2013 IL App (4th) 110968-U

NO. 4-11-0968

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 13, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
RAYMOND R. FLORES,	)	No. 10CF688
Defendant-Appellant.	)	
	)	Honorable
	)	James E. Souk,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed: the trial record is insufficient to decide whether defendant was denied the effective assistance of counsel where his attorney failed to contest the validity of a search and seizure. This claim of ineffective assistance of counsel is better brought on collateral review rather than direct appeal.

¶ 2 A jury convicted defendant, Raymond Flores, of unlawful possession of more than 15 grams but less than 100 grams of a controlled substance, methylenedioxymethamphetamine (MDMA), with the intent to deliver. 720 ILCS 570/401(a)(7.5) (A)(i); 720 ILCS 570/204(d)(2) (West 2010). Prior to trial, defense counsel filed a motion to suppress evidence, alleging defendant was unlawfully detained absent individualized suspicion of wrongdoing at a drug checkpoint and his person and backpack were searched without probable cause. Original defense counsel withdrew and was replaced by new counsel who did not pursue the motion. Instead, she filed a motion to suppress defendant's statements following arrest on the grounds he was not

advised of his *Miranda* rights (*Miranda v. Arizona*, 384 US 436 (1966)).

¶ 3 After a hearing, the trial court denied the motion to suppress defendant's statements. Defendant was convicted after an August 2011 jury trial. In September 2011, the trial court sentenced defendant to a 15-year prison term. The only issue on appeal is the ineffective assistance of counsel for failure to pursue the motion to suppress evidence. We find this issue is better raised upon collateral review than on direct appeal as the trial record has not been developed and is incomplete in regard to this claim. We decline to consider the issue and affirm.

¶ 4 I. BACKGROUND

¶ 5 On July 15, 2011, the trial court held a hearing on defendant's motion to suppress his statements. Testimony at the hearing revealed on July 15, 2010, the Illinois State Police Task Force Six placed signs on Interstate highway I-55 a short distance ahead of the exit to the Funk's Grove Rest Area falsely warning motorists a drug enforcement checkpoint was ahead. The rationale was motorists transporting drugs would take the exit to the rest area to avoid the checkpoint or dispose of the drugs. Eight officers from the task force were stationed in the rest area to look for "suspicious" behavior and to "approach the vehicles to do a consensual encounter." All of the officers, except for one, were dressed in plain civilian clothes and using unmarked vehicles.

¶ 6 The vehicle in which defendant was traveling drove into the parking lot of the rest area. The vehicle was owned by Elana Cohen and driven by Brian Bucciarelli. Defendant was the front seat passenger. Defendant and Cohen exited the vehicle to use the restroom facilities. Bucciarelli stayed in the car and talked on a cell phone. One of the police officers approached Bucciarelli when he awkwardly leaned back in his seat to look at a marked squad car at far end of

rest area. The officer in the car stated Bucciarelli looked nervous. The officer stated he approached the car and Bucciarelli consented to a drug sniff by a drug canine. The canine alerted and the officers conducted a search of the vehicle.

¶ 7 A backpack was found on the backseat next to where Cohen had been seated. Inside, Baggies were found containing a brown powdery substance which the officers suspected to be heroin. Tests at the police laboratory later revealed it to be MDMA. When asked who owned the backpack, defendant stated it was his. Following the search, defendant and Cohen were arrested.

¶ 8 At an August 9, 2011, jury trial, Cohen testified against defendant. Testimony in regard to the search of the vehicle in which defendant was traveling did not differ from that offered at the pretrial hearing. Defendant was convicted of unlawful possession of more than 15 grams but less than 100 grams of a controlled substance with intent to deliver (count IV) and acquitted of unlawful possession of more than 100 but less than 400 grams of a controlled substance with intent to deliver (720 ILCS 570/401(a)(7.5)(B)(i) (West 2010) (count III)). On September 27, 2011, the trial court sentenced defendant to 15 years' imprisonment. This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant argues his trial counsel was ineffective for failing to pursue a motion to suppress physical evidence. He contends the ruse drug checkpoint on I-55, meant to trick motorists transporting drugs into turning off at the exit for the Funk's Grove Rest Area, was unlawful under *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000), as searches and seizures made at drug interdiction checkpoints must be accompanied by individualized suspicion

a crime is being committed and that was lacking in this case. Because defense counsel failed to pursue a motion to suppress what he contends was illegally seized evidence, defendant argues he was denied the effective assistance of counsel resulting in his conviction for possession with intent to deliver a controlled substance.

¶ 11 To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists, but for the deficient performance, the outcome of the proceedings would have been different. *People v. McCleary*, 353 Ill. App. 3d 916, 921, 819 N.E.2d 330, 335 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

¶ 12 Claims of ineffective assistance of counsel are preferably brought on collateral review rather than direct appeal. *People v. Bew*, 228 Ill. 2d 122, 134, 886 N.E.2d 1002, 1009 (2008). A defendant is not generally required to bring a claim of ineffective assistance of counsel on direct review or else forfeit the claim. *Id.* When an ineffective assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not fully developed precisely for the object of the litigation or preserving the claim and is often incomplete for this purpose. *Id.* The benefit of bringing a claim in a collateral proceeding is both defendant and the State have a full opportunity to present evidence establishing ineffective assistance or refuting that claim and this court will have the benefit of a factual record on the issue.

¶ 13 In this case, the hearing in the trial court was on defendant's motion to suppress his admission to police on the ground his postarrest statement was obtained without receipt of the warnings set out in *Miranda*. Evidence on this issue is not the proper basis for a decision on the propriety of a search of defendant's person and property. In the case of a claim for ineffective

assistance of counsel for failure to pursue a motion to quash arrest and suppress evidence, defendant must show the unargued suppression motion was meritorious and there is a reasonable probability the verdict would have been different without the excludable evidence. *People v. Harris*, 182 Ill. 2d 114, 146, 695 N.E.2d 447, 462-63 (1998). The State can counter with its own evidence justifying the intrusion of a warrantless search and seizure. See *People v. Lampitok*, 207 Ill. 2d 231, 239, 798 N.E.2d 91, 98 (2003). The State did not do so here, because the issue was not litigated.

¶ 14 The record before us is insufficient to decide the propriety of the search and seizure of defendant's property. We cannot determine whether defense counsel was ineffective in failing to pursue the filed motion to suppress evidence. No other issues were presented. Accordingly, we affirm.

¶ 15 III. CONCLUSION

¶ 16 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.

¶ 17 Affirmed.