood, defendant told him that cocaine was in a box in the basement along the wall. Agent Wood testified that he went to that location and found a box; inside the box, he found two bags containing a white powdery substance that appeared to be cocaine and a digital scale. Agent Wood testified that defendant also relayed the location of the gun. "[O]ther agents went to that area [and found the gun]. I think it was upstairs in a bedroom that they went." DEA Task Force Officer James Healy testified that he assisted in defendant's arrest and the search of defendant's house. Officer Healy testified that Agent Wood informed him that there was a gun in an upstairs bedroom closet. Officer Healy testified that he recovered a gun, an extra cylinder for the gun, and bullets from a black plastic case on a shelf in the bedroom closet.

James McGreal, Special Agent Illinois State Police, DUMEG, testified that on March 14, 2008, he was working on the Operation Scratch Off investigation. Agent McGreal testified that he received from Agent Wood two bags of a white powdery substance recovered from 337 Popular in Bensenville, Illinois (defendant's house). Agent McGreal processed the evidence and "it was delivered to the lab." The two bags of the white powdery substance recovered from defendant's house were admitted into evidence as exhibit one.

Agent McGreal testified that, later that day, he "respond[ed] to a location of 289 North Catalpa Avenue in Wood Dale, Du Page County, Illinois [Ceolla's and Drugis's alleged 'stash

house']." According to Agent McGreal, a "search warrant was executed at that residence," and he recovered a "plastic bag with a white powdery substance" in a baby wipe container from an upstairs bedroom closet and "white powdery substance" in another baby wipe container from a drawer next to the basement stove. Agent McGreal processed the evidence, and it "was transferred to the lab." The white powdery substance from the "stash house" was admitted into evidence as group exhibit 5.

Linda Gadzinskas, Special Agent for the Illinois State Police and assigned to DUMEG, testified that on March 14, 2008, she and another police officer interviewed defendant at the Wood Dale, Illinois, Police Department. Prior to the interview, she "had information that DEA agents had gotten consent to obtain cocaine and a gun out of his residence." Agent Gadzinskas testified that she began the interview by reading defendant his *Miranda* rights from a DUMEG preprinted form and told defendant to initial each line and sign the bottom if he understood his rights. Defendant initialed and signed the form. Agent Gadzinskas testified that defendant was cooperative and indicated that he wished to speak with her after completing the form.

Agent Gadzinskas testified that defendant related "what happened on March 14th of 2008:"

"Q. What did he say?

A. He explained that he had provided consent to police officers to search his house and obtain the cocaine and the gun that he had in the home.

Q. Did he also indicate that he told those officers where those items could be found?

A. Yes. He explained that — I don't recall exactly where the items were located but he told me that he told officers where the gun and where the cocaine was located in the residence.

Q. Did you continue the interview?

A. Yes.

Q. What did the defendant say about what he did leading up to March 14th when he was arrested?

A. He had explained that the day before he had obtained approximately 18 ounces of cocaine. He hadn't paid for that cocaine at that time yet, but he was going to be giving those 18 ounces to his friend, Mr. Gomez.

Q. Did he indicate that he did give that to Mr. Gomez?

A. Yes.

Q. Did he say when that happened?

A. I believe it was that morning. He explained that he had given Gomez that cocaine and he said that Gomez said that it looked funny and that Gomez had given him back nine ounces of it and told [defendant] to take the nine ounces and put it back in his home.

Q. When you were speaking with the defendant about this, did he specifically say nine ounces or did he say that Gomez split it in half?

