2011 IL App (4th) 100030-U

Filed 9/30/11

NO. 4-10-0030

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
ERIK C. LONGBRAKE,	)	No. 09CF270
Defendant-Appellant.	)	
	)	Honorable
	)	Chet W. Vahle,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht concurred in the judgment.
Justice Appleton dissented.

ORDER

¶ 1 *Held*: The appellate court rejected the defendant's argument that his trial counsel was ineffective by failing to move to suppress a videotape recording, concluding that the defendant had no reasonable expectation of privacy in a drug sale conducted inside his home that was recorded with a buttonhole camera the invited buyer–a police informant–concealed in his clothing.

¶ 2 Following an October 2009 trial, a jury convicted defendant, Erik C. Longbrake, of two counts of unlawful delivery of a controlled substance (less than one gram of a substance containing oxycodone) (720 ILCS 570/401(d) (West 2008)). The trial court later sentenced defendant to five years in prison on each count, to be served concurrently.

¶ 3 Defendant appeals, arguing that he was denied the effective assistance of trial counsel when his counsel failed to suppress a recording of the drug transaction conducted in his home that was covertly filmed with a buttonhole camera that the invited buyer–a police

informant–concealed in his clothing. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 In May 2009, the State charged defendant with two counts of unlawful delivery of a controlled substance. The following evidence was presented at defendant's October 2009 trial.

¶ 6 In March 2009, Matthew Schroder informed officers of the Quincy drug task force that he had arranged to purchase prescription narcotics from defendant. After searching Schroder, two task force officers (1) concealed a buttonhole video camera inside Schroder's clothing, (2) gave him $100 in marked currency, and (3) transported him to meet defendant. Schroder later met with defendant, and as they walked down a street, defendant sold Schroder 15 pills containing oxycodone for $70. Schroder then arranged to meet with defendant the next day.

¶ 7 Prior to that second meeting, a third task force officer again (1) searched Schroder, (2) concealed a buttonhole video camera inside of Schroder's clothing, (3) gave him $80 in marked currency, and (4) transported him to a location near defendant's home. When Schroder arrived at defendant's home, defendant invited him inside. While there, defendant sold Schroder 10 oxycodone pills for $80. Schroder explained that defendant charged more for each pill at the second purchase because "they were the last remaining pills until [defendant] could get more." (Without objection, the State introduced both video recordings into evidence and played them for the jury.) A subsequent analysis of the pills revealed the presence of oxycodone.

¶ 8 Thereafter, the jury convicted defendant of both counts of unlawful delivery of a controlled substance. After denying defendant's posttrial motion for a new trial, the trial court later sentenced defendant to five years in prison on each count, to be served concurrently.

¶ 9 This appeal followed.

¶ 10 II. DEFENDANT'S INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM

¶ 11 A. The Two-Pronged Test for Ineffective-Assistance-of-Counsel Claims and the Standard of Review

¶ 12 In *People v. Meyer*, 402 Ill. App. 3d 1089, 1092, 931 N.E.2d 1274, 1279 (2010), this court stated the following burden a defendant must satisfy to sustain a claim of ineffective assistance of trial counsel:

> "To sustain a claim for ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and, but for the deficient performance, a reasonable probability exists that the outcome of the proceeding would have been different. [Citation.] Performance is deficient where it is unreasonable under prevailing professional standards. [Citation.] A reasonable probability is one sufficient to undermine our confidence in the outcome of the proceeding. [Citation.] The failure to satisfy either prong of the test is fatal to an ineffective-assistance claim."

"[W]hether defense counsel provided ineffective assistance involves a bifurcated standard of review, wherein we defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but make a *de novo* assessment of the ultimate legal issue of whether counsel's actions support an ineffective assistance claim." *People v. Stanley*, 397 Ill. App. 3d 598, 612, 921 N.E.2d 445, 456 (2009).

¶ 13 B. Defendant's Constitutional Deprivation Claim

¶ 14 Defendant argues that he was denied the effective assistance of trial counsel when

his counsel failed to suppress a videotape recording of the drug transaction conducted in his home that was covertly filmed with a buttonhole camera the invited buyer–a police informant–concealed in his clothing. Specifically, defendant contends that the police violated his (1) fourth-amendment right against unreasonable searches (U.S. Const., amend. IV) and (2) right to be protected against an invasion of privacy guaranteed under the Illinois Constitution (Ill. Const. 1970, art. I, § 6). Thus, defendant asserts that his trial counsel's failure to move to suppress the videotaped recordings deprived him of a fair trial. We address defendant's claims in turn.

¶ 15 1. *Defendant's Fourth-Amendment Claim*

¶ 16 Defendant contends that the police violated his fourth-amendment right against unreasonable searches by providing Schroder with a buttonhole camera to covertly record the drug transaction that occurred in his home. We disagree.

¶ 17 The fourth amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV.

