

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).

2013 IL App (4th) 120309-U

NO. 4-12-0309

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
October 10, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
RYAN P. TYSON,	)	No. 10CF233
Defendant-Appellant.	)	
	)	Honorable
	)	Mark A. Fellheimer,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.  
Justices Pope and Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court granted the office of the State Appellate Defender's motion to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), because no meritorious issue could be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967), because no meritorious issue can be raised in this case. For the following reasons, we grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In September 2010, the State charged defendant, Ryan P. Tyson, with (1) unlawful possession of cannabis (720 ILCS 550/4(d) (West 2010) (more than 30 grams but less than 500 grams of a substance containing cannabis) (subsequent offense)) and (2) unlawful possession of a

controlled substance (720 ILCS 570/402(c) (West 2010) (less than 15 grams of a substance containing Methylenedioxyamphetamine (MDMA))).

¶ 5 A. Defendant's Motion To Suppress Evidence

¶ 6 In December 2010, defendant filed a "motion to quash arrest and suppress evidence" in which he requested "an order finding unlawful the stop and detention of the defendant's person, the search of the defendant's vehicle and its contents and occupants, and the arrest of the defendant." Defendant sought suppression of "all items obtained upon such stop, detention, search and arrest, including the identification of the defendant as the driver of the vehicle involved in the stop."

¶ 7 The trial court heard partial evidence on defendant's "motion to quash arrest and suppress evidence" in April of 2011 and heard the remaining evidence in July of 2011. The evidence presented consisted of (1) a video recording of the traffic stop during which officers discovered cannabis and MDMA in defendant's vehicle and (2) the testimony of Deputy Robert McGraw of the Livingston County sheriff's department. After the trial court viewed the video of the traffic stop, Deputy McGraw testified as follows regarding the traffic stop and search of defendant's car.

¶ 8 At approximately 11:30 p.m. on September 10, 2010, Deputy McGraw was conducting a routine patrol in an unmarked police car on Route 17 in Livingston County between the towns of Dwight and Reddick. A car traveling eastbound passed McGraw, who was traveling westbound, and McGraw used his dash-mounted radar to measure the car's speed at 78 miles per hour. The posted speed limit was 55 miles per hour. McGraw turned his car around, initiated a traffic stop, and used his radio to inform other officers in the area of his location. Defendant

conceded that the initial traffic stop was lawful.

¶ 9 Upon approaching the car and making contact with the driver, whom Deputy McGraw identified as defendant, McGraw made the following observations:

"[Defendant was] very nervous, shaking, just over the top, I would say, compared to a normal traffic stop, a little nervous getting out the driver's license and that type of stuff. [Defendant] was visibly shaking, just anxious, everything going on.

\* \* \*

We were talking, and as I was talking to him, I could smell a fresh cannabis coming out of the vehicle. I didn't smell it on the approach to the vehicle, so I felt it was coming out of the vehicle."

McGraw testified that he underwent training on the smell of cannabis at the Police Training Institute in Champaign, Illinois, and he had previously seized cannabis on several occasions during his time as a police officer.

¶ 10 Without informing defendant that he smelled cannabis, Deputy McGraw returned to his police car and began to fill out a speeding citation. Within three to five minutes, backup officers arrived. Once McGraw completed the citation, he asked defendant to stand at the rear of defendant's car. McGraw asked defendant about the smell of cannabis and requested permission to search the car. Defendant denied possessing cannabis and refused to give consent to search. McGraw informed defendant he would be conducting a search of the vehicle, which he then did.

¶ 11 At the conclusion of defendant's evidence, the State orally moved for a directed finding. The trial court granted the State's motion, finding that, based on Deputy McGraw's

unrefuted testimony that three to five seconds into the stop he smelled the odor of cannabis coming from inside defendant's car, probable cause existed to justify the search under the automobile exception to the warrant requirement.

¶ 12 B. Defendant's Stipulated Bench Trial

¶ 13 In November 2011, the trial court held a stipulated bench trial. Defendant answered in the affirmative when asked by the court if he had spoken with his attorney regarding a stipulated bench trial. The court then addressed defendant personally in open court and admonished him in compliance with Illinois Supreme Court Rule 402 (eff. July 1, 1997). Defendant stated he understood each of the admonishments.