A. I don't recall how he phrased the answer.

Q. Did he then indicate that that's what he did?

A. Yes.

Q. What was that?

A. He had put nine ounces of cocaine in his home and that he had given Mr. Gomez the other nine ounces.

Q. What else did he say he did that day?

A. He explained that he was going to charge Mr. Gomez $4600.00 for the first nine ounces.

* * *

Q. [D]id the defendant say whether he knew what Mr. Gomez was going to do with the nine ounces that he gave Mr. Gomez?

A. Yes.

Q. What did he say Mr. Gomez was going to do?

A. He was going to deliver that nine ounces to another person.

Q. And did he know what amount that Mr. Gomez would be requesting when Mr. Gomez gives that to someone else?

A. $5,250.00.

Q. Did he also indicate the amount of money that he owed the original person that gave him the 18 ounces the day before?

A. He would owe $9,000.00 to his supplier.

Q. You also said he spoke about a gun?

A. Yes.

Q. What did he say about the gun?

A. He explained that he had gotten the gun from a guy named Mallow from Melrose Park. He didn't pay for that gun yet, but once he sold the gun, Mallow was expecting $300.00 cash or one half ounce of cocaine in exchange for the weapon.

Q. Did he describe what his plans were regarding selling the gun?

A. Yes. He was going to sell the gun to a guy he called Jose but Jose never returned his phone call to sell the gun.

Q. Did he say he would make a profit on selling the gun?

A. Yes.

Q. What was that?

A. $50.00.

Q. You spoke just a moment ago about the defendant's statements about the cocaine and that Mr. Gomez, the person he gave the cocaine to, would be selling it to another individual. Do you recall that?

A. Yes.

Q. Did he indicate who that other individual was that Gomez would be selling that cocaine to?

A. Santo.

Q. As part of this investigation, do you know who Santo is?

A. Santino Ceolla.

Q. After discussing verbally what happened on March 14th of 2008, did you give the defendant an opportunity to provide a written statement?

A. Yes.

Q. Just describe that discussion. How did that come about?

A. We discussed the events of the day. And then he had agreed to speak with Officer Bieker and I. I began the written statement in a question an [*sic*] answer format to make it more understandable. The things that we discussed that put in a question an [*sic*] answer

format which when are completed I gave it to [defendant] and asked him to review it and initial each line, make sure it was accurate. And if it was accurate to initial it and sign the bottom of each page.

Q. And did you make that in a question and answer format for the statement?

A. Yes.

Q. Did you provide it to the defendant to review?

A. Yes.

Q. And did he review it and initial as you requested?

A. Yes.

Q. And did he also sign it after reviewing it?

A. Yes."

Agent Gadzinskas acknowledged that defendant answered affirmatively the question as to whether any promises or threats had been made for the statement. She testified, however, that neither she nor any other officers made any promises or threats to defendant. In addition to the statements to which Agent Gadzinskas testified, defendant's written statement reflected that: "[Gomez] told me to put 9 oz in my house, we would deliver the other 9 oz to the guy that got busted by DEA this morning. [Gomez] said he would deliver the other 9 oz once the guy called him back after that day."

Andrea Champagne, a former forensic scientist with the Du Page County Sheriff's Office Crime Laboratory, testified and explained the testing procedures relied upon by experts in the forensic chemistry field to identify cocaine, including weighing the evidence, performing preliminary "color tests" such as the thiocyanade and Marquis tests and crystal tests, and performing

the gas chromatograph-mass spectrometer test. Champagne testified that she tested the evidence in this case using these procedures. Specifically, she tested exhibit one — two bags containing "chunky white powder" recovered from defendant's house — and opined that one bag contained 89 grams of cocaine and the other bag contained 125 grams of cocaine. She also tested group exhibit five — five bags containing "chunky white powder" recovered from the "stash house." Champagne opined that one bag contained 219 grams of cocaine; one bag contained 124 grams of cocaine; one bag contained 128 grams of cocaine; one bag contained 55 grams of cocaine; and one bag contained 9.21 grams of cocaine. She testified that her testing did not reveal a controlled substance in a sixth bag that was part of group exhibit five.

The State rested. Defendant moved for a directed finding on all counts. The trial court denied the motion.

