2015 IL App (4th) 131108-U

NO. 4-13-1108

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 9, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
PARRISH L. KINCY,	)	No. 12CF948
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by denying defendant's motion to suppress evidence, rejecting defendant's contention that his consent to search was involuntary.

¶ 2 In October 2012, the State charged defendant, Parrish L. Kincy, with residential burglary (720 ILCS 5/19-3(a) (West 2010)), alleging that he entered a dwelling with the intent to commit a theft therein. The charges resulted from a search of the trunk of defendant's vehicle, from which police seized an Xbox gaming console that was allegedly stolen from the dwelling.

¶ 3 In April 2013, defendant filed a motion to suppress the Xbox, arguing that his consent to search the vehicle's trunk was involuntary. The trial court later denied defendant's motion. Following an October 2013 bench trial, the court found defendant guilty of residential burglary and sentenced him to four years in prison.

¶ 4 Defendant appeals, arguing that (1) the trial court erred by denying his motion to suppress because defendant's consent was involuntary and (2) trial counsel was ineffective for

failing to raise alternative arguments that the seizure of the Xbox was unlawful. We affirm.

¶ 5 I. BACKGROUND

¶ 6 In October 2012, the State charged defendant with residential burglary after police seized a laptop and Xbox from the trunk of defendant's vehicle. The Xbox was allegedly stolen from a nearby dwelling.

¶ 7 A. The Motion To Suppress

¶ 8 In April 2013, defendant filed a motion to suppress the Xbox, claiming that his consent to search his vehicle was involuntary. At the May 2013 hearing on defendant's motion, Officer Jennifer Garcia of the Normal police department testified that in the early morning on August 25, 2012, she was working a plainclothes detail in an area that contained many student apartments. Garcia saw a black male—whom she later identified as defendant—wearing a hat and sunglasses, carrying a laptop, and walking at "a pretty high rate of speed." As defendant walked past Garcia, he put his hand to his head "like he was talking on his cell phone, but there was no cell phone in his hand." Defendant walked to a vehicle and placed the laptop in its trunk. Garcia radioed her observations to other officers, who responded to the vehicle.

¶ 9 Garcia testified further that she and two other plainclothes officers later approached the vehicle. Two other officers were already present. Defendant smelled of alcohol, his speech was slurred, and he swayed as he stood. Garcia testified that once she smelled alcohol on defendant, she no longer considered him free to leave. Defendant told Garcia that the vehicle was not his and that he had not been drinking. When Garcia asked defendant where he had come from, defendant could not give her an exact location.

¶ 10 Normal police officer Ronald Stoll testified that around 1:45 a.m. on August 25, 2012, he was conducting a plainclothes detail with another officer, when he received Garcia's

radio call that a suspicious black male had placed a laptop in the trunk of a red Pontiac. Stoll and the other officer responded to the scene, where they found defendant standing next to a red Pontiac. The officers identified themselves as police, and Stoll asked defendant for identification. Defendant responded that he did not have identification but gave Stoll his name and date of birth. Based on defendant's given date of birth, he would have been 18 years old. Stoll noticed that defendant's eyes were glazed, bloodshot, and glassy. Stoll reasoned that defendant was under the influence of cannabis and alcohol. Stoll did not consider defendant free to leave after learning that defendant was 18 years old and appeared to have consumed alcohol and cannabis.

¶ 11 Stoll then asked defendant for consent to search his person, which defendant granted. The search revealed a set of car keys. Defendant initially denied placing a laptop in the car's trunk but later told Stoll that the laptop and the car belonged to a friend. When Stoll asked for consent to search the car, defendant responded that the car did not belong to him. Stoll then ran the car's plates, which revealed that the car was registered to defendant. Stoll informed defendant that he was aware defendant owned the car and asked again for consent to search it. Stoll testified that defendant "kind of got a defeated look on his face, kind of dropped his shoulders, and said, 'yeah, go ahead.' " Inside the trunk, Stoll found a laptop and an Xbox. Defendant maintained that the laptop belonged to his friend but was unable to give the friend's address or phone number.

¶ 12 Stoll stated further that there were eventually "about a half dozen" officers present at the scene. However, Stoll and defendant "were mainly talking just one-on-one for the most part" while the other officers spoke with a nearby group of males. The entire encounter with defendant lasted 20 minutes.

¶ 13 Defendant did not present evidence and argued that the Xbox should be sup-

pressed because defendant's consent to search the vehicle was not voluntary. The trial court found that "Officer Stoll was talking to the Defendant basically one-on-one, just the two of them, and the other officers were off talking with some other folks a little ways away." The court denied his motion to suppress the Xbox, finding that defendant's consent to search the vehicle was voluntary.

