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2015 IL App (3d) 130193-U

Order filed March 20, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0193
v.)	Circuit No. 11-CF-405
)	
BRANDON SMITH,)	Honorable
)	Stephen A. Kouri,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice McDade and Justice O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant did not have standing to contest the validity of the search of Summershade.
- ¶ 2 A jury found defendant, Brandon Smith, guilty of unlawful possession with intent to deliver a controlled substance (720 ILCS 570/401(a)(2)(D) (West 2010)); unlawful possession of a controlled substance (720 ILCS 570/402(a)(2)(D) (West 2010)); calculated criminal drug conspiracy (720 ILCS 570/405(b) (West 2010)), and criminal drug conspiracy (720 ILCS 570/405.1(a) (West 2010)). The trial court sentenced defendant to 18 years on only the

possession with intent to deliver charge (720 ILCS 570/401(a)(2)(D) (West 2010)). The court did not sentence defendant on the other three charges. On appeal, defendant argues that: (1) his convictions should be reversed outright because evidence from 6710 Summershade, Apartment L (Summershade) was the subject of an illegal search and should have been suppressed; and (2) the State failed to prove defendant's guilt of calculated criminal drug conspiracy and criminal drug conspiracy beyond a reasonable doubt. We affirm.

¶ 3

FACTS

¶ 4

The State charged defendant with unlawful possession with intent to deliver a controlled substance, unlawful possession of a controlled substance, calculated criminal drug conspiracy, and criminal drug conspiracy. Prior to trial, defendant filed a motion to quash the search and arrest warrants and suppress evidence. The motion contested the search warrants issued by the Peoria County circuit court for three residences located at: 2426 West Ann Street (Ann), 1522 South Faraday (Faraday), and Summershade.

¶ 5

In the Summershade complaint, Peoria police officer Corey Miller alleged that he and other officers received information from three confidential sources that defendant was an upper level distributor of cocaine and crack cocaine in the Peoria area. Rasheem McCree, Jeffrey Skinner, Jonathon Taylor, and Deandrew Jackson also participated in the drug trafficking.

¶ 6

Confidential source one (CS1) said defendant transported cocaine from Rockford to distribute in Peoria. CS1 purchased several ounces of crack cocaine from defendant in the past and believed that defendant maintained stash houses throughout Peoria where he stored narcotics and currency. CS1 was at Faraday when cocaine or crack cocaine was present.

¶ 7

Confidential source two (CS2) said that he purchased an unspecified amount of controlled substance from McCree and Skinner at the Faraday and Ann locations. On three

occasions, officers conducted surveillance on Faraday while CS2 purchased unspecified amounts of controlled substance from McCree and Skinner. CS2 also purchased controlled substances at Ann on two occasions. During one of the transactions, an officer observed defendant standing outside Ann while CS2 purchased drugs from McCree. Thereafter, defendant got into a Chevrolet Monte Carlo and drove to Faraday.

¶ 8 Within 72 hours of the application for the warrant, CS2 had arranged a controlled delivery of crack cocaine from McCree. McCree initially directed CS2 to Faraday, but later redirected CS2 to Ann. Before CS2 reached Ann, McCree called and accused CS2 of working for the police. McCree refused to complete the transaction.

¶ 9 Confidential source three (CS3) reported that defendant brought a large amount of cocaine to either Ann or Faraday from an unknown location. When the cocaine arrived, one of defendant's associates converted a portion of it into crack cocaine. CS3 also said that both locations contained firearms.

¶ 10 The complaint also alleged that Miller had obtained a federal global positioning system (GPS) tracking warrant. Thereafter, he placed a tracking device on a black 2004 Ford truck. The truck was tracked as it traveled between the Ann and Faraday locations multiple times. On March 14, 2011, the truck traveled to Summershade where it remained stationary throughout the night. The next day, the truck traveled from Summershade to 3021 West Latrobe Street (Latrobe). Miller then observed defendant drive the truck from Latrobe to Faraday.

¶ 11 In April 2011, Miller conducted periodic surveillance on Summershade and noticed a Monte Carlo in front of the building that was registered to Jerry D. Smith and defendant. On one occasion, Miller saw defendant drive the Monte Carlo to Summershade. Defendant then exited the car and knocked on the door of apartment L, the door opened, and defendant entered the unit.

¶ 12 At the hearing on the motion, the State argued that defendant did not have standing to contest the search warrants. The State pointed out that the application for the warrant noted that defendant was observed knocking on the door, which showed that defendant did not have a "right to that residence." Defense counsel argued that the State could not contend that defendant did not have standing while it also argued that defendant had control over the areas where the contraband was found.

