2014 IL App (3d) 130153-U

Order filed March 20, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0153
v.	)	Circuit No. 06-CF-2624
	)	
ARTHUR BROWN,	)	The Honorable Edward Burmila, Jr., Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it denied defendant's motion for a mistrial because the record affirmatively shows the trial court did not consider the stricken testimony.

¶ 2 The trial court found defendant Arthur Brown guilty of possession of a controlled substance with the intent to deliver and imposed a six-year term of imprisonment. Defendant appeals, alleging the trial court erred when it denied his motion for a mistrial after a witness

testified that defendant did not want to speak with police after they read defendant his *Miranda* rights. We affirm.

¶ 3 BACKGROUND

¶ 4 On November 2, 2006, the State charged defendant with unlawful possession of a controlled substance, specifically more than 15 grams but less than 100 grams of cocaine, with the intent to deliver. 720 ILCS 570/401(a)(2)(A) (West 2006). The cause proceeded to a bench trial on August 3 and 18-20, 2010. During defendant's opening statement, one of his attorneys asserted, "Where is there [an] admission by [defendant] that those narcotics, in fact, belonged to him? It doesn't exist."

¶ 5 The State presented the testimony of Jennifer Hoffman, now known as Jennifer Schoenberg. According to Jennifer, she owned and lived in a townhouse located at 226 B Elkhorn Court in Bolingbrook, Illinois, and defendant rented an upstairs bedroom from her at the time of the incident.

¶ 6 On October 15, 2006, Jennifer returned home from a weekend trip to Lemont, Illinois, around 8 p.m. When she entered her bedroom, approximately 20 minutes after she arrived home, she noticed the drawers to a large chest were slightly open and the mattress was slightly off her bed. Jennifer discovered that a small safe with cash in it had been removed from one of the drawers. Jennifer stated she went into every room except defendant's bedroom to see if someone was in her home. Finding no other person in the house, Jennifer called the police.

¶ 7 Once the police arrived, Jennifer explained someone had been in her home and her safe was missing. After showing police her bedroom, she informed the officers the second bedroom belonged to defendant. Jennifer knocked on the door, which was closed but not locked, and opened it for the police. Jennifer immediately noticed the room was "clearly ransacked" and

told the police defendant did not normally leave his room in that condition. The officers asked for her permission to enter defendant's bedroom and then asked Jennifer to go downstairs.

¶ 8 Bolingbrook police officer John Tuttle testified he had nine years of experience as a police officer with another department and was training with officer Dane Stepien on the evening of October 15, 2006. Around 9 p.m., he arrived at Jennifer's residence to investigate the reported burglary. After Jennifer explained the situation, he and Stepien conducted a sweep of the residence. During the sweep, Tuttle learned defendant rented a room from Jennifer. Tuttle stated defendant's bedroom was in "complete disarray," because dresser drawers were pulled out, the mattress was flipped around and there was "stuff thrown all over the room."

¶ 9 From the doorway, Tuttle observed a hospital-style table in the center of the room that contained several baggies of a white substance, some of it in a rock formation, a tan substance in rock formation which Tuttle suspected was heroin, a plate with white residue on it, and a green leafy substance that Tuttle suspected was cannabis. After Tuttle observed these items, he backed out of the room. Tuttle did not touch or take any of the items he saw on the table.

¶ 10 Bolingbrook police detective Nick Azzos testified that on October 15, 2006, around 9 p.m., he responded to the burglary at Jennifer's residence. Azzos stated that once Jennifer opened the door to defendant's room, he walked into the room, which was in "total disarray[.]" Azzos observed substances located on a hospital table in defendant's bedroom which he suspected to include cocaine, heroin and cannabis. He also observed a plate with white residue and blades on it, and a scale. Azzos secured the room and prepared to leave the residence to secure a search warrant.

¶ 11 Azzos stated defendant was arrested in front of the townhouse just before Azzos left to secure a search warrant for defendant's bedroom. During the search incident to defendant's

arrest, officers found $588 cash on defendant's person, including $540 in $20 bills. Azzos left and successfully secured a warrant to search the room.

¶ 12 During the search pursuant to a search warrant, Azzos and his fellow officers secured all of the items he saw on the hospital-style table. They also found a coffee grinder with residue on it that later tested positive for cocaine, a large amount of small baggies, some of which contained suspected cocaine and cannabis, a scale, $70 cash, and either a warning or traffic ticket bearing defendant's name and listing his address as 226 B Elkhorn Court in Bolingbrook, Illinois.