Defendant testified on his own behalf. He testified that on March 14, 2008, Gomez came to his house at 337 Popular Avenue, Bensenville, Illinois. According to defendant, Gomez "came to ask *** if I could borrow some speakers for him, and he also brought the cocaine with him." Defendant testified that Gomez said:

> "[L]et me do this at your house because he knows that I'm a cocaine addict. He knew it in the beginning. He said let me weigh this at your house. So he said call the guy named Santo. I don't know who it is. Let me take nine ounces to Santo and hold this for me, and I decided to hold it, nine ounces at my house."

Defendant testified that "[t]hen we decided to go. [Gomez] said come with me because he was going to give me seven grams for myself and I went with him. I didn't know he was being chased by the police." Defendant testified that he and Gomez went to "a restaurant on Thorndale

and 53," where he stayed in the car but Gomez "got out of the car, jumped in the white Hyundai car, and left and came back a few minutes later." After that, "We left. We went back home. Let's go back home and put the speakers in the car." Defendant denied delivering drugs to anyone.

Defendant testified that when they returned to defendant's home, he was thrown to the ground and arrested. He denied making a written statement, signing a written statement, or initialing a written statement.

On cross-examination, defendant admitted that he told police officers that there was a gun and cocaine in his house. However, he denied signing the consent-to-search form; he stated that "[t]hey made my cousin sign my name." Defendant admitted signing the *Miranda* form. He testified that Agent Gadzinskas asked him "a lot of questions" but did not remember "what she asked me." He said that he did not initial anything.

Defendant was cross-examined regarding Agent Gadzinskas's questioning:

"Q. Who was the cocaine for? Did she ask you that question? Did [Agent] Gadzinskas ask you the question?

A. She probably did. It's been too long.

Q. So you don't remember her asking you?

A. I don't remember.

Q. Do you remember answering Rico?

A. I've been saying that was Rico's drugs, not mine.

Q. Did you tell her Rico?

A. Yes. I said that was Rico's drugs.

Q. Did you pay anything for the 18 ounces? Did she ask you that question?

A. No.

Q. Nope or you don't remember?

A. I don't remember. It's been too long."

Defendant further testified on cross-examination that he held nine ounces of cocaine in his basement for Gomez. Defendant stated that Gomez "took it [cocaine] to Santo's house. He said come with me and I'll give you three grams."

Defendant was cross-examined about the division of the cocaine:

"Q. When was the cocaine divided up from 18 ounces into two packages of nine ounces? When was that done?

A. He came — we went — he came in. Santo call him and say you know what.

Q. I'm asking you were you there when the cocaine was divided up from 18?

A. He did it in the basement.

Q. He was in your house in the basement?

A. Yes.

Q. He divided it up while he was in your house, the 18 ounces into nine ounces?

A. Yes.

Q. But that was the 18 ounces?

A. That was 18 ounces, yes.

Q. Then you put the cocaine in a box in your basement in your house?

A. Yes, to hold onto it."

Defendant was also cross-examined about whether Agent Gadzinskas questioned him regarding profit from the cocaine:

"Q. Did she ask you how much profit were you going to make from the 18 ounces that you delivered?

A. No. I never delivered.

Q. That's right. You only delivered the nine ounces, right?

A. Like I said, Gomez brought the dope to my house.

Q. You kept nine ounces there?

A. Because I got a drug problem. That's what you don't understand.

Q. Did you tell her that you were going to profit by $200.00 by delivering the drugs?

A. No. Rico hold this [*sic*] and I'm going to give you seven grams of cocaine."

The defense rested.

In response to the trial court's questioning during closing argument, the State explained its theory with respect to count one for possession with intent to deliver 400 or more but less than 900 grams of cocaine:

"Judge, you have count one which is the possession of controlled substance with intent to deliver. Our argument is that the defendant had 18 ounces of cocaine to begin with and that he then delivered nine ounces of cocaine with his partner to Santo Ceolla with officers conducting surveillance. And ultimately that cocaine winds up at the Catalpa Street address where it's found with other cocaine that had already been there from other suppliers or who knows but it winds up at that location.

