2016 IL App (2d) 140394-U
No. 2-14-0394
Order filed March 28, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SAMUEL SPAN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 13-CF-884 Honorable John A. Barsanti, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in preventing defendant from raising a motion to suppress during trial, as, per section 114-12(c) of the Code of Criminal Procedure, he had sufficient knowledge and opportunity to raise the motion before trial.

¶ 2 Defendant, Samuel Span, appeals from the judgment of the circuit court of Kane County finding him guilty after a bench trial of unlawful delivery of a controlled substance within 1,000 feet of a park (720 ILCS 570/407(b)(1) (West 2014)). He contends that the trial court abused its discretion in prohibiting him from seeking the suppression of evidence during trial. Because

defendant knew of the basis for the motion to suppress, and had ample opportunity to file a pretrial motion, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of unlawful delivery of 1 or more but less than 15 grams of a controlled substance (cocaine) (720 ILCS 570/401(c)(2) (West 2014)) within 1,000 feet of a park (count I) (720 ILCS 570/407(b)(1) (West 2014)) and one count of unlawful delivery of 1 or more but less than 15 grams of a controlled substance (cocaine) (count II) (720 ILCS 570/401(c)(2) (West 2014)). He was also charged in case No. 13-CF-338 (No. 338) with unlawful possession of less than 15 grams of a controlled substance (cocaine). Both cases arose out of the same controlled drug buy, which took place on February 22, 2013.

¶ 5 Defendant, who was represented by counsel, filed a motion to quash arrest and suppress evidence in No. 338. At a June 7, 2013, hearing on both cases, at which defendant was present, the State indicated, over defendant's objection, that it would proceed first with this case. The trial court, after continuing the motion to quash arrest and suppress evidence in No. 338, advised defendant that he "[might] want to file a similar motion [in this case], as well."

¶ 6 At an October 10, 2013, hearing, the trial court allowed defendant's attorney to withdraw and permitted defendant to represent himself.

¶ 7 On October 13, 2013, the State included, as part of discovery, a police report involving the stop in No. 338. On December 30, 2013, the State identified the arresting officer in No. 338 as a potential witness.

¶ 8 On November 7, 2013, defendant, *pro se*, demanded a trial on both cases, but the State again elected to proceed first with this case. Defendant then waived his right to a jury trial, and the trial court set this case for a bench trial on January 7, 2014.

¶ 9 On January 7, 2014, the State filed three motions *in limine*, one of which sought leave to introduce, as other-crimes evidence, the evidence related to the charge in No. 338. Specifically, the State sought to introduce evidence that defendant was jaywalking when he was stopped, as well as the cocaine and cash seized during the stop.

¶ 10 At the pretrial hearing on the motion *in limine*, defendant acknowledged receiving a copy of the motion and stated that he was prepared to proceed. Defendant objected to the introduction of the other-crimes evidence, contending, in part, that the State was attempting to improperly use that evidence to prove the charges in this case.

¶ 11 In ruling on the motion *in limine*, the trial court denied admission of the evidence that defendant was jaywalking. In doing so, the court noted that such evidence "[c]ertainly would be relevant in a motion to quash arrest." The court allowed admission of the evidence of the cocaine and the cash seized during the stop, for the purpose of establishing defendant's identity.

¶ 12 The following evidence was established at the bench trial. Jacob Pieczonka was a paid confidential informant working for the Elgin police department. On February 22, 2013, he arranged to purchase cocaine from Mateo Cedillo. After speaking with Cedillo on the telephone, Pieczonka met with Elgin police officers who placed a hidden video camera on him and gave him $350 to purchase the cocaine. Officer Adam Arnold of the Elgin police department photographed the serial numbers on the currency.

¶ 13 At approximately 4:37 p.m. on February 22, 2013, Pieczonka entered Cedillo's apartment. Cedillo was there, along with a man later identified as defendant and an unidentified Hispanic male. Defendant had been present on February 12, 2013, when Pieczonka purchased cocaine from Cedillo.

¶ 14 When Pieczonka asked defendant how the cocaine looked, defendant told him that he was going to go get it and left the apartment. Defendant returned about 20 to 30 minutes later.

¶ 15 After returning, defendant went into a bedroom with Cedillo and closed the door. A few minutes later, Cedillo exited the bedroom and gave Pieczonka a plastic bag, containing what appeared to be crack cocaine. Pieczonka, in turn, gave Cedillo the $350 in buy money.

¶ 16 Cedillo told Pieczonka that Pieczonka could check the amount of cocaine. Pieczonka followed Cedillo into the bedroom where a scale was sitting on the bed. Defendant placed the plastic bag on the scale. When Pieczonka said that it was "all good," defendant said, "Oh no, hold on, that's why I keep extra just for that reason." Defendant then reached into his coat pocket and removed another plastic bag that appeared to contain cocaine. After Pieczonka repeated that it was "all good," defendant returned the original plastic bag to Pieczonka.