¶ 13 At one point during the cross-examination of Azzos, defense counsel asked when defendant "was interviewed on that night, whatever time it may have been, as best [as] you can recollect, did [defendant] appear to be under the influence of either alcohol or narcotics?" The State objected, and asserted defense counsel's question "assume[d] that [defendant] was interviewed." The court sustained the objection. Shortly after this exchange, Azzos testified that as defendant walked up to the residence on the night in question, officers told him to "[g]et down. [He was] under arrest[,]" and defendant complied. Azzos explained defendant did not carry on a conversation with the officers.

¶ 14 Defense counsel continued by asking Azzos whether defendant stated he owned the narcotics police discovered in the townhouse, to which Azzos replied "[t]here was no interviewing of [defendant]." Counsel then asked Azzos, "[A]t no time did [defendant] acknowledge any of the narcotics in that room were his?" Azzos stated that defendant "didn't want to talk. He was read his [r]ights. He didn't want to talk." Immediately following this statement, the trial court *sua sponte* stated the comment would "be stricken from the record and disregarded by the Court." At that point, defense counsel moved for a mistrial. Defense counsel asserted that when a witness makes a statement referring to defendant's invocation of his

Miranda rights, the error was sufficient to warrant a mistrial. The State contended the court could ignore the stricken testimony and also that defense counsel essentially "badgered" Azzos into making the statement.

¶ 15 The trial court denied defendant's motion for a mistrial. The court specifically stated that Azzos' statement that defendant refused to waive his *Miranda* rights may be the cause for a "mistrial even in a bench trial[,] so the fact that it's a bench trial [did] not in and of itself preclude the motion for a mistrial." The court found Azzos' response was inadvertent. The court stated it would strike the comment and refuse to give it recognition.

¶ 16 Illinois state police officer Ray Rodriguez testified as an expert in the area of drug distribution and valuation. According to him, a person possessing one to three grams of cocaine intended to personally consume the drug, but a person possessing 16 grams of cocaine intended to distribute it. Rodriguez opined that "cutting agents," a grinder, small baggies and a scale were items used by a person who distributed cocaine.

¶ 17 The State offered a stipulation from Kenneth Rasor, an expert in forensic chemistry who worked for the Illinois State Police Crime Lab. Rasor tested samples the police recovered from defendant's bedroom. Rasor specifically tested 5 grams, 1.9 grams, and 9.2 grams of a substance containing cocaine. After Rasor's stipulation, the State rested. Defendant moved for a directed verdict, which the trial court denied.

¶ 18 Defendant called officer who testified that police did not take fingerprints from any of the items found in defendant's bedroom. Katie Fowler, defendant's friend, also testified for the defense. According to Katie, she went to defendant's home on October 14, 2006, around 1 p.m., and spent two hours cleaning defendant's bedroom. Defendant was present the entire time. On that day, Katie did not see any narcotics, a scale, baggies or a grinder in defendant's room.

¶ 19 Katie testified that, on the night of October 15, 2006, she went to defendant's home because defendant had telephoned her. When she arrived around 8:15 p.m., Jennifer was home alone. Katie conversed with Jennifer and then went into defendant's bedroom to retrieve some papers. During the four minutes she was present in defendant's room, she noticed the room was unusually messy but she did not see narcotics, a scale, baggies, a plate or any money in the room. After she closed defendant's door, she left that residence to walk to the home of another friend, Scott, who lived nearby.

¶ 20 Katie and defendant returned Jennifer's house, with defendant's dog, around 8:45 or 9 p.m. As they turned the corner, they saw there were "about 12 police officers" in front of the residence. The officers "scream[ed] for [defendant] to get down[,]" and defendant complied.

¶ 21 Defendant testified on his own behalf. He explained he worked as a barber and also worked at a "temp" agency. According to defendant, he spent October 14, 2006, alone at home. He left around 11 p.m. to go to a party in Chicago. When defendant returned home from Chicago at 2 or 3 a.m. on October 15, 2006, he discovered the sliding door to the residence was broken and his room was "disfigured[,]" in that it was not in the same condition as it was when he left the night before.

¶ 22 According to defendant, on October 14, 2006, the room did not contain narcotics, paraphernalia, a scale, baggies, a white plate, or a razor blade. Defendant further stated these items were not in his room at 2 or 3 a.m. on October 15, 2006. Defendant stated $200 or $300 was stolen from his room but he did not call the police because he wanted to investigate the situation himself.