What you find out, what the lab weights given from Andrea Champagne is that there is two amounts of cocaine that are substantially similar contained within those exhibits. So our argument is that the cocaine that he has in his house, the cocaine that is found pursuant

> to him telling the police officers and then consistent with his testimony that he is holding it there with the scales that are found with the different items that are found with the gun and the case talks about the gun being a tool of a drug dealer. He says it's for sale. I think you could figure out when it's in a house that it has cocaine and the other items in it. Clearly, that large amount of cocaine, possessing that with intent to deliver."

The trial court found defendant guilty on count one (possession with intent to deliver 400 or more but less than 900 grams of cocaine), count three (possession with intent to deliver 100 or more but less than 400 grams of cocaine), and count six (unlawful possession of a weapon by a felon). The trial court stated that count one "deals with the original 18 ounces." The court found that the signature on the *Miranda* form (which defendant admitted signing) and the signature on the written statement (which defendant denied signing) were "very very similar." Accordingly, the trial court found:

> "I think that [defendant] did make these statements, and I think they were recorded as he is indicating he initialed and signed them. He talks about — he talks about having gotten the 18 ounces, having split it with Gomez and Gomez giving him nine ounces back. There is a finding of guilty on count one."

Regarding counts three and six, the trial court found defendant guilty because "clearly, the items are found in his basement. Combine that with his statements regarding the purpose of why he had the 18 ounces I think establishes the intent to deliver. And there is a finding of guilty on the weapons charge as well."

However, the trial court found defendant not guilty on count two (unlawful delivery of 100 grams or more but less than 400 grams of cocaine). The trial court stated:

> "The evidence we have, there is certainly some indication based on the defendant's statements here that nine ounces was taken to that location. It's Gomez who gets out of the car and goes into the vehicle and then comes back. I didn't hear any testimony that he saw any money. I didn't hear any testimony that something was seen to be exchanged. What you are asking me to do is basically bootstrap the fact that some kind of exchange took place there. But, in fact, then when they go to the Catalpa address where Ceolla went to. [*sic*] They found an amount that might be similar. The amount I don't think that's enough. There is a finding of not guilty on count two."

On May 6, 2009, defendant filed a motion for a new trial on grounds that the State failed to prove his guilt beyond a reasonable doubt, the trial court erred in denying his motion for a directed verdict, and "[s]uch other grounds and each and every error as may appear from the report of proceedings of the trial." The trial court denied the motion for a new trial on June 5, 2009.

On June 5, 2009, the trial court also sentenced defendant to 16 years' imprisonment for possession with intent to deliver 400 or more but less than 900 grams of cocaine; 16 years' imprisonment for possession with intent to deliver 100 or more but less than 400 grams of cocaine; and 10 years' imprisonment for unlawful possession of a weapon by a felon, with the sentences to run concurrently to each other but consecutively to a sentence in another case. That day, defendant filed a motion to reconsider the sentence. The trial court denied the motion to reconsider the sentence on June 8, 2009. Defendant timely appealed.

ANALYSIS

Defendant argues that the State failed to prove him guilty beyond a reasonable doubt of possession with intent to deliver 400 or more but less than 900 grams of cocaine; that he received

ineffective assistance of trial counsel because trial counsel failed to file a pretrial motion to quash arrest and suppress evidence; and the trial court erred in failing to appoint counsel to investigate and represent defendant on his pretrial *pro se* claims that trial counsel failed to file a motion to quash arrest and suppress evidence. We disagree.

Sufficiency of the Evidence

Defendant seeks reversal of his conviction on count one for possession with intent to deliver 400 or more but less than 900 grams of cocaine on insufficiency-of-the-evidence grounds. The evidence is sufficient to sustain a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Perez*, 189 Ill. 2d 254, 265-66 (2000). In evaluating an attack on the sufficiency of the evidence, we do not retry the case. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Instead, we defer to the trial court's determinations of the credibility of the witnesses, the weight of their testimony, and the reasonable inferences drawn from the evidence. *People v. Steidl*, 142 Ill. 2d 204, 226 (1991).

