

No. 1-13-0055

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. 12 CR 4246
)	
ERNEST HOOVER,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm the judgment where trial counsel provided effective assistance when he did not file a futile motion to quash the search warrant and suppress evidence which resulted therefrom.

¶ 2 Following a bench trial, defendant Ernest Hoover was convicted of one count of possession of cannabis with intent to deliver and two counts of unlawful use of a weapon by a felon (UUWF) and sentenced to three concurrent terms of four years' imprisonment. On appeal, defendant contends that his trial counsel did not provide effective assistance because he failed to

file a motion to quash the search warrant and suppress the evidence which resulted therefrom.

We affirm.

¶ 3 The record shows that on February 2, 2012, Officer Durand Lee filed a complaint for a warrant to search defendant and the premises located at 7834 South Ellis Avenue, apartment 102 in Chicago, as well as seize cannabis, documents showing residency, paraphernalia used in the weighing, cutting, mixing or packaging of illegal drugs, money, and records detailing illegal drug transactions.

¶ 4 Officer Lee's complaint was based on information provided by a "J. Doe" informant.

Both affiants Lee and J. Doe appeared before the magistrate to obtain the search warrant.

According to the warrant, the informant told Lee that a man known as "Black" was selling weed from the apartment in question, and that the informant had purchased weed from him on several occasions over the last month, including within the last 48 hours from the time the complaint for search warrant was filed. The informant described "Black" as a stocky, short black male in his late 20's with a large nose, dark complexion, and braided hair. Lee ran the address in question with the physical description provided by the informant using the Chicago police department data warehouse. The results returned the name of defendant as having previously used that address as his residence. Lee showed the informant a picture of defendant, and the informant positively identified defendant as the individual he knew as "Black." Lee and the informant passed by the aforementioned address, and the informant pointed at and confirmed the building as being the location where he previously purchased weed from defendant. Based on those facts, Lee believed there was sufficient evidence for the issuance of a search warrant. The court granted the search warrant, which the police executed the following day.

¶ 5 The evidence at trial revealed that Officer Kevin Kusinski was part of a team of officers that executed the search warrant at the apartment in question at about 1:43 p.m. on February 3, 2012. The officers made a forced entry into the apartment, and Kusinski observed three adults and seven to eight children who were detained for safety reasons. There were three bedrooms in the apartment, one closest to the living room, one at the end of a hallway, and one in the middle of the other two bedrooms. The middle bedroom was locked and police forced the door open. Defendant, who was previously convicted of possession of a controlled substance with intent to deliver, was inside that bedroom and detained. Kusinski searched the middle bedroom where defendant was found and recovered 26 ziploc bags and a plastic bag, each containing cannabis. Defendant's identification card was found between the mattress and box spring of the middle bedroom. Kusinski recovered several other items from that bedroom, including a revolver containing three spent and two live rounds on a shelf in the closet, ziplock bags commonly used to package narcotics on the top of the night stand, and a digital scale commonly used to weigh narcotics from the window sill. After being taken into custody, defendant was told to get dressed. Defendant told Kusinski that his clothes were in the bedroom where the items were recovered, and Kusinski found defendant's pants under the bed. Kusinski searched the pants and found \$586.

¶ 6 Tracey Rainey, who testified for the defense, stated that she lived in the apartment in question with her mother and two children. Defendant was her friend and did not live at the apartment, but was there on February 3 to help her move. Following closing arguments, the court found defendant guilty of possession of cannabis with intent to deliver and two counts of UUWF.

¶ 7 On appeal, defendant contends that he was provided ineffective assistance of counsel because counsel failed to file a motion to quash the search warrant and suppress the evidence

which resulted therefrom. He specifically maintains that the complaint for the search warrant was based solely on the allegations of an unidentified informant with no track record of reliability.

Defendant thus argues that a motion to quash and suppress the evidence had a reasonable probability of success, and that the outcome at trial would have been different had the evidence been suppressed.

¶ 8 A defendant arguing ineffective assistance of counsel, must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000), citing *Strickland*, 466 U.S. at 697.

