

No. 1-10-3585

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 670
)	
ARNELL ELAM,)	Honorable
)	Luciano Panici,
Defendant-Appellant.)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in commenting, at a hearing on a motion to quash arrest and suppress evidence, that drug transactions can take place outside in the open. Defendant's guilt of delivery of a controlled substance was proven beyond a reasonable doubt where police officer testified that he viewed that delivery. Defense counsel was not ineffective for preemptively introducing into evidence the written statement of a witness that he had received drugs from defendant where counsel also elicited from the witness an explanation of why he had given this statement, which he testified was false.

¶ 2 In a bench trial, defendant Arnell Elam was convicted of delivery of a controlled substance (1 gram or more but less than 15 grams of cocaine) and sentenced to eight years in

prison. In this appeal, defendant contends that the trial court erred in relying upon its personal knowledge in denying defendant's motion to quash arrest and suppress evidence. Defendant also contends that his guilt was not proven beyond a reasonable doubt. Alternatively, he contends that he was denied the effective assistance of counsel.

¶ 3 Prior to trial, defendant filed a motion to quash arrest and suppress evidence obtained as a result of that arrest. Chicago Heights detective Mario Cole was the sole witness to testify at the hearing on this motion. Cole testified that on the evening of September 11, 2008, at about 7:56 p.m., he was conducting narcotics surveillance in the vicinity of 1341 Halsted at a Church's restaurant parking lot in Chicago Heights. Before entering the lot in his vehicle, he had seen a person standing behind the business, "popping in and out" from behind a dumpster. Cole used binoculars to observe what happened. The man, subsequently identified as Lorenzo Hill, then walked out from behind the restaurant to the front several times. Finally, he walked in front of the restaurant and stood there.

¶ 4 Shortly thereafter, defendant pulled up to the front of the store in his car and Hill then approached him. They had a short conversation through the open window of defendant's car. Cole then saw defendant hand a knotted bag to Hill, who placed it in the front pocket of his sweatshirt. Cole did not see Hill hand anything back to defendant. Instead he saw Hill, who was now on his cell phone, take out another "package," which was open, and begin to count the items that were in the package. Based upon his experience, Cole recognized the package to be "packaged narcotics" and so he called in his arrest team. Hill began to walk off, but when he saw the arrest team approaching him, he dropped the package to the ground. Both Hill and defendant were detained, as Detective Cole picked up the package from the ground. The knotted bag was recovered from Hill's sweatshirt. Both items were in the same type of packaging. According to Cole, no narcotics were recovered from defendant.

¶ 5 On cross-examination, Cole testified that the area he placed under surveillance that evening was "active" for drug activity because numerous drug arrests had been made in that vicinity. In the year of defendant's arrest, 2008, he had made 20 narcotics arrests in that area. He also testified that the knotted bag recovered from Hill's sweatshirt pocket was the same bag he had seen defendant hand to Hill. On redirect examination, defense counsel elicited from Cole that the area where this transaction took place was an open area where "all [the] public could see."

¶ 6 In support of the motion to quash and suppress, defense counsel argued that Cole's testimony was not credible because, *inter alia*, Cole claimed that the drug transaction took place in an open area, in front of a store. The trial court found Cole's testimony to be credible, stating:

"You know what, I've seen drug transactions wide open. So that the fact that it's being done wide open, that he's counting whatever he's counting, the material that he has, that has no bearing whatsoever ***."

The court also stated that it did not believe this was a drug exchange or sale, but instead was a drug delivery. The court added that "Maybe [defendant] is the supplier for [Hill]." The court then denied defendant's motion to quash arrest and suppress evidence.

¶ 7 At trial, Cole testified for the prosecution that on the day in question he had placed the parking lot of a Church's restaurant under surveillance, looking for drug activity. He was using high-powered binoculars to conduct this surveillance. Cole saw Hill with a hooded sweatshirt, with the hood pulled over his head. Hill had been walking back and forth from dumpsters in back of the restaurant to the front. A car driven by defendant pulled up to the front of the restaurant and Hill approached it and began to converse with defendant. Cole then saw defendant hand Hill a knotted plastic bag, which Hill put in the pouch of his sweatshirt. Cole

described the lighting in front of the restaurant as very bright. Hill then began to talk on his cell phone, which he had braced against his head by his shoulder. As he did this he was also counting items from another plastic bag which he now had in his hand. Cole notified his "take down" team of officers and they approached the men. Hill began walking away and as he did so he dropped the plastic bag he had in his hand. Cole recovered that bag from the ground and found that it was a sandwich bag containing 18 plastic "mini Ziplocks" containing what he suspected was cocaine. Two of the other officers searched Hill and recovered a knotted plastic bag which also contained suspected cocaine. They also recovered \$544 from Hill.