¶ 23 Defendant testified he spoke with Jennifer on the telephone around 8 p.m. on October 15, 2006. Jennifer told him that someone had been in her room and stolen money. Defendant came

to the home around 8:05 p.m. and spoke with Jennifer. He then left with his dog to go to Scott's house. Katie met him at Scott's house and they returned to Jennifer's around 8:45 p.m.. Upon arrival, a police officer told defendant to get on the ground. The police searched him and discovered cash on his person from his employment.

¶ 24 The court found defendant guilty of possession of a controlled substance, cocaine, with the intent to deliver. The court found the testimony of defendant and Katie to be "completely incredible and unbelievable." The court specifically noted that, if it believed defendant and Katie's version of events, it would have to believe that the contraband and paraphernalia were not in defendant's room at 8:15 on the night of the incident, indicating Jennifer placed the drugs and other items in defendant's room for the police to find. The court also noted that defendant and Katie's testimony conflicted because defendant testified he did not have any visitors at his residence on October 14, 2006, while Katie testified she cleaned his room that day.

¶ 25 Defendant filed a motion for a new trial on October 12, 2010, and a subsequent amended motion for a new trial, alleging, among other things, the trial court erred when it denied defendant's motion for a mistrial based on officer Azzos's testimony mentioning defendant invoked his *Miranda* rights. At a hearing on December 3, 2012, the trial court denied defendant's amended motion for a new trial.

¶ 26 At this hearing, regarding defendant's contention the court erred when it denied his motion for a mistrial, the court stated that, in a bench trial, it was presumed that the court ignored inadmissible evidence. The court continued that "even if Officer Azzo[s]'s testimony was purposeful, it certainly was not considered by the Court in any fashion in arriving at a verdict in th[e] case." The court further stated it "believe[d defense] counsel was the one that caused [Azzos] to respond as he did. And unfortunately the response that [defense counsel] got

appeared to be, in the Court's opinion, a response that he was seeking. [The court did not] believe that the defendant [was] entitled to a new trial because of that." Following the imposition of a six year sentence, on March 1, 2013, defendant filed a timely notice of appeal.

¶ 27 ANALYSIS

¶ 28 On appeal, defendant contends officer Azzos' testimony improperly informed the court that he exercised his due process right to remain silent, recognized by the Supreme Court in *Doyle v. Ohio*, 426 U.S. 610 (1976), and should have resulted in a mistrial. The State contends Azzos' testimony was harmless because the evidence of defendant's guilt was overwhelming. In addition, the State argues the trial court disregarded the statement and correctly denied the request for a mistrial.

¶ 29 Once a defendant has been informed of his *Miranda* rights and chooses to remain silent, the use of his silence violates the due process clause of the fourteenth amendment of the United States Constitution. *Doyle v. Ohio*. 426 U.S. 610, 619 (1976). Thus, prosecutorial remarks and questions concerning a defendant's postarrest silence are generally improper. *People v. Pegram*, 124 Ill. 2d 166, 176 (1988). When a trial court judge is faced with a potential *Doyle* violation during a bench trial, "the court 'is presumed to have considered only properly admitted evidence and defendant was not prejudiced.' " *People v. Titone*, 115 Ill. 2d 413, 425 (1986), quoting *People v. Eddmonds*, 101 Ill. 2d 44, 66 (1984).

¶ 30 In this case, when detective Azzos testified defendant "was read his [r]ights [and] [defendant] didn't want to talk[,]" the court, on its own motion, immediately struck the testimony and indicated this testimony would not be considered by the court. In addition, as it ruled on defendant's motion for a mistrial, the court indicated it would first strike and then disregard Azzos' statement that defendant did not want to speak after police read him his *Miranda* rights.

During the hearing on defendant's amended posttrial motion, the court explicitly stated Azzos' testimony "certainly was not considered by the Court in any fashion in arriving at a verdict in th[e] case."

¶ 31 A trial court's decision to deny a motion for mistrial will not be disturbed on appeal absent a clear abuse of discretion. *People v. Nelson*, 235 Ill. 2d 386, 435 (2009). A trial court should only grant a motion for a mistrial where an error of such gravity has occurred that defendant has been denied fundamental fairness and continuation of the trial would defeat the ends of justice. *Nelson*, 235 Ill. 2d at 435.

¶ 32 Here, the court *sua sponte* struck the improper testimony and repeatedly indicated it would not and did not consider the stricken testimony. Thus, we need not rely on the presumption that a trial court only considered competent evidence during this bench trial because the record shows the court affirmatively stated it did not consider Azzos' statement regarding defendant's silence. Consequently, we conclude the trial court did not abuse its discretion when it denied defendant's motion for a mistrial.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 35 Affirmed.