

No. 1-12-1617

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. 10 CR 13475
)	
CURTIS FUNDERBURG,)	Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 **Held:** Judgment entered on aggravated battery to a peace officer affirmed over defendant's contention that he was denied effective assistance of counsel; fines and fees order modified.

¶ 2 Following a bench trial, defendant Curtis Funderburg was found guilty of aggravated battery to a peace officer, then sentenced to two years' probation, and assessed \$630 in fines and fees. On appeal, he contends that he received ineffective assistance of trial counsel, and contests

the propriety of certain pecuniary penalties imposed by the court.

¶ 3 At trial, Chicago police officer William Ingvolstad testified that on July 4, 2010, he and his partner, Officer Wojtasik, were on duty in full uniform and wearing bullet proof vests. At 11:30 p.m., they arrived at 6226 South Laflin Street in Chicago to investigate a homicide that occurred outside that building. Officer Ingvolstad described the scene as chaotic with 60 angry civilians in the street pushing and shoving, and five police officers already present. Red crime scene tape was in place for the interior of the crime scene, and Officer Ingvolstad was handed yellow crime scene tape to set off the outer crime scene. While he was trying to do so, defendant came out of a nearby gangway and walked inside the marked off areas a few feet away from where the homicide victim was lying on the sidewalk. Officer Ingvolstad, in the presence of his partner, ordered defendant to leave. He observed that defendant appeared intoxicated, was unsteady on his feet, and walked in circles. He also said something inaudible, but was not kneeling down next to the body or talking to the victim.

¶ 4 After ordering defendant to leave three times, Officer Ingvolstad grabbed defendant's arm to escort him out of the crime scene area. Defendant, however, shook his arm loose from the officer and struck him with a closed fist. He then ripped off the officer's bullet proof vest and they both fell to the ground. Officer Ingvolstad tasered defendant and then detained him. While searching defendant's person, he and his partner found marijuana. Officer Ingvolstad suffered a sprained right thumb and pulled ligaments in the incident. He stated, however, that his ability to search defendant was not hindered by his injuries although he subsequently received treatment at the hospital. Officer Ingvolstad also identified a photograph showing the tear in his bullet proof vest.

¶ 5 Detective Mendoza testified that defendant stated he did not touch Officer Ingvolstad, or

shove or hit the officer. Defendant told Detective Mendoza that he was arrested because he was urinating in the gangway.

¶ 6 Defendant testified that he was in the back of the house at 6228 South Laflin Street when he heard gunshots. He came out front and saw that his "cousin-in-law" Jerry Seals had been shot and was lying on the ground. He started talking to him, trying to keep him conscious, and stayed next to Seals for 15 minutes before police came. When police arrived, one of them told him to step aside. Defendant complied, but was distraught and began to walk towards his car to leave the area. He did not notice any police tape. As he was walking towards a crowd of 40 people, Officer Ingvolstad "burst" through the crowd and immediately pushed and punched him twice in the head. The officer's partner told defendant to get down and he complied, falling down on his stomach. Officer Ingvolstad remained standing and tasered him in the buttocks before placing him in handcuffs. Defendant testified that six officers were "on" him, kicking him in the face and in the back and ribs. Defendant was then dragged to the police car. He denied he was drinking or had any drugs on him.

¶ 7 Defendant further testified he told Detective Mendoza that he had an injury from being tasered, and that he was punched in the head twice, shoved, and repeatedly kicked while he was on the ground. He told the officer who took photographs of his injuries that he had been kicked and punched, but the officer only took photographs of the wounds on his buttocks from the taser. Defendant testified that he asked police to remove the tasers from his body, but they swore at him so he had to remove them himself. Defendant denied he told Detective Mendoza that he was urinating in the nearby gangway.