¶ 14 B. The Bench Trial

¶ 15 At an October 2013 bench trial, Kevin Farrell testified that on August 24, 2012, he was a student at Illinois State University and lived in an apartment with three roommates at 118 West Locust Street. When he left his apartment around 11 p.m., his roommates, Clint Yonkers and Kevin Glabowicz, were in the apartment watching television with friends. When Farrell returned the next day, his Xbox—which he kept in the apartment's living room—was missing. Farrell called the police and gave them the serial number of the Xbox. The next day, police showed him an Xbox they recovered that matched the serial number Farrell gave them. Farrell did not know defendant and had never given him permission to borrow the Xbox.

¶ 16 Glabowicz testified that on the evening of August 24, 2012, he and a friend used Farrell's Xbox to watch Netflix in the living room until 1:15 the next morning. At that time, Glabowicz went to bed, and his friend left the apartment. Glabowicz did not remember locking the apartment's front door. When Glabowicz tried to watch Netflix again later that morning, the Xbox was no longer in the living room. Glabowicz stated that he did not know defendant and had not given him permission to take the Xbox.

¶ 17 Stoll testified that at approximately 1:48 a.m. on August 25, 2012, he was conducting plainclothes alcohol enforcement when he received a call from Garcia about a black male running and carrying a laptop. Stoll found defendant standing next to a purple Pontiac.

Stoll opined that defendant appeared intoxicated. When Stoll asked about the laptop, defendant initially denied putting it in the car's trunk. After Stoll told defendant that officers saw him put it there, defendant replied that he put the laptop in the trunk but that it belonged to a friend, as did the car. Stoll ran the car's plates and determined that it belonged to defendant. After Stoll confronted defendant with that information, defendant admitted that the car was his but maintained that the laptop belonged to a friend. Defendant was unable to give the friend's last name, phone number, or address. Defendant then consented to a search of his person, which revealed a set of car keys. Defendant initially refused to consent to a search of the car but later acquiesced. When Stoll searched the car, he found a laptop and an Xbox.

¶ 18 Garcia testified that on the morning of August 25, 2012, she was conducting a plainclothes detail, when she observed a black male wearing sunglasses and walking at a high rate of speed while carrying a laptop a half-block from 118 West Locust Street. When she made eye contact with the man, he raised his hand to his head and began talking like he was on the phone, but he did not have a phone in his hand. Garcia then saw the man approach a vehicle and place the laptop in the trunk. Garcia was assisting in an unrelated investigation, so she radioed a description of what she had seen to other officers. Garcia made an in-court identification of defendant as the man she saw carrying the laptop.

¶ 19 When Garcia eventually approached defendant, other officers had already arrived and searched the vehicle, where they found a laptop and an Xbox. Defendant told Garcia that a man named Trevor had given him the Xbox, but defendant did not know Trevor's phone number or address. Defendant said that he was also carrying an Xbox when Garcia first saw him, but Garcia testified that she did not see him carrying an Xbox.

¶ 20 Defendant did not present evidence.

¶ 21 The trial court found defendant guilty of residential burglary and later sentenced him to four years in prison.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 Defendant argues that (1) the trial court erred by denying his motion to suppress because defendant's consent was involuntary; and (2) trial counsel was ineffective for failing to raise alternative arguments that the seizure of the Xbox was unlawful. We address defendant's arguments in turn.

¶ 25 A. Whether the Trial Court Erred by Denying the Motion To Suppress

¶ 26 Defendant argues that the trial court erred by denying defendant's motion to suppress because defendant's consent was involuntary.

¶ 27 1. *Consent Searches*

¶ 28 The "ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Absent a warrant, a search is reasonable only if it meets a specific exception to the warrant requirement. *Riley v. California*, ___ U.S. ___, 134 S.Ct. 2473, 2482 (2014).

¶ 29 One such exception to the warrant requirement is a search conducted with voluntary consent. *People v. Prinzing*, 389 Ill. App. 3d 923, 932, 907 N.E.2d 87, 96 (2009). Whether a defendant's consent to search was voluntary should be determined from the totality of the circumstances. *Id*. For consent to be voluntary, it must be given absent any coercion, express or implied. *People v. Kratovil*, 351 Ill. App. 3d 1023, 1030, 815 N.E.2d 78, 86 (2004). Consent is not voluntary when it results from coercion, intimidation, or deception. *Prinzing*, 389 Ill. App. 3d at 932, 907 N.E.2d at 96. "An initial refusal to a police request to search is a factor that could

demonstrate involuntariness." *Id.* Likewise, knowledge of the right to refuse consent is a factor to be considered (*id.*), but it would "be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). The State has the burden to show by a preponderance of the evidence that the defendant's consent was voluntary. *Prinzing*, 389 Ill. App. 3d at 932, 907 N.E.2d at 96.