¶ 13 The trial court found that the search warrants for Summersshade, Faraday, and Ann were supported by sufficient probable cause, and the good-faith exception, as described in *United States v. Leon*, 468 U.S. 897, 923 (1984), likely applied. Thereafter, the case proceeded to a jury trial.

¶ 14 Peoria police officer Erin Barisch testified that he was the evidence collection officer during the search of Summersshade. Barisch video recorded the search and the recording was played for the jury. The search uncovered a brown book bag between the furnace and wall. A brown plastic bag inside of the book bag contained nine individually wrapped baggies of a substance containing cocaine. The baggies each weighed approximately 127 grams. Inside the master bedroom, officers found defendant's State of Illinois and student identification cards and some clothing that belonged to defendant. Several coats inside the apartment contained currency wrapped in \$1,000 bundles. Officers found a total of \$14,400 in the apartment. A box near the master bedroom contained a .38-caliber revolver. In the kitchen, officers found a digital scale, low income housing documentation for Kayla Cornish, and defendant's passport application, birth certificate, and social security card.

¶ 15 Officer Scott Bowers analyzed the fingerprints found on the sandwich bags and brown plastic bag discovered at Summersshade. The fingerprints matched defendant's fingerprint card.

¶ 16 The parties stipulated to the testimony of Walter Smith. Walter was a paid informant who, on January 24, 2011, purchased 2.3 grams of cocaine from McCree at Ann. On February 11, 2011, Walter purchased 2.7 grams of cocaine from McCree. At the time, McCree drove a black Ford truck. On February 15, 2011, Walter purchased 4 grams of cocaine from Skinner. On February 23, 2011, Walter purchased 15.6 grams of cocaine from McCree. At the time, McCree was driving a Chevrolet.

¶ 17 Peoria police officer Matthew Lane testified that he worked with Walter. On January 24, 2011, Lane provided Walter with money to purchase cocaine and observed Walter enter Ann. Later, Walter gave Lane the cocaine from the buy.

¶ 18 On February 11, 2011, Lane gave Walter money to purchase additional cocaine. Lane followed Walter to Easton Street where he saw a black Ford truck. Walter conducted the buy and then met with Lane to hand over the cocaine.

¶ 19 On February 15, 2011, Lane followed Walter to another controlled buy where Lane observed a black Ford truck. Lane thought it was the same truck that was in the area of the February 11, 2011, buy. The truck was registered to Stephanie Turner. Thereafter, Walter provided Lane with the cocaine from the buy.

¶ 20 On February 23, 2011, the final controlled buy occurred. Lane did not observe the transaction but met with Walter after the buy to retrieve the cocaine.

¶ 21 Miller testified that he worked with Walter while investigating defendant, Jackson, Taylor, Skinner, and McCree. Miller used the information from the controlled buys to obtain a federal GPS tracking warrant. After the warrant was issued, Officer Todd Leach made a traffic stop on a black Ford truck that defendant was driving. Defendant did not possess a valid driver's

license, and the truck was impounded. During the impound, a GPS tracking device was installed on the truck.

¶ 22 Miller also conducted visual surveillance of the truck, and on March 14, 2011, Miller observed defendant place some items into the truck while it was parked on Latrobe Avenue, where defendant's parents lived. Defendant then drove the truck to a location near Faraday.

¶ 23 On March 18, 2011, defendant drove the truck to Ray Dennison Chevrolet in Pekin. Defendant appeared to sell the truck and left the dealership in a Chevrolet Monte Carlo. Miller retrieved the GPS tracking device from the truck and began visual surveillance on the Monte Carlo. On March 28, 2011, Miller placed a GPS tracking device on the Monte Carlo while it was parked in the Summershade lot. The State admitted a map into evidence that displayed the dates and number of times that the Ford truck and Monte Carlo made stops at Summershade, Faraday, and Ann.

¶ 24 On cross-examination, Miller stated that he saw defendant walking near Faraday and standing in front of Ann. Miller never saw defendant use a key to get into any of the residences; however, he saw defendant enter Summershade.

¶ 25 Peoria police officer Daniel Duncan testified that he videotaped and collected evidence during the search of Faraday. The search uncovered a 9-millimeter firearm, a .45-caliber firearm, ammunition, an electric scale with cocaine residue, a glass plate with cocaine residue, a Walgreen's card issued to Skinner with cocaine residue, a traffic ticket issued to McCree, boxes of sandwich bags, and some photographs. The photographs were located in the living room and showed Skinner, Taylor, McCree, and defendant at a nightclub in Peoria.