¶ 8 Tiya Strong testified that at the time in question, she was sitting outside 6228 South Laflin Street when she heard gunshots and saw Seals get hit. After the gunfire, she observed

defendant talking to the victim in order to keep him conscious. When police arrived, they asked defendant to move and he complied. A short while later, she noticed five officers approach defendant and yell at him, but could not recall what was said. She then saw police grab defendant and he ended up on the ground. There were so many officers present she could not see which officer did what, but she knew they were physical with defendant. Strong testified that one of the officers kned defendant in the back, and a crowd of people watched as the officers attacked him. Strong did not see defendant strike any officers, and although she recalled hearing defendant being tasered, she did not see it. She stated that she did not notice police tape in the area at the time.

¶ 9 Detective Mendoza testified that Officer Ingvolstad told him that he removed five baggies, each containing a green leafy substance, suspect cannabis, from defendant. Forensic scientist Nancy McDonagh testified that the recovered substance weighed 3.3 grams and tested positive for cannabis.

¶ 10 Defense counsel subpoenaed Officer Wojtasik but he was injured on duty (IOD), and unavailable to testify at trial. Counsel informed the court that he had Officer Wojtasik's preliminary hearing testimony and sought to admit it in lieu of the officer's testimony at trial. Counsel explained that this testimony would contradict Officer Ingvolstad's testimony. The State objected to the use of the preliminary hearing testimony, arguing that the testimony was not impeaching, and that at a preliminary hearing there is no opportunity to clarify what would be presented at trial. The court noted that it is usually the State seeking to use such testimony, and that the State had an opportunity to examine the witness at the preliminary hearing. The court further noted that Officer Wojtasik was the State's witness at the preliminary hearing. The court allowed the transcript to be admitted at trial.

¶ 11 The court took a recess to review the transcript. At the preliminary hearing, Officer Wojtasik testified that Officer Ingvolstad told him that he saw defendant on the other side of the police tape, and asked him to leave the crime scene. Officer Ingvolstad said that defendant then punched him in the face. When the officer attempted to take defendant into custody, he fell to the ground injuring his right wrist. The officer was treated for his injuries at the hospital. Officer Wojtasik testified that he did not observe any part of the incident, and that the information he received was from Officer Ingvolstad. Officer Wojtasik did not notice defendant until after he was taken into custody at the crime scene.

¶ 12 After the recess, the State informed the court that Officer Wojtasik was back from IOD and present in court. Defense counsel stated that he hoped to elicit from Officer Wojtasik the information covered by his preliminary hearing testimony, and rested. The State did not object to the court using the preliminary hearing transcript despite Officer Wojtasik's availability since the court already ruled that it was admissible. The court found that the officer would be considered unavailable since no one was going to call him at trial.

¶ 13 In rebuttal, the State then called Officer Ingvolstad. Officer Ingvolstad testified that he tasered defendant once in his buttocks. He explained that it is possible for a taser to discharge twice if one holds the trigger for an extended time, but he did not believe his taser discharged twice.

¶ 14 Chicago police officer Abuzanat testified that he photographed defendant at the police station. He told defendant that he was an evidence technician and his purpose was to photograph where defendant was tasered. When he asked defendant where he should photograph, defendant pointed only at his buttocks. Defendant did not tell him that he was also tasered in his back, or that he was injured from being kicked in his back and punched in the head. Officer Abuzanat

observed no other injuries to defendant, and would have photographed them if he had noticed any.

¶ 15 Detective Mendoza was then called by the State. He testified that defendant told him that he never touched the officer and was arrested for urinating in the gangway. He did not tell him that Officer Ingvolstad punched him repeatedly and shoved him, or that police repeatedly kicked him while he was on the ground after being tasered.

¶ 16 The defense called defendant in sur-rebuttal. Defendant testified that he told Detective Mendoza that he was going through a passageway, urinating there, when he heard gunshots. He waited for police to arrive before he came out of the gangway. At that point, he saw that his cousin had been shot and he kneeled down to talk to him. He told the detective that an officer told him to step aside, and he did, but shortly afterwards he proceeded toward his vehicle. On cross-examination, defendant conceded that he had marijuana on him at the time.

