2013 IL App (4th) 120557-U

NO. 4-12-0557

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 16, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
PIERRE D. MIDDLETON,	)	No. 09CF943
Defendant-Appellant.	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Appleton and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court committed clear or obvious error when it allowed a former Assistant State's Attorney to testify in the State's case in chief about admissions made by defendant under oath at a motion to suppress hearing, the error was not so serious that it affected the fairness of defendant's trial or challenged the integrity of the judicial process.

¶ 2 In November 2009, the State charged defendant, Pierre D. Middleton, with numerous drug-related offenses. During a January 2011 hearing on defendant's motion to suppress evidence, the trial court admonished defendant that the proceedings were recorded, a State's Attorney was present, and anything defendant said at the hearing would be recorded, heard by the State's Attorney, and could be used against him at his trial. Defendant then testified at the hearing, and on cross-examination he admitted the crack cocaine at issue here was found in his right pants pocket.

¶ 3 At defendant's March 2012 jury trial, former Assistant State's Attorney William Vig was allowed to testify as part of the State's case in chief. Over defendant's objection, Vig recounted for the jury defendant's prior admission under oath that the crack cocaine at issue in the case was found in his right front pants pocket. The jury convicted defendant of unlawful possession of a controlled substance (cocaine) (less than 15 grams) (720 ILCS 570/401(c)(2) (West 2008)) and found him not guilty of the remaining counts that were pending when the trial began. In May 2012, the trial court sentenced defendant to five years in prison.

¶ 4 No posttrial motions were filed.

¶ 5 Defendant appeals, asserting that the trial court committed reversible error when it (1) admonished defendant that anything he said at the suppression hearing could be used against him at trial and (2) allowed former Assistant State's Attorney Vig to testify at trial, over defendant's objection, that defendant admitted under oath the crack cocaine at issue was found in his right pants pocket.

¶ 6 We affirm.

¶ 7 I. BACKGROUND

¶ 8 In November 2009, the State charged defendant by information with (1) unlawful possession of a controlled substance (cocaine) with the intent to deliver (one gram or more but less than 15 grams), a Class 1 felony (count I) (720 ILCS 570/401(c)(2) (West 2008)); (2) unlawful possession of a controlled substance (cocaine) with the intent to deliver (less than one gram), a Class 2 felony (count II) (720 ILCS 570/401(d) (West 2008)); and (3) unlawful possession of a controlled substance (cocaine) (less than 15 grams), a Class 4 felony (count III) (720 ILCS 570/402(c) (West 2008)). In February 2010, the Stated added two additional charges:

(1) unlawful possession of a controlled substance (cocaine) with the intent to deliver (more than one gram but less than 15 grams) within 1,000 feet of a public park, a Class X felony (count IV) (720 ILCS 570/407(b)(1) (West 2008)); and (2) unlawful possession of a controlled substance (cocaine) with the intent to deliver (more than one gram but less than 15 grams) within 1,000 feet of a church, a Class X felony (count V) (720 ILCS 570/407(b)(1) (West 2008)).

¶ 9 A. Relevant Motion To Suppress Evidence

¶ 10 In April 2010, defense counsel filed a motion to suppress the evidence seized from defendant's person asserting the search was (1) executed without a search warrant, (2) executed without consent from defendant, and (3) not made incident to a lawful arrest. At the January 2011 hearing on the motion to suppress, several police officers testified for the State. (Because their testimony at the suppression hearing is not relevant for purposes of this appeal, we decline to provide a summary of it here.)

¶ 11 Defense counsel called defendant to testify. Prior to testifying, the following colloquy occurred:

> "THE COURT: Mr. Middleton, you understand that all of these proceedings are recorded?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You understand that anything you say, it will be recorded and also there's a State's Attorney in the room?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Anything that's recorded, heard by the State's Attorney can be used against you ultimately at your trial in

the underlying case?

THE DEFENDANT: Yes."