¶ 26 The court accepted Peoria police lieutenant Loren Marion as an expert in the manufacturing, packaging, and distribution of cocaine. Marion opined that the 1,000 grams of

cocaine discovered at Summershade had a street value of approximately \$100,000. The 127 gram packaging was indicative of a mid-to-upper-level dealer. The \$14,400 indicated that some of the cocaine had been sold.

¶ 27 Marion also testified that it was common for cocaine distributors to store drugs in homes that were not in the distributor's name. Distributors kept firearms in these homes to protect the cocaine from other drug dealers. Additionally, no pipes or straws were found at Summershade or Faraday, which indicated that the drugs were not present for personal consumption.

¶ 28 Cornish testified that she lived at Summershade with her three-year-old son. Cornish was unaware of the cocaine and handgun in the residence, and she denied ownership of the money. On cross-examination, Cornish stated that defendant stayed at Summershade two to three times per week while he attended school and occasionally kept some articles of clothing in the unit. Defendant did not possess a key to the unit. Cornish had the key at all times except for when she loaned her car to another individual because the key to Summershade was on the same ring as her car key. Cornish allowed defendant to use her vehicle, but she did not think that defendant had used the apartment key.

¶ 29 Scott Saver, finance manager of Ray Dennison Chevrolet, testified that on March 18, 2011, defendant and Jerry came to the dealership to purchase a Monte Carlo. Defendant and Jerry attempted to trade in a Ford truck as part of the deal, but the agreement fell through when the dealer learned that the truck had a salvage title. At that point, defendant and Jerry purchased the Monte Carlo with \$11,000 cash.

¶ 30 Greg Rashid, bank manager at Associated Bank, provided defendant's bank records for the period between January and April 2011. In January 2011, defendant opened an account with \$1,180 and made five cash deposits that totaled \$2,540. In February 2011, defendant made three

cash deposits that totaled \$2,240. In March 2011, defendant made four cash deposits that totaled \$2,240. In April 2011, defendant made three deposits that totaled \$2,240. At the end of April 2011, defendant's account had a balance of \$9,261.50.

¶ 31 Following deliberations, the jury found defendant guilty of unlawful possession with intent to deliver a controlled substance, unlawful possession of a controlled substance, calculated criminal drug conspiracy, and criminal drug conspiracy. The trial court sentenced defendant to 18 years' imprisonment.

¶ 32 ANALYSIS

¶ 33 I. Summershade Search Warrant

¶ 34 Defendant argues that his conviction should be reversed because the complaint for the Summershade search warrant was deficient. Defendant acknowledges that he has forfeited this issue, but argues that it is subject to review under the plain error doctrine or the forfeiture was the result of ineffective assistance of counsel.

¶ 35 A. Plain Error

¶ 36 The plain error doctrine allows a previously unchallenged error to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Wilmington*, 2013 IL 112938, ¶ 31. The first step in a plain error analysis is to determine whether error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 37 The State argues that defendant does not have standing to contest the validity of the Summersshade search warrant. Defendant argues that the trial court implicitly found that he had standing by ruling on the merits of his motion.

¶ 38 Defendant bears the burden of demonstrating that he had standing to contest the legality of the search, *i.e.*, that he had a legitimate expectation of privacy in the premises or property searched. *People v. McLaurin*, 331 Ill. App. 3d 498, 501 (2002). The fourth amendment protection against unreasonable searches and seizures extends only to individuals who have a reasonable expectation of privacy in the place searched or property seized. *People v. Johnson*, 114 Ill. 2d 170, 191 (1986). Property ownership is not dispositive of whether an individual has standing to contest the constitutionality of a search. *Id.* A defendant's transitory presence on the premises at the time of the search or prior to the search is also insufficient to establish a legitimate expectation of privacy. *McLaurin*, 331 Ill. App. 3d at 501. Factors indicative of a defendant's reasonable expectation of privacy in the area searched include defendant's: (1) legitimate presence in the area searched; (2) possessory interest in the area or property seized; (3) prior use of the area searched or property seized; (4) ability to control or exclude others' use of the property; and (5) subjective expectation of privacy in the property. *Johnson*, 114 Ill. 2d at 191.