¶ 14 The State and defendant then stipulated that, during the search of defendant's car, police discovered (1) several bags of cannabis weighing a total of more than 30 grams but less than 500 grams, and (2) pills containing MDMA. The parties also stipulated that defendant was previously convicted of delivery of a controlled substance (720 ILCS 570/401(d) (West 2000)) in McLean County case No. 00-CF-173. The court found the stipulated facts sufficient to prove defendant guilty beyond a reasonable doubt of (1) unlawful possession of cannabis (720 ILCS 550/4(d) (West 2010) (subsequent offense)) and (2) unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010)). The court ordered a presentence investigation report (PSI) pursuant to section 5-3-1 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-3-1 (West 2010)).

¶ 15 C. Defendant's Sentencing Hearing

¶ 16 At a January 2012 sentencing hearing, the trial court accepted into evidence (1) a certified copy of defendant's prior conviction for possession of a controlled substance (720 ILCS

570/401(d) (West 2000)) in McLean County case No. 00-CF-173; (2) the PSI prepared pursuant to section 5-3-1 of the Unified Code (730 ILCS 5/5-3-1 (West 2010)); and (3) seven separate letters written by defendant's acquaintances attesting to his positive character.

¶ 17 The State did not present evidence in aggravation but relied on the facts contained in the PSI, including defendant's following criminal history: (1) a 2000 Class 2 felony conviction for delivery of a Schedule III controlled substance (McLean County case No. 00-CF-173), for which defendant was sentenced to 36 months' probation; (2) a 2000 Missouri conviction for possession of drug paraphernalia and possession of marijuana, for which defendant was sentenced to 2 years' probation (Forsyth, Taney County, Missouri, case No. 417M); (3) a 2002 conviction for retail theft (Kankakee County case No. 02-CM-509), for which defendant was sentenced to 1 year of probation; and (4) a 2009 Missouri conviction for possession of a controlled substance (Stone County, Missouri, case No. 09SN-CR01357-01), for which defendant was sentenced to 5 years' probation.

¶ 18 The State also noted (1) defendant admitted using K2, a synthetic cannabis, within 30 days of the stipulated bench trial; (2) defendant was sentenced to probation in Missouri 30 days before being arrested for the offense in this case; and (3) defendant was found in possession of a fake penis and urine bladder, which he admitted he intended to use to defeat a urine test conducted pursuant to his Missouri probation. The State, arguing defendant would not be likely to comply with a court order of probation, recommended a sentence of 5 years' imprisonment.

¶ 19 Defense counsel noted (1) defendant had actively participated in therapy; (2) defendant suffered from a chemical dependency; (3) defendant had been working part-time and attending community college full-time; and (4) defendant's psychotherapist opined that defendant

could gain more through therapy and outpatient treatment for chemical dependency than through imprisonment. Defense counsel recommended the trial court impose the maximum term of probation and "whatever jail time the Court believes needs to be imposed as a punitive measure in this case." Defendant then made a statement in allocution.

¶ 20 Prior to announcing its sentence, the trial court noted the following factors in mitigation: (1) defendant had documented anxiety and insomnia issues, which may have contributed to his drug problems; (2) defendant went from 2002 to 2009 without committing any criminal offenses; and (3) defendant had taken steps to correct the issues that led to the instant offense. The court also noted the following factors in aggravation: (1) defendant's conduct caused or threatened serious harm; (2) defendant had a significant prior criminal history; (3) defendant committed the instant offense while serving a term of probation for a Missouri offense; and (4) defendant attempted to deceive probation authorities in Missouri by using a fake penis and bladder to defeat a drug test.

¶ 21 The trial court sentenced defendant to concurrent terms of 3 1/2 years' imprisonment for possession of cannabis (720 ILCS 550/4(d) (West 2010) (subsequent offense)) and 3 years' imprisonment for possession of a controlled substance (720 ILCS 570/402(c) (West 2010)). The court then admonished defendant in compliance with Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001).