Defendant testified that he was wearing sweatpants and a T-shirt when the police officers entered the home and that he did not give them permission to search his person. On cross-examination, defendant testified that he was asleep on the couch when the officers arrived and because of that may not have responded right away when he was addressed, and that the crack cocaine was found in his right pants pocket.

¶ 12 Based on the evidence presented during the hearing, the trial court denied defendant's motion to suppress evidence.

¶ 13 B. Relevant Jury Trial Testimony

¶ 14 In March 2012, defendant's jury trial commenced. The following testimony is relevant for purposes of this appeal.

¶ 15 Officer Ryan Leach testified that on November 2, 2009, he was a member of the street crimes unit and participated in the search at 2610 Bluebird, apartment number 5, after the unit had received information that a subject at that address was on parole and selling narcotics out of the apartment. After two other officers had made contact with the resident parolee, Officer Leach and two additional officers entered the apartment and saw defendant lying on the couch. Officer Leach had defendant stand up and for his own safety conducted a pat-down search of defendant's exterior clothing. Officer Leach felt something in defendant's right front pants pocket that resembled the shape and texture of crack cocaine. Upon retrieving the suspected crack cocaine from defendant's pocket, Officer Leach positively identified it by sight as crack cocaine. Based on Officer Leach's experience, he believed the amount of crack cocaine found on

defendant, and the way it was packaged (five individual bags wrapped together in one larger bag) was not indicative of personal use. No pipe used to smoke crack was found on defendant's person. Officer Leach further testified the apartment was located approximately 250 feet from a church. On cross-examination, Officer Leach testified he believed that defendant was sleeping when they entered the apartment. He did not find any money or a cellular telephone on defendant during the search of his person.

¶ 16 Officer Ryan Machin testified he was a canine officer and a member of the street crimes unit who participated in the search. He entered the apartment with the other officers and saw defendant on the couch. Officer Machin observed Officer Leach search defendant and recover a clear plastic bag containing five individually wrapped white rock-like substances. Officer Machin obtained the bag from Officer Leach and turned it over to the evidence custodian.

¶ 17 Officer Ronald Williams testified he also participated in the search and observed defendant lying on the couch upon entry into the apartment.

¶ 18 Emily Brashear, an identification technician for the Springfield police department, testified that she measured the distance between the apartment and the Kingdom Hall church and the apartment and Lake Victoria Park. It was approximately 390 feet from the apartment to the church and 705 feet from the apartment to the park.

¶ 19 Matthew Fricke, the sergeant supervisor of the street crimes unit, testified as an expert in the field of drug investigation. He participated in the search of the apartment during which heroin, crack cocaine, digital scales, and packaging material were recovered. He testified that drugs packaged for sale are typically individually weighed and wrapped and then placed in a larger container, such as a larger bag, so that the seller can easily pick out what he is selling.

Individually wrapped bags contained inside a larger bag are typically possessed by a person selling the drugs, not one who intends to ingest them. Sergeant Fricke testified that in his opinion the crack cocaine recovered from defendant in this case was packaged for sale. On cross-examination, Sergeant Fricke acknowledged defendant did not have any cash or weapons on him at the time he was searched, both of which Fricke stated are relevant in determining whether a person is a dealer versus a user.

¶ 20 During a break, defense counsel objected to the anticipated testimony of former Assistant State's Attorney William Vig, whom the State planned to call regarding defendant's testimony at his motion to suppress hearing. The trial court overruled defense counsel's objection.

¶ 21 Attorney William Vig testified that he was previously employed as an Assistant State's Attorney and while so employed, he was assigned to prosecute defendant's current case. Vig indicated he was present and cross-examined defendant during a previous motion hearing. When Vig asked defendant where the crack cocaine was found on his person, defendant responded, "it was in [my] right front pants pocket." Vig further testified that defendant was under oath when defendant made the statement regarding the location of the crack cocaine.

¶ 22 Joshua Stern, a forensic scientist specializing in drug chemistry for the Illinois State Police Forensic Science Laboratory, testified the substance found in each of the five bags found on defendant weighed a total of 1.583 grams and each tested positive for cocaine.