¶ 8 On cross-examination, Cole testified that the area he had placed under surveillance was about one and one-half blocks from the police station. At the time he was there it was already dark, but the area was well lighted. He did not recall whether a cell phone was found on the defendant, but he did not see defendant using a cell phone. Cole conceded that it was possible that defendant had used one. He did not see defendant give Hill any money.

¶ 9 Chicago Heights detective Anthony Bruno testified that he was working with the takedown team on the evening in question. Defendant was in his car when Bruno first saw him. Bruno asked him to get out of the car and placed him in handcuffs before transporting him to the police station. Bruno patted down the defendant and found no weapon and no narcotics on him. He did not recall that anything was found in a search of defendant's car.

¶ 10 The defense called Lorenzo Hill as a witness. Hill testified that he was currently incarcerated for possession of a weapon, possession of narcotics, and driving without a license. On the evening in question he had arranged to meet a woman at the Church's restaurant in order to sell her cocaine. He had approximately 60 bags of cocaine in three larger bags on his person at that time. While he was in the parking lot he saw defendant drive up to a telephone. Hill walked up to defendant and defendant asked him if he had a cell phone. Hill knew defendant from the

neighborhood but had not previously spoken to him. He dialed the telephone for defendant and then handed him the phone. Defendant stayed on the phone for about a minute and then handed the phone back to Hill. As Hill then turned to leave he was arrested and ordered to lie on the ground. The police found cocaine on his person as well as a bag of cocaine that had fallen to the ground. In his testimony Hill denied receiving this cocaine from defendant. He was transported to the police station, where he was questioned by several police officers. The police wrote down the statement he made, in which he said that he had received cocaine from defendant. Hill also said in the statement that he had been receiving cocaine from defendant for some time and he distributed cocaine for defendant.

¶ 11 Hill denied the truth of the statement he gave to the police. He said he gave the statement because he was trying to get of the trouble he was in with the police because they had found cocaine on him. On cross-examination he admitted that in addition to the prior convictions to which he had already admitted, he had previously been convicted of a number of robberies, armed robbery, vehicular invasion, burglary, and several thefts. On redirect, Hill testified that despite his prior convictions, he was present in court to tell the truth, which was that he never received cocaine from defendant.

¶ 12 Defendant testified in his own defense that he had been employed as an auto detailer for approximately 16 years. On the evening in question he had received a telephone call to pick up someone who was going to join him at a cousin's house for a family gathering concerning defendant's grandmother's death. Defendant drove to the person's home but he was not there. Defendant then drove in search of a telephone to call the individual. He pulled up to the Church's restaurant because he recalled that it had a telephone outside, but it was no longer there. He then saw Hill using a cell phone and he asked him if could use the phone. Defendant stated that he had seen Hill before but had not previously spoken to him. Hill walked up to defendant's

car and they had a brief conversation before Hill let him use his phone. As Hill was reaching to give the phone back to Hill, the police "came from everywhere." Defendant saw Hill drop something to the ground as Hill began to walk away. Defendant denied giving narcotics or money to Hill and denied receiving any narcotics from Hill. Defendant was impeached with prior convictions for forgery and possession of a controlled substance in 2000 and 2003.

¶ 13 In final argument, defense counsel argued that Hill had given a false account of receiving drugs from defendant in order to improve his own situation by admitting to being a buyer of drugs rather than a seller. Counsel also argued that Hill, who had already pleaded guilty to the offense arising out of this incident, no longer had a motivation to lie.

¶ 14 Defendant was convicted of delivery of a controlled substance and sentenced to eight years in prison. This appeal ensued.

¶ 15 We first consider defendant's contention that the trial judge erred in relying on his personal knowledge when he denied defendant's motion to quash his arrest and suppress evidence. Defense counsel, in argument on the motion, contended that it was not believable that defendant would engage in a drug delivery in an open area such as the Church's parking lot. In ruling on the motion the judge stated that he had "seen drug transactions wide open." Defendant argues that in making this statement the trial judge was improperly relying on his own personal knowledge, not evidence introduced at trial. This comment by the trial judge was not like those made in *People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962), relied upon by defendant. There the defendant was accused of robbery and testified that at the time of the robbery he was 79 blocks away, waiting for a mechanic to come and repair a deflated tire. In describing the route he had taken, the defendant testified that he had not stopped earlier because there were no gas stations along the way. In finding defendant guilty, the trial judge commented on this testimony, stating in effect that he knew there were gas stations along that route. The court in *Wallenberg* found

that the trial judge had improperly relied upon his private knowledge, thus depriving the defendant of a fair trial. *Wallenberg*, 24 Ill. 2d at 354. Nor does this case resemble that of *People v. Dameron*, 196 Ill. 2d 156, 171-179 (2001), a death penalty case cited by defendant, where the sentencing judge in imposing the death penalty relied extensively upon a sociology book and upon comments made by his father, a judge, in a previous murder case. Clearly those were impermissible sources for the trial court's reasoning in imposing the death penalty.