To convict a defendant for possession of a controlled substance with intent to deliver, the State must prove that (1) the defendant had knowledge of the presence of a controlled substance; (2) the controlled substance was in the defendant's immediate possession or control; and (3) the defendant intended to deliver the controlled substance. *People v. Adams*, 388 Ill. App. 3d 762, 766 (2009). Defendant challenges the sufficiency of the evidence with respect to the second factor. He argues that the State failed to prove beyond a reasonable doubt that he possessed the cocaine found in the "stash house."

Possession may be proven by evidence of actual physical possession or constructive possession. *People v. Blue*, 343 Ill. App. 3d 927, 939 (2003). Constructive possession exists where there is no actual physical dominion over the drugs, but the defendant has an intent and a capability to exercise control and dominion over the drugs. *Blue*, 343 Ill. App. 3d at 939.

The record demonstrates that the State's theory with respect to count one was that defendant possessed 18 ounces of cocaine that he intended to deliver, 9 of which he gave to Gomez to deliver to Ceolla and 9 of which he stored in his house. The two bags of cocaine found in defendant's house weighed 125 grams and 89 grams for a total weight of 214 grams. The five bags of cocaine found in the "stash house" weighed 219 grams, 124 grams, 128 grams, 55 grams, and 9.21 grams. The State relied on the similarity in weight of the 214 grams found in defendant's house and the 219-gram bag found in the "stash house" to establish that the 219-gram bag was part of the 18 ounces defendant split in half with Gomez, who in turn delivered the 219 grams to Ceolla in the Wendy's parking lot.

Defendant argues that the State failed to prove that he possessed the 219-gram bag of cocaine found in the "stash house" because there was no evidence that he was ever in the home, handled any of the cocaine found in the home, or exercised control or dominion over the home. In support, defendant cites *Blue*, 343 Ill. App. 3d at 939-40 (reversing conviction where, although the defendant was present in the apartment where narcotics were found, there was insufficient evidence that the defendant had control over the apartment); *People v. Strong*, 316 Ill. App. 3d 807, 812 (2000) (reversing conviction notwithstanding evidence of the defendant's proximity in an apartment to a container with drugs where the defendant was one of four adults at the apartment and he was not engaged in any activity suggestive of control over the drugs); *People v. Macias*, 299 Ill. App. 3d 480,

485-88 (1998) (reversing conviction despite evidence that a hospitalized apartment tenant gave the defendant a key to the apartment where drugs were found and the defendant entered the apartment and turned lights on in the apartment); *People v. Ray*, 232 Ill. App. 3d 459, 462-63 (1992) (reversing conviction where there was no evidence that the defendant owned, rented, or lived in the apartment where the cocaine was found).

These cases are inapposite because they involve whether the defendant had control over the premises where the drugs were located. The State's theory was that defendant possessed *the drugs* found in the "stash house," not the house. Where drugs are found on premises that are not under the defendant's control, the dispositive question is the defendant's relationship to the drugs. *People v. Minniweather*, 301 Ill. App. 3d 574, 578 (1998).

In this regard, defendant contends that the State failed to prove that he possessed the 219-gram bag of cocaine found in the "stash house" because it was mere speculation that Gomez transferred cocaine to Ceolla in the Wendy's parking lot. Defendant argues that there was no testimony that anything was exchanged between Gomez and Ceolla in the Wendy's parking lot, that Ceolla brought cocaine into the "stash house" after his meeting at Wendy's, or that the 219-gram bag of cocaine found in the "stash house" was at an earlier point in time the 9 ounces of cocaine that defendant purportedly distributed to Gomez. Defendant relies on Agent Oko's testimony that he did not observe Ceolla carrying anything into the "stash house" after returning from Wendy's, and that cocaine was not found on Ceolla, in his car, or in his own house in Roselle.