¶ 30 2. *Standard of Review*

¶ 31 When reviewing a trial court's ruling on a motion to suppress, we apply a bifurcated standard of review, "reviewing a trial court's factual findings under a manifest weight of the evidence standard of review but applying a *de novo* standard of review to the ultimate question whether the evidence should be suppressed." *People v. Young*, 2013 IL App (4th) 120228, ¶ 30, 996 N.E.2d 671 (quoting *People v. Harper*, 2012 IL App (4th) 110880, ¶ 22, 969 N.E.2d 573).

¶ 32 3. *The Trial Court's Finding That Defendant's Consent Was Voluntary*

¶ 33 In this case, defendant responded to Stoll's request for consent to search the trunk by saying, "[Y]eah, go ahead." Defendant's statement was a clear and unambiguous expression of consent to search the car's trunk. We therefore conclude that defendant consented to the search and now turn to whether that consent was voluntary.

¶ 34 Defendant argues that the totality of the circumstances made defendant's consent involuntary. Specifically, defendant relies on the following facts: (1) he was not free to leave; (2) he was not advised of his constitutional rights; (3) his consent was not immediate; (4) he was surrounded by several officers; and (5) defendant was only 18 years of age. We disagree.

¶ 35 Defendant argues that his consent to search was involuntary, in part, because he

was not free to leave—*i.e.*, he was seized—when he gave that consent. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave."). Defendant's argument is problematic for two reasons.

¶ 36 First, the record does not establish that defendant was not free to leave. In support of his argument, defendant points to Stoll's testimony that he did not consider defendant free to leave. However, Stoll's belief about the issue does not matter.

¶ 37 Over 20 years ago, in *People v. Goyer*, 265 Ill. App. 3d 160, 167, 638 N.E.2d 390, 395 (1994), this court wrote that "if undisclosed, an officer's subjective thoughts and beliefs are irrelevant to the assessment whether the defendant is in custody." *People v. Griffin*, 385 Ill. App. 3d 202, 209-10, 898 N.E.2d 704, 710-11 (2008). More recently, in *People v. Smith*, 214 Ill. 2d 338, 355, 827 N.E.2d 444, 455 (2005), the Supreme Court of Illinois wrote the following:

> "Police officers' objective conduct is relevant to determining whether a seizure has occurred, not their subjective intentions. *Michigan v. Chesternut*, 486 U.S. 567, 575 n.7, 108 S. Ct. 1975, 1980 n.7, 100 L. Ed. 2d 565, 573 n.7 (1988) ('the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that the intent has been conveyed to the person confronted'). Citing *Mendenhall*, 446 U.S. at 554 n.6, 100 S. Ct. at 1877 n.6, 64 L. Ed. 2d at 509 n.6, see also *People v. Wicks*, 236 Ill. App. 3d 97, 104, [603 N.E.2d 594] (1992) (officer's subjective view that suspect un-

> der arrest not relevant unless view conveyed to suspect). 4 W. LaFave, Search & Seizure § 9.4(a), at 413 (4th ed. 2004) (uncommunicated intention of officer not determinative in analyzing whether seizure occurred)."

(Although *People v. Leudemann*, 222 Ill. 2d 530, 548, 857 N.E.2d 187, 198-99 (2006), abrogated *Smith* on other grounds, it did not affect *Smith's* holding regarding the irrelevancy of a police officer's subjective intent in determining whether a person is in custody.)

¶ 38 Because defendant did not testify at the hearing on the motion to suppress, this record contains no basis upon which to claim that Stoll's subjective intent to arrest defendant was somehow communicated to defendant.

¶ 39 Second, consent given while a defendant is seized or in custody is not necessarily involuntary. Instead, a person's voluntary consent is doubtful when that person has been *unlawfully* seized or arrested. See *People v. Brownlee*, 186 Ill. 2d 501, 521, 713 N.E.2d 556, 566 (1999) ("[W]here an illegal detention has occurred, a subsequent consent to search may be found to have been tainted by the illegality."). Moreover, "the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search." *United States v. Watson*, 423 U.S. 411, 424 (1976). A lawful seizure does not necessarily taint a defendant's voluntary consent and is merely another factor to be considered among the totality of the circumstances.

¶ 40 We find distinguishable cases that lend support to the theory that lawful custody negates voluntary consent. In *People v. Green*, 358 Ill. App. 3d 456, 462, 832 N.E.2d 465, 470-71 (2005), the Second District Appellate Court reversed the trial court's finding that consent to search was voluntary because (1) an officer told the defendant she was not free to leave; (2) the

defendant had already twice refused to give consent; and (3) the officer falsely represented that he could obtain a search warrant if the defendant refused consent. The *Green* court considered the totality of the circumstances in that case before determining that the defendant's consent was involuntary. The court did not rely solely on whether the defendant was free to leave.