¶ 16 The trial judge here did not state that he knew that the area at issue, in front of a Church's store, was a site of drug transactions. The judge's comment was a common-sense statement that some drug transactions are made in the open. It was part of an evaluation of the credibility argument made by the defense, which asserted, without any evidentiary foundation, that such transactions are not made in the open. Moreover, there was testimony adduced from Detective Cole that this area had previously been the site of drug activity and that he had made 20 arrests in that area in 2008 alone. Thus there was trial evidence from which the judge could have inferred that it would not be unusual to observe drug transactions there. We find no basis for reversal on this ground.

¶ 17 Defendant also contends that his guilt was not proven beyond a reasonable doubt. Our standard of review is a familiar one: whether the evidence, when viewed in the light most favorable to the prosecution, would permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). We also bear in mind that the trial court, as the finder of fact, is not required to disregard inferences which flow normally from the evidence or to search for all possible explanations which are consistent with innocence. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). Furthermore, we will not set aside a criminal conviction unless the trial evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000).

Here, the testimony of Detective Cole was clear and credible. Through his high-powered binoculars he saw defendant hand Lorenzo Hill a knotted plastic bag. Within minutes of that transaction, Hill was apprehended and searched and was found to have in his possession several plastic bags containing cocaine. He had dropped one bag to the ground. The trial judge was not required to believe defendant's claim that the object he handed Hill was a cell phone which Hill had allowed him to use. Even when seen through binoculars, it is evident that a cell phone would not resemble a plastic bag.

¶ 18 Defendant argues that it was highly improbable that Hill would wait until defendant handed him a bag before he began to count the contents of a bag which he already possessed. He also contends that it would have been more reasonable for Hill to count the drugs allegedly contained in the bag near the dumpsters, where he had previously been seen by Detective Cole. These are all arguments suitable for resolution by the trier of fact (*People v. Collins*, 106 Ill. 2d 237, 261-62 (1985)); we do not find that they render the trial evidence so improbable that they create a reasonable doubt of defendant's guilt.

¶ 19 Defendant's final contention is that he was deprived of the effective assistance of counsel by decisions made by his trial counsel. Defendant specifically claims that his attorney prejudiced his case when he called Lorenzo Hill to testify on defendant's behalf. To establish this claim, defendant must show: (1) that his attorney's performance fell so far below an objective standard of reasonableness that it deprived defendant of his right to counsel and (2) that this substandard performance prejudiced defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In evaluating this claim, defendant must overcome a strong presumption that his attorney's actions constituted trial strategy rather than incompetence or ineffectiveness. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998); *People v. Lopez*, 371 Ill. App. 3d 920, 929.

¶ 20 During the course of examining Hill, defense counsel elicited Hill's testimony that he had told the police that defendant had given him cocaine on the day in question and had done so on previous occasions in order to distribute it for defendant. But Hill also testified that this account was false, given to the police in an effort to cast his own actions in a more favorable light. As defense counsel argued to the trial court, Hill was attempting to establish that he had not delivered or sold the cocaine found on him, but had received it from defendant, so that he was guilty of possession rather than the greater offense of sale or delivery. Defense counsel elicited from Hill testimony which substantially corroborated that of defendant. Hill testified that on the night in question defendant was merely trying to reach an acquaintance by phone and when the police observed a "transaction" between defendant and Hill, they were only observing defendant returning Hill's cell phone to him.

¶ 21 Hill was clearly far from an ideal witness. He was impeached with numerous previous convictions and he admitted lying to the police. But in a criminal prosecution, the defendant and the prosecution often do not have the choice of selecting ideal witnesses to testify for them; they must rely upon those found in real life, who may come with multiple impeaching aspects. *United States v. Hardin*, 209 F.2d 652, 661 (7th Cir. 2000). Furthermore, Hill did corroborate defendant's exculpatory testimony, and presenting his impeaching testimony in defendant's case was a time-honored means of diminishing the force it would have had if introduced by the prosecution. Based upon these factors we find that defense counsel's actions constituted trial strategy, not ineffective assistance of counsel. Because we so find, we do not reach the prejudice prong of the *Strickland* analysis.

¶ 22 For the reasons set forth in this order, we affirm defendant's conviction and sentence.

¶ 23 Affirmed.