¶ 17 After Pieczonka left the apartment, he met with Officer Arnold. He told Officer Arnold that the cocaine had been brought to the apartment by a light-skinned African-American or Hispanic male wearing dark clothing who had the word "pain" tattooed on his face. Officer Arnold relayed the description to other officers who were conducting surveillance.

¶ 18 Officer Marcy Kogut of the Elgin police department, who was assigned to monitor the operation, saw a "light-skinned male black or Hispanic" wearing a gray hoodie and black jacket exit the apartment about two minutes after Pieczonka had entered. A little over 20 minutes later, that same person returned. A few minutes after that, Pieczonka left. Shortly thereafter, the person wearing the gray hoodie and black jacket left on foot. Officer Kogut notified the other officers of that person's route.

¶ 19 Officer Sean Schroeder of the Elgin police department was assigned to stop and/or identify anyone leaving or entering the apartment. At about 5:15 p.m., he saw a "male dark-

skinned subject" wearing a hoodie and black jacket walking. That person was later identified as defendant.

¶ 20 As defendant crossed Perry Street, Officer Schroeder pulled up in his squad car and asked to speak to him. According to Officer Schroeder, defendant walked up to the squad car, put his hands on top of the squad car, and spread his feet. When Officer Schroeder asked defendant why he had done that, defendant answered that he "thought that's how it goes."

¶ 21 Officer Schroeder noticed a small plastic bag in defendant's pocket that contained an "off-white substance." When Officer Schroeder asked defendant about the substance in the plastic bag, defendant referred to it as "rock." Officer Schroeder arrested defendant and searched him. The search revealed $391 in cash, which included the $350 in buy money.

¶ 22 During cross-examination, Officer Schroeder testified that Officer Arnold had asked him to stop defendant. When defendant asked Officer Schroeder if he had been stopped "for no legal reason," the trial court sustained the State's objection.

¶ 23 Defendant, in turn, asked Officer Schroeder if there was a "reason for [the] stop." When the trial court asked defendant what he was trying to accomplish, defendant explained that an officer cannot stop someone "without having probable cause" and that he wanted to know the basis for the stop. The trial court ruled that, because "[they were] on trial *** for the offense here," defendant could not ask questions as to the basis for the stop. Defendant responded that, because he was "not able to question the legality of the stop, [he had] no further questions." The court added that the "stop is irrelevant right now."

¶ 24 Following defendant's arrest, Officer Arnold obtained a photograph of defendant showing the facial tattoo that said "pain." From that photograph, Pieczonka identified defendant as having been present during the drug transaction in the apartment.

¶ 25 Defendant testified that he was at the apartment when Pieczonka arrived. According to defendant, he left a few minutes later but returned between 20 and 40 minutes later to pick up some items that he had left there. When he returned, he went into the bedroom and Pieczonka and Cedillo were in another room. While defendant was on the phone in the bedroom, Cedillo and Pieczonka came in. About two minutes later, Pieczonka left the apartment, and about a minute after that, defendant left. As defendant walked down the street, he was stopped by the police. According to defendant, both he and the unidentified Hispanic male in the apartment were wearing gray hoodies and black jackets.

¶ 26 After defendant testified, he asked if he would be able to further question Officer Schroeder about the lawfulness of the stop. The trial court said no, because that was a matter for a motion that "should have been made before trial."

¶ 27 Notwithstanding the trial court's comments, defendant called Officer Schroeder and asked him why he had stopped him. The State objected. When the trial court asked defendant why such testimony was relevant, defendant responded that it was being offered to show that the stop violated the fourth amendment. The court stated that the only issue was whether the State had proved defendant guilty and that the issue of whether there was an improper seizure should have been the "subject of a pretrial motion." The court added that, if defendant's purpose in calling Officer Schroeder was to establish the illegality of the stop, then such testimony would be irrelevant. Defendant offered no other reason for seeking to question Officer Schroeder.

¶ 28 The trial court found defendant guilty of both counts. Defendant, in turn, filed a motion for a judgment notwithstanding the verdict (JNOV) or a new trial, a postconviction petition, and a copy of the pretrial motion to quash arrest and suppress evidence that he filed in No. 338. Pertinent to this appeal, defendant contended in his motion for JNOV/new trial that the trial court

erred in barring him from challenging during trial the lawfulness of the stop. He asserted in the postconviction petition that the stop violated the fourth amendment and that he should have been permitted to question Officer Schroeder about the basis for the stop.

¶ 29 At the hearing on the posttrial filings and for sentencing, the trial court asked defendant if he had filed anything other than the motion for JNOV/new trial and the postconviction petition. Defendant answered "[f]or 13 CF 884, no, just those two. I filed one for 13 CF 338." After the court explained to defendant that his postconviction petition was premature, defendant stated that he did not want it heard at that time. Defendant agreed that the only motion to be decided was the motion for JNOV/new trial.