¶ 41 The second case, *People v. LaPoint*, 353 Ill. App. 3d 328, 818 N.E.2d 865 (2004), is also distinguishable. In *LaPoint*, police stopped the defendant's rental car for a traffic violation. The officer checked the defendant's driver's license and rental-car agreement in his squad car before returning with a written warning ticket. Before issuing the defendant the warning and returning her license and rental agreement, the officer told the defendant to stand at the back of her vehicle, where he asked her additional questions. After the additional questioning, the defendant gave consent to search her vehicle, in which the officer found cannabis. The trial court denied her motion to suppress.

¶ 42 The Third District Appellate Court reversed, concluding that "under the totality of the circumstances," the defendant's consent was not voluntary. *Id.* at 333-34, 818 N.E.2d at 870. The *LaPoint* decision is distinguishable from the present case because, when the *LaPoint* defendant gave consent, she was most likely subject to an unlawful seizure that had exceeded the scope of the initial traffic stop. See *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."). We also note that defendant in this case concedes that any potential seizure was lawful, because "Stoll and *** Garcia had probable [cause] to seize [defendant] because he was caught drinking underage."

¶ 43 As to the remaining circumstances surrounding defendant's consent, no evidence

was presented that Stoll coerced defendant into giving consent. Defendant gave consent on a public street rather than inside a police station or the back of a squad car. When Stoll initially asked for consent to search the vehicle, defendant did not decline but instead informed Stoll that the car did not belong to him. Stoll asked for consent again only after learning that the car actually belonged to defendant. This was not a situation in which Stoll repeatedly berated defendant into consenting. Instead, Stoll accepted defendant's initial denial of ownership of the car and continued his investigation by running the car's plates. Although Stoll never informed defendant of his right to refuse consent, "[i]t would be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." *Robinette*, 519 U.S. at 39-40.

¶ 44 Additionally, even though "about a half dozen" officers responded to the scene, Stoll testified that most of the other officers were speaking with other individuals nearby and not questioning defendant. See *State v. Davis*, 304 P.3d 10, 15 (N.M. 2013) (consent voluntary where "six or seven" armed officers were present, but only one approached the defendant). Further, even if we were to conclude that defendant was not free to leave, defendant concedes (as we earlier noted) that police had probable cause to detain him. Finally, the entire encounter with defendant lasted only 20 minutes.

¶ 45 For the foregoing reasons, we conclude that the trial court's decision finding defendant's consent voluntary was not against the manifest weight of the evidence.

¶ 46 B. Ineffective Assistance of Counsel

¶ 47 Defendant also claims that counsel was ineffective for failing to raise alternative arguments that the seizure of the Xbox was unlawful. Specifically, defendant claims that trial counsel should have argued that (1) the seizure of the Xbox was outside the scope of consent and

(2) the police lacked probable cause to seize the Xbox because they did not know it was contraband.

¶ 48 To show ineffective assistance of counsel, a defendant must establish that (1) his attorney's representation fell below an objective standard of reasonableness and (2) there exists a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Further, in order to establish deficient performance, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Smith*, 195 Ill. 2d 179, 188, 745 N.E.2d 1194, 1200 (2000).

¶ 49 This court has held that "[c]laims of ineffective assistance of counsel are usually reserved for postconviction proceedings where a trial court can conduct an evidentiary hearing, hear defense counsel's reasons for any allegations of inadequate representation, and develop a complete record regarding the claim and where attorney-client privilege no longer applies." *People v. Weeks*, 393 Ill. App. 3d 1004, 1011, 914 N.E.2d 1175, 1182 (2009). Based on these considerations, we decline to reach the merits of defendant's ineffective-assistance-of-counsel claim in this direct appeal. On this record, we do not know whether trial counsel had strategic reasons for his decision, nor do we know what knowledge and reasoning the police may have had to support the seizure of the Xbox.

¶ 50 Defendant contends that this court should now address and decide his ineffective-assistance-of-counsel claim and cites in support *People v. Henderson*, 2013 IL 114040, where the supreme court concluded that the record before it was adequate to address a similar claim regarding trial counsel's ineffectiveness due to his failure to file a motion to suppress. However, these cases are *sui generis*, and the mere fact that the supreme court in *Henderson* found the rec-

ord adequate in that case says nothing about the adequacy of the record in this case. Further, we note that the more usual course of action regarding a claim that trial counsel was ineffective for failing to file a motion to suppress is to let the matter be resolved pursuant to a postconviction petition. Doing so arises out of a recognition by courts of review that absent a motion to suppress, the State will rarely have put on all the evidence it may have possessed to justify the search at issue. Further, the record will almost never contain the State's argument at the trial level regarding why the search was appropriate or the remarks of the trial court concerning the appropriateness of the search.

¶ 51 III. CONCLUSION

¶ 52 For the foregoing reasons, we affirm. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 53 Affirmed.