Defendant likens this case to *People v. Jackson*, 318 Ill. App. 3d 321 (2000). In *Jackson*, a police officer observed the defendant receive money from an unknown individual and point to a third person, who was standing nearby holding a brown paper bag. The third person reached in the bag

and transferred an unidentified object to the unknown individual, who then left the area. The defendant and the third person were arrested, and a search of the bag revealed several packets of cocaine and heroin. A search of defendant uncovered $150 but no contraband. The defendant was convicted of possession of a controlled substance with intent to deliver under an accountability theory of liability. *Jackson*, 318 Ill. App. 3d at 322-23. The appellate court held that the evidence was insufficient to sustain defendant's conviction. *Jackson*, 318 Ill. App. 3d at 324-26. The court reasoned that the only link between the defendant and the drugs was the alleged transaction with the unknown person, and there was no evidence identifying the nature of the object passed to the unknown person. *Jackson*, 318 Ill. App. 3d at 324. "It is at least theoretically possible that there was something innocuous in the bag which [the third party] handed to the unknown person, notwithstanding that the remaining packets in the paper bag contained cocaine and heroin." *Jackson*, 318 Ill. App. 3d at 324.

Unlike *Jackson*, the evidence of defendant's possession of the 219-gram bag of cocaine eventually found in the "stash house" was not speculative. Rather, in finding defendant guilty of possession with intent to deliver 400 or more but less than 900 grams of cocaine, the trial court relied on defendant's own written statement. Defendant denied making the statement, although his testimony wavered on this issue, and he denied signing or initialing the written statement. The trial court found that defendant made the statement and noted the similarity between defendant's signature on the *Miranda* form (which defendant admitted to signing) and defendant's signature on his written statement. We defer to this credibility determination.

According to defendant's written statement and Agent Gadzinskas's testimony regarding her questioning of defendant, defendant received 18 ounces of cocaine on March 13, 2008, and planned

to give it to Gomez. He gave the cocaine to Gomez on the morning of March 14, 2008, but Gomez said that it looked funny. Therefore, Gomez "told [defendant to put 9 oz in my house, we would deliver the other 9 oz to the guy that got busted by DEA this morning. [Gomez] said he would deliver the other 9 oz once the guy called him back after that day." Defendant said that intended to charge Gomez $4,600 for the first nine ounces, and Gomez was going to sell that amount to "Santo," whom defendant knew was Santiano Ceolla, for $5,250. Defendant stated that he owed his supplier $9,000 for the entire 18 ounces.

Testimony from the DEA agents established that Ceolla was a "cocaine hub" and would be meeting with a supplier on March 14, 2008, at 9:30 a.m. at Wendy's – the same date, time, and place where defendant and Gomez were observed. The testimony also established that the 219-gram bag of cocaine at issue was recovered from Ceolla's home the same day, March 14. Viewing the evidence in the light most favorable to the State, the trial court could have found that the 219-gram bag of cocaine found in the "stash house" was the 9 ounces of cocaine that defendant gave to Gomez, thus establishing defendant's possession at one point in time that day of all 18 ounces.

As a final matter, defendant argues that even if he had control over the cocaine that was found in the "stash house," he "abandoned" the cocaine when Ceolla took possession of it in the Wendy's parking lot. Defendant cites *People v. Adams*, 161 Ill. 2d 333, 345 (1994), in which our supreme court stated that "[c]onstructive possession may exist even where an individual is no longer in physical control of the drugs, provided that 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." There, two of the defendant's associates carried cocaine on board an airplane and hid the drugs in the plane's restroom. *Adams*, 161 Ill. 2d at 345. Our supreme court held that

the "jury could certainly have concluded that [the defendant's] associates had physical control of the drugs with intent to exercise control in their own behalf" because the cocaine was concealed in the restroom "only so they could escape detection until the plane reached its destination." *Adams*, 161 Ill. 2d at 345. No other person obtained possession of the cocaine, and "no serious claim can be made that the drugs were ever abandoned." *Adams*, 161 Ill. 2d at 345.