¶ 17 At the close of evidence, the court found defendant guilty of aggravated battery to a peace officer. The court noted that Officer Ingvolstad told defendant repeatedly to leave the scene of the crime, and when he tried to escort defendant away, defendant pulled his arm loose and struck the officer in the face. He then grabbed and ripped the officer's vest as shown by the photographs presented in court. The court thus found that the State proved beyond a reasonable doubt that defendant struck, pushed, and shoved the officer, and tore his vest.

¶ 18 On appeal, defendant contends that he was denied effective assistance of trial counsel and a fair trial. He bases his claim on counsel's decision to present Officer Wojtasik's preliminary hearing testimony which did not impeach Officer Ingvolstad, but instead bolstered his credibility with the prior, consistent hearsay statement that defendant punched him in the face.

¶ 19 Under the two-prong test for examining a claim of ineffective assistance of counsel,

defendant must establish that his attorney's performance fell below an objective standard of reasonableness, and that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, defendant must satisfy both prongs of the *Strickland* test, and if this court concludes that defendant did not suffer prejudice, we need not decide whether counsel's performance was deficient. *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 20 Based on the record before us, we find that defendant cannot establish the prejudice prong of the *Strickland* test. We observe that trial counsel attempted to impeach Officer Ingvolstad with statements he made to Officer Wojtasik through the introduction of Officer Wojtasik's preliminary hearing testimony. As defendant points out, this included a prior consistent hearsay statement from Officer Ingvolstad that defendant struck him. However, the prior consistent hearsay statement did not prejudice defendant where the officer's testimony was consistent on the elements of the offense and corroborated in part by the forensic evidence, and where defendant's testimony was rife with inconsistencies and did not discredit the State's evidence. *People v. Simon*, 2011 IL App (1st) 091197, ¶113; *People v. Scarpelli*, 82 Ill. App. 3d 689, 698 (1980)).

¶ 21 First, defense counsel used Officer Wojtasik's testimony to point out inconsistencies in Officer Ingvolstad's account of the incident. Although Officer Ingvolstad testified that he injured his thumb while struggling with defendant on the ground, Officer Wojtasik stated that he told him he injured his wrist when he tripped and fell while taking defendant into custody. He also told Officer Wojtasik that defendant was on the other side of the police tape. Thus, defense counsel's decision to use Officer Wojtasik's preliminary hearing testimony in this manner amounted to trial strategy. A matter of trial strategy will not support a claim of ineffective

assistance of counsel unless the strategy is objectively unreasonable. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). Since Officer Ingvolstad was the State's only testifying witness of the incident, defense counsel's attempt to impeach his testimony was sound trial strategy.

¶ 22 Furthermore, defendant was not prejudiced by the admission of Officer Wojtasik's testimony. Officer Ingvolstad's testimony was corroborated by the photograph showing a tear in his bulletproof vest, and by the testimony of Officer Abuzanat. Officer Abuzanat stated that defendant did not tell him that officers kicked him or that he was tasered in the back. He also did not observe any visible injuries to defendant other than the prong marks in defendant's buttocks.

¶ 23 Defendant's account of the incident also contained inconsistencies. He testified that he was in the back of the house when he heard the gunshots, then went outside and waited with Seals for 15 minutes until police arrived. He also testified that he told Detective Mendoza that while he was urinating in the gangway, he heard gunshots and waited in the gangway for police to arrive. When they arrived, he went up to Seals. However, defendant also stated that he did not tell Detective Mendoza that he was urinating in a nearby gangway, but told him that he was punched, shoved, and kicked by police. Officer Mendoza's testimony rebutted defendant's account. Defendant also denied having cannabis on him, but in sur-rebuttal conceded that he did. When defendant chooses to give an explanation for his conduct, he should provide a reasonable story or be judged by its improbabilities. *People v. Hart*, 214 Ill. 2d 490, 520 (2005). Based on these facts, we find that any deficiency by defendant's counsel in introducing as evidence the preliminary hearing testimony of Officer Wojtasik did not prejudice defendant's case (*Simon*, 2011 IL App (1st) 091197, ¶113). Accordingly, defendant was not denied effective assistance of trial counsel (*Harris*, 206 Ill. 2d at 304).