¶ 22 Pursuant to the parties' stipulations, the trial court imposed a street value fine of \$150 for the cannabis and \$10 for the MDMA. The court also imposed the following mandatory fines and fees: (1) \$698 for court costs; (2) an \$80 statutory surcharge (730 ILCS 5/5-9-1(a) (West 2010)); (3) a \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)); (4) a \$160 drug

street value fine (730 ILCS 5/5-9-1.1(a) (West 2010)); (5) a \$500 drug assessment fee (720 ILCS 570/411.2 (West 2010)); (6) a \$100 drug trauma fund fine (730 ILCS 5/5-9-1.1(b) (West 2010)); (7) a \$5 drug spinal cord injury fine (730 ILCS 5/5-9-1.1(c) (West 2010)); and (8) a \$10 arrestee for medical expenses (730 ILCS 125/17 (West 2010)).

¶ 23 D. Defendant's Motion To Reconsider Sentence

¶ 24 In February 2012, defendant filed a motion to reconsider sentence, in which he argued the trial court's sentence was excessive.

¶ 25 At an April 2012 hearing on defendant's motion to reconsider sentence, neither the defendant nor the State presented evidence. Defendant declined to present argument. The trial court denied defendant's motion to reconsider his sentence. The court again admonished defendant in compliance with Rule 605 (Ill. S. Ct. R. 605) (eff. Oct. 1, 2001).

¶ 26 Defendant filed a timely notice of appeal and the trial court appointed OSAD as counsel on appeal.

¶ 27 In June 2013, OSAD filed a motion to withdraw, attaching to its motion a brief in conformity with the requirements of *Anders v. California*, 386 U.S. 738. On its own motion, this court granted defendant leave to file additional points and authorities by July 24, 2013.

Defendant has not done so.

¶ 28 II. ANALYSIS

¶ 29 In support of its motion to withdraw, OSAD asserts no colorable argument can be made that (1) the information failed to state an offense, (2) the trial court erred by denying defendant's motion to suppress, (3) the court failed to comply with Illinois Supreme Court Rule 402 (eff. July 1, 1997), or (4) the court abused its discretion at sentencing. We agree and grant

OSAD's motion to withdraw.

¶ 30 A. The Information Properly Stated an Offense

¶ 31 The State charged defendant by information with two counts: (1) unlawful possession of cannabis (720 ILCS 550/4(d) (West 2010) (more than 30 grams but less than 500 grams of a substance containing cannabis) (subsequent offense)) and (2) unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010) (less than 15 grams of a substance containing MDMA)).

¶ 32 Section 111-3(a) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/111-3(a) (West 2010)) provides as follows:

"A charge shall be in writing and allege the commission of an offense by:

- (1) Stating the name of the offense;
- (2) Citing the statutory provision alleged to have been violated;
- (3) Setting forth the nature and elements of the offense charged;
- (4) Stating the date and county of the offense as definitely as can be done; and
- (5) Stating the name of the accused, if known, and if not known, designate the accused by any name or description by which he can be identified with reasonable certainty."

The information filed by the State in this case complied with section 111-3(a) of the Procedure Code (725 ILCS 5/111-3(a) (West 2010)) as to both counts. Further, the information adequately charged defendant with possession of cannabis as a subsequent offense. The information alleged defendant had been previously convicted of the Class 2 felony of manufacture-delivery of a controlled substance in McLean County case No. 00-CF-173.

¶ 33 We agree with OSAD that no colorable argument can be made the information failed to state an offense.

¶ 34 B. The Trial Court Properly Denied Defendant's Motion To Suppress

¶ 35 1. *Standard of Review*

¶ 36 In reviewing a trial court's ruling on a motion to suppress evidence, we apply a two-part standard of review. *People v. Luedemann*, 222 Ill. 2d 530, 542, 857 N.E.2d 187, 195 (2006) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)). Under this standard, a trial court's findings of historical fact are reviewed only for clear error, and we give due weight to any inferences drawn from those facts by the fact finder. *Id.* In other words, we give great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence. *Id.* However, we review *de novo* the trial court's ultimate legal ruling as to whether suppression is warranted. *Id.*

¶ 37 2. *The Search of Defendant's Car*

¶ 38 As previously noted, defendant concedes the lawfulness of the initial stop for speeding. "The fourth amendment has long been interpreted to allow probable-cause-based warrantless searches of a vehicle that is stopped on the apron of a highway, given the exigency of that situation." *People v. Williams*, 2013 IL App (4th) 110857, ¶ 19, 990 N.E.2d 916. "A police

officer's detection of controlled substances by their smell has been held to be a permissible method of establishing probable cause." *People v. Stout*, 106 Ill. 2d 77, 87, 477 N.E.2d 498, 502 (1985).