However, this argument addresses constructive possession. The evidence here established that defendant *actually* possessed the cocaine before its transfer to Ceolla, which is what the State was required to prove to convict defendant of possession with intent to deliver. *Adams*, 388 Ill. App. 3d at 766. Indeed, defendant admitted that he purchased 18 ounces of cocaine on March 13, 2008, half of which he said he gave to Gomez the next day to sell to Ceolla. Testimony regarding the transaction in the Wendy's parking lot and the cocaine recovered from the "stash house" supported the finding that the 219-gram bag of cocaine found in the "stash house" was the 9 ounces of cocaine that defendant gave to Gomez. The evidence was sufficient to sustain defendant's conviction for possession with intent to deliver 400 or more but less than 900 grams of cocaine.

Ineffective Assistance of Counsel

Defendant seeks reversal of his convictions on all counts on grounds that he received ineffective assistance of trial counsel because counsel failed to file a pretrial motion to quash arrest and suppress evidence. Defendant's claim is subject to 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 show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have

been different. *Strickland*, 466 U.S. at 687-88, 694; *People v. Houston*, 226 Ill. 2d 135, 144 (2007). A reasonable probability that the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *Houston*, 226 Ill. 2d at 144. Failure to satisfy one prong defeats the claim. *Strickland*, 466 U.S. at 697; *Houston*, 226 Ill. 2d at 144-45. To prevail on a claim of ineffective assistance of counsel for failure to file a motion to quash arrest and suppress evidence, a defendant must establish a reasonable probability that the motion would have been granted, and the trial outcome would have been different. *People v. Bailey*, 375 Ill. App. 3d 1055, 1059 (2007).

Defendant contends that trial counsel was ineffective for failing to move to quash his arrest on the basis that the police did not have probable cause to arrest him. In turn, defendant argues that trial counsel should have moved to suppress the evidence recovered from his home as well as his incriminating statements because his consent to search and the statements were the product of an illegal arrest. In addition, defendant contends that his consent to search was involuntary. Defendant fails to establish a reasonable probability that the trial court would have granted such motions and therefore does not show the requisite prejudice for his ineffective assistance of counsel claim.

Probable cause for an arrest exists "when the totality of the facts and circumstances known to the officer is such that a reasonably prudent person would believe that the suspect is committing or has committed a crime." *People v. Johnson*, 368 Ill. App. 3d 1073, 1081 (2006). "[P]robable cause does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false." *People v. Wear*, 229 Ill. 2d 545, 564 (2008). Thus, "the existence of possible innocent explanations for the individual circumstances or even for the totality of the

circumstances does not necessarily negate probable cause." *People v. Rodriguez-Chavez*, ___ Ill. App. 3d ___, 938 N.E.2d 623, 627 (2010).

Here, the facts known to the law enforcement officers were sufficient to lead a reasonably prudent person to believe that defendant had committed a crime. Defendant's arrest stemmed from a coordinated investigation of illegal drug dealing in Du Page County. The investigation included overhears of Ceolla's telephone calls, including a call on March 13, 2008, from which the DEA learned that Ceolla was going to be meeting a supplier the next day at about 9:30 a.m. at the Wendy's restaurant on Rohlwing and Thorndale Roads. Agents surveilled Gomez's and defendant's houses on the morning of March 14, 2008, because they had learned that Gomez was going to conduct a drug transaction that day and that a "target" was going to arrive at defendant's house. That morning, agents observed Gomez's arrival at defendant's house, defendant's entry into the passenger seat of Gomez's car, their entry into defendant's house, their reentry into Gomez's car twenty minutes later, and the meeting in Ceolla's car in the Wendy's parking lot, where defendant remained in the passenger seat of Gomez's car.