¶ 23 Based on this evidence, the jury found defendant guilty of possession of a controlled substance (cocaine) (count III) and not guilty of the remaining three counts (counts I, IV, and V; count II was dismissed by the State prior to trial). In May 2012, the trial court

sentenced defendant to five years in prison.

¶ 24 No posttrial motions were filed.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, defendant asserts the trial court committed reversible error when it (1) admonished defendant that anything he said at the suppression hearing could be used against him at trial and (2) allowed former Assistant State's Attorney Vig to testify at trial, over defendant's objection, that defendant admitted under oath he possessed the cocaine at issue.

¶ 28 To preserve an issue for appellate review, a defendant must (1) object at trial and (2) file a written posttrial motion raising the issue. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). Here, defendant failed to file a posttrial motion. Thus, defendant has forfeited this issue on appeal unless he can establish plain error. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010).

¶ 29 "To obtain relief under [the plain-error doctrine], a defendant must first show that a clear or obvious error occurred." *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. After showing a clear or obvious error occurred, a defendant must then show "either (1) the evidence was so closely balanced that the plain error alone severely threatened to tip the scales of justice against the defendant or (2) the plain error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Hillsman*, 362 Ill. App. 3d 623, 638, 839 N.E.2d 1116, 1129-30 (2005). Defendant bears the burden of persuasion under both prongs of the plain-error doctrine. *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187.

¶ 30 We must first determine if either the admonishment of defendant prior to the

motion to suppress hearing or the allowance of the testimony of Vig during defendant's trial constitutes clear or obvious error. The trial court's admonishment of defendant prior to the hearing on the motion to suppress was inaccurate in that it did not make clear that defendant's motion to suppress testimony could only be used in limited circumstances. However, given it is possible, under certain circumstances, for a defendant's testimony during a motion to suppress hearing to be used during a defendant's trial, the inaccurate admonishment was not an error of the magnitude necessary to constitute reversible error under the second prong of plain-error analysis. See *People v. Herron*, 215 Ill. 2d 167, 177-78, 830 N.E.2d 467, 474 (2005) (describing error meeting the second prong of plain-error analysis as one that taints "the integrity and reputation of the judicial process").

¶ 31 In addition, defendant does not argue the evidence in the case was so closely balanced that the error alone severely threatened to tip the scales of justice against defendant. Instead, defendant asserts, "if trial court judges in Sangamon County are routinely admonishing defendants that any testimony they give at a motion to suppress hearing will be used against them at trial, this is a structural error affecting a wide array of defendants and a reversal of this conviction would send a clear message this procedure is unacceptable." However, the record is devoid of any evidence this is a routine practice in Sangamon County or that this is a structural error. See *Washington v. Recuenco*, 548 U.S. 212, 218 n. 2 (2006) (citing examples of structural errors as (1) a complete denial of counsel, (2) a biased trial judge, (3) racial discrimination in grand jury selection, (4) the denial of self-representation at trial, (5) the denial of a public trial, and (6) a defective reasonable doubt instruction). Further, this court lacks the supervisory authority needed to reverse a judgment simply to "send a clear message" to trial courts. See *In re*

Appointment of Special Prosecutor, 388 Ill. App. 3d 220, 234, 902 N.E.2d 730, 743 (2009) ("When the appellate court lacks any statutory, precedential, or constitutional basis for taking a particular action in remanding a cause to the circuit court, such conduct amounts to the use of supervisory authority, which the appellate court does not possess.").

¶ 32 In this case, the State concedes that the trial court committed clear or obvious error when it allowed former Assistant State's Attorney Vig to testify in the State's case in chief, over defendant's objection, about defendant's testimony at the motion to suppress hearing. See *People v. Sturgis*, 58 Ill. 2d 211, 216, 317 N.E.2d 545, 548 (1974) (testimony of a defendant in conjunction with his motion to suppress "may not be introduced by the State directly in its case in chief but may be used for purposes of impeachment should the defendant choose to testify at trial."). However, the State asserts that defendant cannot show the evidence was closely balanced or that the error was so serious it affected the fairness of his trial. Defendant does not contend the evidence was closely balanced but asserts Vig's testimony denied him a fair trial and challenged the integrity of the judicial process.