¶ 30 In arguing in support of his motion for JNOV/new trial, defendant contended, in part, that the trial court had erred in allowing the State to use evidence from No. 338 without allowing him to challenge the lawfulness of the stop that produced that evidence. Defendant acknowledged that he was present at the hearing on the motion *in limine* at which the parties and the court discussed the admissibility of evidence from the stop.

¶ 31 In ruling on the motion for JNOV/new trial, the trial court referred to section 114-12 of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-12 (West 2014)). The court found that defendant knew from discovery and the pretrial hearing on the motion *in limine* that the State planned to introduce the evidence from the stop. The court ruled that defendant had "every opportunity to make that motion before trial and [he] had all of the information necessary to file that motion" and therefore defendant's challenge during the trial was untimely under section 114-12 of the Code. Thus, the court denied the motion for JNOV/new trial.

¶ 32 The court merged the conviction on count II and sentenced defendant on count I to 15 years' imprisonment. The State nol-prossed No. 338. Defendant filed a timely notice of appeal.

¶ 33 II. ANALYSIS

¶ 34 On appeal, defendant contends that the trial court abused its discretion in applying section 114-12 of the Code to bar him from seeking to suppress during trial the evidence produced from the stop.

¶ 35 Generally, a defendant who claims that he was subjected to an unlawful search or seizure must file a motion to suppress before trial if he wants to challenge the evidence as having been illegally seized. *People v. Givens*, 237 Ill. 2d 311, 332 (2010). However, the trial court has the discretion to allow a motion to suppress during a trial where certain statutory requirements are satisfied. *Givens*, 237 Ill. 2d at 332; *People v. Flatt*, 82 Ill. 2d 250, 262 (1980). We review the trial court's decision as to whether to allow a motion to suppress during trial for an abuse of discretion. *People v. Bier*, 213 Ill. App. 3d 303, 306 (1991). An abuse of discretion will be found only where the trial court's decision is so unreasonable, arbitrary, or fanciful that no reasonable person would agree with it. *People v. Kladis*, 2011 IL 110920, ¶ 23.

¶ 36 Pursuant to section 114-12(c) of the Code, a motion to suppress shall be made before trial, unless the opportunity to do so did not exist or the defendant did not know of the grounds for such a motion. 725 ILCS 5/114-12(c) (West 2014). When a motion to suppress is made during trial, the court must decide whether the motion is timely. 725 ILCS 5/114-12(c) (West 2014). Such a motion generally should be made before trial, because a court should not have to stop the orderly progress of the trial to decide whether offered evidence was obtained in violation of the defendant's constitutional rights. *Flatt*, 82 Ill. 2d at 262; *Bier*, 213 Ill. App. 3d at 305 (citing *People v. Johnson*, 38 Ill. 2d 399, 402 (1967)). Section 114-12 applies to bench trials as well as jury trials. *Bier*, 213 Ill. App. 3d at 305.

¶ 37 In this case, the trial court found that defendant knew before trial the basis for his motion to suppress and that he had an adequate opportunity to file the motion before trial. We agree.

¶ 38 Defendant clearly knew the grounds for a motion to suppress the evidence from No. 338, as he had filed in No. 338 a motion to quash arrest and to suppress that same evidence. That leaves the question of whether he had an opportunity to file such a motion before trial in this case.

¶ 39 Defendant knew of the grounds for a motion to suppress as of June 7, 2013. Moreover, at the June 7, 2013, proceeding, the trial court alerted defendant to the need to file a motion to suppress the evidence from No. 338. That gave him nearly six months to file such a motion before his trial commenced.

¶ 40 Even if defendant was not aware of the need to file a pretrial motion to suppress as of June 7, 2013, he certainly would have known on the day of trial. By that time, the State had reiterated its election to proceed first with this case. The State had also indicated through discovery and its motion *in limine* that it intended to introduce evidence from No. 338. As the trial court noted in denying defendant's posttrial motion, he had "every opportunity" to seek suppression of the evidence before trial.

¶ 41 Finally, we note that defendant does not identify, nor does the record indicate, any encumbrances to his ability to have filed a motion to suppress before trial. Indeed, as part of the posttrial proceedings, he filed a copy of the motion to suppress from No. 338. There is no indication that he could not have done so before trial.

¶ 42 Based on the circumstances, the trial court correctly found that defendant knew of the grounds for challenging the stop and that he had the opportunity to seek suppression of that

evidence before trial. Thus, the court did not abuse its discretion in barring defendant from seeking suppression of the evidence during the trial.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the judgment of the circuit court of Kane County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 45 Affirmed.