¶ 39 Here, defendant's motion to suppress did not allege that defendant had a privacy interest in Summersshade and the evidence presented at the motion to suppress hearing did not establish that defendant had standing to contest the search. To the contrary, defendant's pleadings and evidence both were calculated to minimize his contact with Summersshade. Likewise, defendant's trial strategy of denying any connection with the contraband and the trial evidence made the task of establishing standing in Summersshade difficult, if not impossible. See *People*

v. Butorac, 2013 IL App (2d) 110953, ¶ 14 (reviewing court is not limited to the evidence presented during the motion to suppress and may rely on the trial evidence in support of an affirmance). At trial, Cornish testified that she lived at Summershade with her son, and defendant did not live in the apartment or have a key. Cornish's testimony was consistent with Miller's observation that he saw defendant enter Summershade, but noted that defendant did not use a key. Additionally, the evidence of defendant's occasional presence at Summershade did not establish defendant's subjective expectation of privacy. Defendant was not present at the time of the search, did not have a possessory interest in the property, and lacked the ability to control or exclude others. Defendant's documents, identification cards, and clothing found inside the apartment only established that defendant had been present at a prior time. Defendant's identification cards found at Summershade did not list that apartment as his address. Defendant's transitory presence at Summershade was insufficient to establish a privacy interest in Summershade and provide standing to challenge the search.

¶ 40 Although the trial court did not directly rule on the standing issue, the record reveals that defendant did not establish standing to contest the Summershade warrant. Therefore, the trial court did not err in denying defendant's motion to suppress. See *People v. Jackson*, 232 Ill. 2d 246, 279 (2009) (reviewing court may affirm a lower court's holding for any reason warranted by the record, regardless of the lower court's reasons).

¶ 41 B. Ineffective Assistance of Counsel

¶ 42 Defendant argues, in the alternative, that defense counsel was ineffective for failing to properly preserve the issues with the Summershade search warrant. To prevail on a claim of ineffective assistance of counsel, defendant must show both that defense counsel's performance was deficient and that prejudice resulted from that deficiency. *People v. White*, 2011 IL 109689,

¶ 132. Defense counsel's performance is measured by " 'an objective standard of competence under prevailing professional norms.' " *People v. Manning*, 241 Ill. 2d 319, 327 (2011) (quoting *People v. Smith*, 195 Ill. 2d 179, 188 (2000)). To establish deficient performance, defendant must overcome the strong presumption that counsel's decision was not the result of sound trial strategy. *Id.* at 327. A reviewing court will be highly deferential to trial counsel on matters of trial strategy and makes "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).

¶ 43 Here, defendant has not established that defense counsel provided deficient performance. Any posttrial argument concerning the validity of the Summershade warrant was limited by defendant's failure to establish standing. Defense counsel's decision not to more clearly establish the standing prerequisite was strategic given defendant's defense of denying any connection with the contraband. If defense counsel had established that defendant had a privacy interest in Summershade, defendant's trial defense would have been significantly weakened. See *People v. Hodge*, 250 Ill. App. 3d 736, 748 (1993) (defendant's admissions at a hearing on a motion to suppress are admissible for impeachment purposes if defendant opts to testify); *People v. Grant*, 339 Ill. App. 3d 792 (2003) (decision not to call a witness who testified during the motion to suppress hearing at trial was strategic where the witness' testimony would have been subject to impeachment by the prior inconsistent statement). Therefore, defense counsel made the reasonable decision to minimize any argument on the standing requirement and emphasize the minimal connections between defendant and the contraband discovered at Summershade. That is, there were a lot of drugs and drug-related contraband inside Summershade. It was quite reasonable to try to distance defendant from that address as opposed to establishing that he had control over it. As a result, we see no reason to question counsel's strategic decision not to raise

a meritless issue in a posttrial motion. See *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 65 (counsel was not ineffective for failing to file a meritless motion).

¶ 44

II. Sufficiency of the Evidence

¶ 45

Defendant argues that the State failed to prove his guilt of calculated criminal drug conspiracy and criminal drug conspiracy beyond a reasonable doubt. Defendant contends that the State did not prove that defendant: (1) formed an agreement with Skinner and McCree to possess and deliver cocaine; or (2) obtained \$500 from the alleged conspiracy. The State argues that defendant cannot challenge the findings because no judgment was entered on the contested offenses. We agree. The court did not sentence defendant on these two charges. Without a sentence, there is no conviction. *People v. Caballero*, 102 Ill. 2d 23 (1984). The final judgment in a criminal case is the sentence; without a sentence there can be no appeal. *Id.* at 51.

¶ 46

CONCLUSION

¶ 47

For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 48

Affirmed.