Defendant argues that even if agents suspected Gomez and Ceolla of engaging in a drug transaction, defendant was not part of the transaction because he was merely a passenger in Gomez's car — a different car from the one in which Gomez and Ceolla met. He cites *People v. Lee*, 214 Ill. 2d 476, 486 (2005), for the proposition that probable cause to arrest a particular individual does not arise merely from the existence of probable cause to arrest another person in the company of that individual. However, as discussed, probable cause to arrest defendant was based on significantly more than defendant's mere accompaniment with Gomez. Moreover, this court recently noted that it is reasonable to infer that if one person in a car is engaged in drug dealing, so are the passengers,

because drug dealing is an enterprise to which a dealer would be unlikely to admit an innocent person who could provide incriminating evidence. *Rodriguez-Chavez*, ___ Ill. App. 3d ___, 938 N.E.2d at 628-29.

Accordingly, defendant fails to establish a reasonable probability that the trial court would have granted a motion to quash arrest based on lack of probable cause. Defendant's derivative argument — that trial counsel was ineffective for failing to move to suppress the cocaine and gun recovered from his home as well as his incriminating statements because his consent to search and the statements were the product of an illegal arrest — likewise fails.

Defendant also fails to establish a reasonable probability that the trial court would have granted a motion to suppress on the basis that his consent to search was involuntary. The determination of whether consent is voluntary is a question of fact to be determined from the totality of all the circumstances. *People v. Phillips*, 264 Ill. App. 3d 213, 217 (1994). Defendant argues that his consent to search was involuntary because he consented after his arrest. However, custody alone does not render a defendant's consent to search involuntary. *People v. Alvarado*, 268 Ill. App. 3d 459, 467-69 (1994); *Phillips*, 264 Ill. App. 3d at 222. The signed consent-to-search form states, "I freely consent to this search," and "I have not been threatened, nor forced in any way." Accordingly, defendant fails to establish a reasonable probability that a motion to suppress on the basis of involuntary consent would have succeeded. Because defendant does not show prejudice, his ineffective assistance of counsel claim fails.

Pretrial Ineffective Claims

Defendant seeks reversal of his convictions on all counts based on the trial court's failure to appoint counsel to investigate and represent defendant on his pretrial *pro se* claims of trial counsel's

deficiency for failure to file a pretrial motion to quash arrest and suppress evidence. A trial court's denial of a *pro se* ineffective assistance of counsel claim will not be reversed unless it is manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008).

Defendant relies on *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny. In *Krankel*, the defendant filed a *pro se* motion for a new trial in which he alleged that his trial counsel was ineffective. The trial court did not appoint new counsel to assist him in the motion and denied the motion. Our supreme court remanded the case for a new hearing on the defendant's motion, with instructions to appoint separate counsel to represent the defendant. *Krankel*, 102 Ill. 2d at 189. Subsequent to the *Krankel* decision, however, our supreme court made it clear that appointed counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, the trial court should first examine the factual basis of the defendant's ineffective assistance claim. *Moore*, 207 Ill. 2d at 77-78. "If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *Moore*, 207 Ill. 2d at 78.

Here, however, defendant raised his ineffective assistance of counsel claims *prior* to trial. Defendant cites *People v. Jocko*, 389 Ill. App. 3d 247 (2009), for the proposition that the "court has extended the rules for appointing new counsel to *pro se* claims of ineffective assistance brought prior to trial." Our supreme court reversed this decision and held that a trial court is *not* required to address a defendant's ineffective assistance claims prior to trial. *People v. Jocko*, 239 Ill. 2d 87, 92-

94 (2010). This decision was issued after defendant filed his opening brief but before the State filed its brief and before defendant filed his reply brief. Neither party acknowledges the decision.

Regardless, the trial court determined that trial counsel's determination not to file a motion to quash arrest and suppress evidence was a matter of trial strategy. Defendant presents no basis upon which to hold that the trial court's determination was manifestly erroneous, particularly in light of our determination that defendant fails to establish a reasonable probability that the trial court would have granted the motion.

For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

Affirmed.