¶ 24 In reaching this conclusion, we find defendant's reliance on *People v. Orta*, 361 Ill. App. 3d 342, 347 (2005), *People v. Moore*, 356 Ill. App. 3d 117 (2005), and *People v. Phillips*, 227 Ill. App. 3d 581 (1992), misplaced. In *Orta*, defendant was charged with possession of a controlled substance with intent to deliver, and counsel, with no legitimate tactical purpose, elicited evidence that defendant had prerecorded funds in his possession the day before from selling drugs to a police informant. *Orta*, 361 Ill. App. 3d at 347. Counsel's actions elicited testimony from the officers that enabled the State to prove that defendant was a drug dealer. *Orta*, 361 Ill. App. 3d at 347. Here, unlike *Orta*, counsel's decision to introduce Officer Wojtasik's preliminary hearing testimony for impeachment purposes did not prove the decisive offense, but also did not enable the State to prove an essential element of the charged offense. Unlike *Orta*, the State's evidence here, presented through the testimony of the officers, established that defendant was guilty of the charged offense.

¶ 25 In *Moore*, 356 Ill. App. 3d at 129-30, counsel elicited inadmissible hearsay evidence which incriminated defendant in a jury trial, and explained the absence of missing evidence in the State's case. Here, counsel did not elicit incriminating evidence missing in the State's case, and furthermore, it was a bench trial, in which the court is presumed to know the law, namely, that prior consistent, hearsay testimony is inadmissible to prove the truth of the matter asserted. *Randolph*, 2014 IL App (1st) 113624, ¶14.

¶ 26 In *Phillips*, 227 Ill. App. 3d at 590, a jury trial, counsel elicited testimony from a State's witness that another person told him defendant was involved in a robbery. Here, defendant was tried before the bench (*Randolph*, 2014 IL App (1st) 113624, ¶14.), and the admission of the prior consistent, hearsay statement was not new incriminating evidence.

¶ 27 Defendant next contests the propriety of certain fees and fines imposed against him. He first contends that he was improperly assessed the \$25 Court Services fee (55 ILCS 5/5-1103 (West 2012)) because it only applies to the offenses enumerated in the statute and he was not convicted of one of those offenses. This court has previously considered this same argument, and held that the statute permits assessment of this fee upon any judgment of conviction. *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶27, and cases cited therein. We continue to adhere to this conclusion, and affirm the assessment of this fee.

¶ 28 Defendant next contends, the State concedes, and we agree, that the trial court improperly assessed him the \$5 Electronic Citation fee, which is only to be imposed upon a judgment of guilty, or grant of supervision in any traffic, misdemeanor, municipal ordinance, or conservation case. (705 ILCS 105/27.3e (West 2012)). Here, defendant was convicted of a felony offense of aggravated battery to a peace officer which is clearly not covered by this statute. *People v. Moore*, 2014 IL App (1st) 112592-B, ¶46.

¶ 29 Finally, defendant contends, the State concedes and we agree, that his \$20 Violent Crime Victims Assistance Fund fine should be reduced to \$8. When defendant was sentenced, the statute provided that the \$20 fine is to be imposed only when no other fine is imposed. 725 ILCS 240/10(c) (West 2010). The statute further provided that when other fines are imposed, the court is to assess an additional penalty of \$4 for each \$40, or fraction thereof, of fine imposed. 725 ILCS 240/10(b) (West 2010). Here, defendant was assessed \$80 in fines. Thus, the total fine that should have been imposed under this statute was \$8. We, therefore, reduce the \$20 fine to \$8.

¶ 30 In light of the foregoing, we modify the fine and fees order as indicated and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 31 Affirmed as modified.