¶ 39 At the hearing on defendant's motion to suppress, Deputy McGraw provided uncontroverted testimony that he smelled the odor of cannabis emanating from inside defendant's car during a lawful traffic stop on the apron of a highway. Defendant argued McGraw's testimony was not credible because McGraw initially asked defendant for consent to search. According to defendant's argument at the hearing on his motion to suppress, McGraw would not have sought consent to search if he was already authorized to search based on the odor of cannabis. The court rejected this argument and found McGraw's testimony credible. The record provides no basis for us to conclude the court's finding was against the manifest weight of the evidence.

¶ 40 We agree with OSAD that no colorable argument can be made the trial court erred by denying defendant's motion to suppress.

¶ 41 C. The Trial Court Properly Admonished Defendant Pursuant to  
Illinois Supreme Court Rule 402

¶ 42 A stipulation is tantamount to a guilty plea—and therefore requires a defendant's personal admonishment and agreement—*only* in instances where: (1) the State's entire case is presented by stipulation *and* the defendant does not preserve a defense; *or* (2) the stipulation concedes the sufficiency of the evidence to convict the defendant. *People v. Clendenin*, 238 Ill. 2d 302, 322, 939 N.E.2d 310, 322 (2010). A stipulated bench trial, when designed to establish guilt beyond a reasonable doubt, is tantamount to a guilty plea and requires the protections set

forth in Illinois Supreme Court Rule 402 (eff. July 1, 1997). *People v. Smith*, 59 Ill. 2d 236, 242-43, 319 N.E.2d 760, 764 (1974). Because the State presented its entire case by stipulation and defendant did not preserve a defense, the trial court was required to provide defendant with Rule 402 admonishments.

¶ 43 We have reviewed the transcript of defendant's stipulated bench trial and conclude the trial court complied with the requirements of Rule 402. Specifically, the court advised defendant of the following: (1) the nature of the charges against him; (2) the minimum and maximum penalties prescribed by law, including the applicable term of mandatory supervised release and the penalty applicable to defendant as a result of his prior convictions; (3) that defendant had the right to plead not guilty and persist in that plea or to plead guilty; and (4) that if defendant stipulated the evidence was sufficient to convict, he waived the right to a trial by jury and the right to confront witnesses against him. The court accepted the stipulated facts provided by the State, which we find adequately established defendant's guilt beyond a reasonable doubt.

¶ 44 We agree with OSAD that no colorable argument can be made the trial court failed to comply with Illinois Supreme Court Rule 402 (eff. July 1, 1997).

¶ 45 D. The Trial Court Did Not Abuse its Discretion at Sentencing

¶ 46 This court has explained appellate standard of review of a defendant's sentence as follows:

"A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character,

mentality, social environment, habits, and age. [Citations.]

Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case.

[Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review. [Citation.] If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004) (quoting *People v. Kennedy*, 336 Ill. App. 3d 425, 433, 782 N.E.2d 864, 871 (2002))).

¶ 47 In this case, defendant's conviction for the Class 3 felony of unlawful possession of cannabis (720 ILCS 550/4(d) (West 2010) (subsequent offense)) carried a possible sentence of two to five years' imprisonment (730 ILCS 5/5-4.5-40(a) (West 2010)). Defendant's conviction for the Class 4 felony of unlawful possession of a controlled substance (720 ILCS 570/401(c) (West 2010)) carried a possible sentence of one to six years' imprisonment (730 ILCS 5/5-4.5-

45(a) (as enhanced by 720 ILCS 570/408(a) (West 2010))). On both counts, the trial court imposed a sentence well within the statutorily authorized range. The court stated its reasoning on the record and identified the factors it considered in both mitigation and aggravation. Based on our review of the transcript of the sentencing hearing, we conclude the court did not consider any inappropriate factors at sentencing. The record contains no basis from which we could find the court abused its discretion at sentencing.

¶ 48 We agree with OSAD that no colorable argument can be made the trial court abused its discretion at sentencing.

¶ 49 III. CONCLUSION

¶ 50 After examining the record in accordance with our duties under *Anders*, we agree with OSAD that no meritorious issue can be raised on appeal. Accordingly, we grant OSAD's motion to withdraw as counsel and affirm the trial court's judgment.

¶ 51 Affirmed.