¶ 18 We note that in claiming a fourth-amendment violation, defendant acknowledges that this court recently addressed such a claim under strikingly similar facts. In *Meyer*, 402 Ill. App. 3d at 1090-1092, 931 N.E.2d at 1277-79, the defendant argued–as in this case–that his counsel rendered ineffective assistance by failing to file a motion to suppress a digital recording taken with a concealed buttonhole camera concealed in a police informant's clothing. The recording at issue in *Meyer* depicted the defendant selling prescription narcotics to an informant

inside the defendant's home. In concluding that the defendant did not have a constitutionally protected privacy interest in any activity that the confidential informant viewed inside of his home, this court stated the following:

> "The fourth amendment does not protect anything that the defendant knowingly exposes to another member of the public, including a government agent. *Hoffa v. United States*, 385 U.S. 293, 302-03, 17 L. Ed. 2d 374, 382-83, 87 S. Ct. 408, 413-14 (1966). As the *Hoffa* Court stated, the fourth amendment does not protect against 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.' *Hoffa*, 385 U.S. at 302, 17 L. Ed. 2d at 382, 87 S. Ct. at 413. In *Lopez v. United States*, [373 U.S. 427, 438, 83 S. Ct. 1381, 1387-88 (1963)], the United States Supreme Court held that the defendant had no privacy interest sufficient to protect against the admission of the recording of a conversation between the defendant and a government agent, made by the agent himself. *** Following the Supreme Court's reasoning from *Lopez*, federal courts of appeal have held that video recordings obtained by or with the consent of a government agent do not constitute an unconstitutional search. See, *e.g.*, *United States v. Brathwaite*, 458 F.3d 376, 381 (5th Cir. 2006); *United States v. Lee*, 359 F.3d 194, 201 (3d Cir. 2004) (holding no violation occurred where the defendant was in the

room but the recording device was not on his person); *United States v. Davis*, 326 F.3d 361, 367 (2d Cir. 2003)." *Meyer*, 402 Ill. App. 3d at 1092-93, 931 N.E.2d 1279.

¶ 19 Relying on *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038 (2001), defendant claims that this court's conclusion in *Meyer* "is at odds with the history and purpose of the [f]ourth [a]mendment" because this case "involves the use of technologically enhanced surveillance to invade a person's privacy inside the sanctuary of his own home." We disagree and stand by our earlier decision in *Meyer*.

¶ 20 In *Kyllo*, 533 U.S. at 29-30, 121 S. Ct. at 2041, the issue before the court concerned police use of a thermal-imaging device to scan the defendant's home to determine whether the heat emanating from that home was consistent with the use of high-intensity lights commonly employed in indoor cannabis cultivation. In reversing the district court's denial of the defendant's motion to suppress evidence, the Supreme Court concluded that when "the [g]overnment uses a device that is not in general public use, to explore details of the home that would [otherwise] have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo*, 533 U.S. at 40, 121 S. Ct. at 2046. In particular, the Supreme Court concluded that the fourth amendment draws a firm and bright line at the entrance to a home. *Id.*

¶ 21 Despite his reliance, *Kyllo* does not offer defendant any support because contrary to the circumstances in *Kyllo*, the police in this case were not peering into a home where defendant intended to maintain a reasonable expectation of privacy. Instead, defendant offered Schroder an invitation into his home that Schroder accepted. Thus, defendant's reasonable

expectation of privacy, as it related to his home, ended the moment defendant allowed Schroder entry into his home. Therefore, for the same reasons this court espoused in *Meyer*, we reject defendant's contention that police violated his fourth-amendment rights.

¶ 22 2. *Defendant's Invasion-of-Privacy Claim*

¶ 23 Defendant next contends that the police violated his right to be protected against an invasion of privacy guaranteed under the Illinois Constitution. We disagree.

¶ 24 Article I, section 6, of the Illinois Constitution, which pertains to searches, seizures, privacy, and interceptions, provides as follows:

> "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, *invasions of privacy or interceptions of communications by eavesdropping devices or other means*. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." (Emphasis added.) Ill. Const. 1970, art. I, § 6.

¶ 25 In this case, defendant, citing *People v. Caballes*, 221 Ill. 2d 282, 317, 851 N.E.2d 26, 47 (2006), correctly claims that the language in article I, section 6, concerning "invasions of privacy or interceptions of communications by eavesdropping devices or other means," expand the individual rights afforded under the fourth and fourteenth amendments to the United States Constitution. However, defendant has failed to show how police unreasonably violated this more expansive right to privacy in this case, given (1) the original intent of the clause creating the additional right to privacy (see *Caballes*, 221 Ill. 2d at 318, 851 N.E.2d at 47 (the additional right

to privacy under article I, section 6, was in response to concerns that the government might use newly available technology to develop a "general information bank" that would collect and monitor personal information)) and (2) defendant invited Schroder into his home (see *People v. Edwards*, 337 Ill. App. 3d 912, 928, 788 N.E.2d 35, 49 (2002) ("The plain language of this section prohibits only *unreasonable* eavesdropping, not all nonconsensual eavesdropping" (emphasis in original)); see also *Caballes*, 221 Ill. 2d at 321, 851 N.E.2d at 49 ("Once the right to privacy under article I, section 6, is established, the court must determine whether the state's invasion of individual privacy is reasonable")). We thus reject defendant's contention that the police violated his right to be protected against an invasion of privacy guaranteed under the Illinois Constitution.

¶ 26 Accordingly, because we conclude that police did not violate defendant's (1) fourth-amendment right against unreasonable searches and (2) right to be protected against an invasion of privacy guaranteed under the Illinois Constitution, we reject defendant's argument that he was denied the effective assistance of trial counsel.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed.

¶ 30 JUSTICE APPLETON, dissenting:

¶ 31 I respectfully dissent from the majority's decision in this case for the same reasons expressed in my dissent in *People v. Meyer*, 402 Ill. App. 3d 1089 (2010).