¶ 33 We agree with both parties that the trial court committed clear or obvious error by allowing Vig to testify, during the State's case in chief, that defendant admitted ownership of the crack cocaine while defendant was under oath. Thus, we must determine only whether the error was so serious it affected defendant's trial and challenged the integrity of the judicial process.

¶ 34 In his initial brief, defendant cites *People v. St. Pierre*, 122 Ill. 2d 95, 114, 522 N.E.2d 61, 69 (1988), for the proposition that the admission of an unlawfully obtained confession is rarely harmless error. Defendant contends that former Assistant State's Attorney Vig's testimony went even further than simply testifying about a confession made by defendant because

Vig—as a representative of the People and an officer of the court—tends to be well-respected in the community. *St. Pierre* is not applicable to the matter before us. This case involves the jury being apprised, during the State's case in chief, of a statement defendant previously made under oath during a judicial proceeding. The record is devoid of any indication defendant's statement under oath during his motion to suppress hearing was obtained through improper tactics. In *St. Pierre*, the court found defendant's confession was obtained subsequent to defendant unequivocally invoking his right to counsel. Also, a review of Vig's testimony reveals that when Vig testified, he was no longer an Assistant State's Attorney but instead was working in private practice at a Springfield law firm. Therefore, when he testified during defendant's trial, Vig was not cloaked with the power and prestige of the position of Assistant State's Attorney.

¶ 35 In this case, defendant faced additional charges based on the allegations that he possessed with the intent to deliver the cocaine within 1,000 feet of a park and within 1,000 feet of a church. Because of his prior criminal history, defendant faced up to a natural-life-in-prison term on the most serious Class X felonies (counts IV and V). During the trial and closing arguments, defense counsel pursued a theory that defendant possessed the crack cocaine but was not selling it. For example, counsel made the following arguments: (1) "So without a sale, [the State is] expecting you to convict him of being a drug dealer. They want you to infer from his possession he is a dealer"; (2) "The point is that [defendant is] not there dealing. The point is that [defendant] is a customer"; (3) "There are a lot of reasons for [defendant] to have possessed five hits without having any intention of selling them"; (4) "You have a choice to make. You can find him guilty of the [p]ossession"; and (5) "Only time that changes is if during your deliberations you find that they have proven him guilty beyond a reasonable doubt of something. We ask

if you do that you find the defendant guilty of possession. Do not find him guilty of manufacture and delivery of a controlled substance."

¶ 36 We find that absent former Assistant State's Attorney Vig's testimony in the State's case in chief, the result of the trial would have been the same. Had defendant testified and denied possessing the cocaine, he would have been impeached with his testimony from the motion to suppress hearing. See *Sturgis*, 58 Ill.2d at 216, 317 N.E.2d at 548. Further, absent Vig's testimony, defense counsel would have still pursued the same closing argument—based on overwhelming evidence that defendant possessed crack cocaine—urging the jury to find defendant guilty of possession only, a Class 4 felony, rather than the more serious Class X felonies. Thus, we conclude that the error in this case was not so serious that it affected the fairness of defendant's trial or challenged the integrity of the judicial process.

¶ 37 Our decision that reversal is not required in this matter in no way condones what happened in this case. With the power to prosecute comes responsibility; the responsibility to do one's best to ensure evidence offered by the State is in accordance with applicable precedent. Given defense counsel's objection, it is unclear why the State failed to discover it was improper to offer, in its case in chief, testimony regarding statements defendant made under oath at his motion to suppress hearing. The trial court, which should be able to rely on the State to refrain from introducing error into the record, was ill-advised to do so in this instance. Trials are difficult and rarely, if ever, perfect. However, we are hopeful that when confronted with situations such as the one illustrated in this case, counsel will take the time to conduct adequate research and bring that research before the court in an effort to ensure the quality of the trial is not unnecessarily diminished.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 40 Affirmed.