¶ 9 To prevail on a claim of ineffective assistance based on counsel's failure to file a motion to quash a search warrant and suppress evidence, defendant must demonstrate that the unargued motion is meritorious, and that a reasonable probability exists that the outcome of the trial would have been different if the evidence had been suppressed. *People v. Henderson*, 2013 IL 114040,

¶ 15. Counsel is not required to make futile motions in order to provide effective assistance. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). The question of whether to file a motion to suppress evidence is generally considered a matter of trial strategy, and has little bearing on competency of counsel. *People v. Kornegay*, 2014 IL App (1st) 122573, ¶ 20. Therefore, counsel's decision is given great deference and is generally immune from claims of ineffective assistance. *Id.*; *People v. Bryant*, 128 Ill. 2d 448, 458 (2008).

¶ 10 Our task on review is to ensure that the trial court had a substantial basis for concluding that probable cause existed to justify the issuance of the search warrant, and not to substitute our

judgment for that of the magistrate. *Kornegay*, 2014 IL App (1st) 122573, ¶¶ 21, 23. "Whether the necessary probable cause exists is governed not by technical legal rules, but rather by commonsense considerations that are factual and practical." *Id.*, ¶ 21. The veracity and basis of knowledge of the persons supplying the hearsay information are included in the circumstances evaluated by the issuing magistrate to determine if there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.*, ¶ 34, citing *People v. Smith*, 372 Ill. App. 3d 179, 184 (2007).

¶ 11 Here, Officer Lee filed a complaint for a search warrant based on information provided by an unnamed informant. The recitation of facts in that complaint included the information provided by the informant regarding his purchase of cannabis at defendant's residence, the informant's positive identification of defendant in a photograph, and the informant's identification of defendant's residence as he passed by the apartment building with Lee. In addition, the warrant complaint indicates that the informant appeared before the magistrate and signed the complaint under oath. The totality of these facts and circumstances satisfy the probable cause requirement for the issuance of the search warrant. Therefore, defendant's ineffective assistance claim fails because a motion to quash the search warrant and suppress the evidence was not meritorious, and the omission of such a motion did not prejudice defendant.

¶ 12 Nevertheless, defendant contends that the search warrant was not supported by probable cause because it was based on an anonymous informant whose reliability was not established. Relying in large part on *Smith*, 372 Ill. App. 3d at 179, defendant emphasizes that the mere fact that the informant appeared before the magistrate who issued the warrant does not allow any presumption that the magistrate questioned him and had an opportunity to assess his credibility. See *Id.* at 184 ("the informant's appearance before the magistrate [is] only one factor" in

analyzing his reliability). We find this court's decision in *Kornegay* instructive in disposing of defendant's argument that the informant's reliability was not established.

¶ 13 In *Kornegay*, the court granted a search warrant based on an unidentified informant who told police that he bought cannabis at a particular address in Chicago from a person named "Sidney." The informant positively identified a picture of the defendant from a police database, admitted purchasing drugs from him within the last 48 hours, and appeared before the magistrate at the time the warrant was issued. *Kornegay*, 2014 IL App (1st) 122573, ¶¶ 35-36. Taken as a whole, the *Kornegay* court found that the evidence provided the magistrate with a substantial basis to conclude that probable cause existed to search the address. *Id.*, ¶ 36. In so finding, the court held that despite the lack of proof that the informant was questioned in court, the informant appeared before the magistrate when the warrant was issued and was thus available for questioning. *Id.* "The fact that questioning may or may not have occurred does not undermine the magistrate's finding that probable cause existed to issue the search warrant because the informant's very presence supported his or her reliability." *Id.* Furthermore, as stated above, defendant overlooks the fact that the informant's presence before the judge was not the only factor showing the informant was reliable. The informant also positively identified defendant in a photo as the person who sold him cannabis, pointed out defendant's residence to Officer Lee, and the police corroborated the information provided by the informant. See *Id.*, ¶ 35 (weighing the informant's personal observations, the degree of detail offered and police corroboration of the information against the fact that the record did not establish that the informant testified in support of the warrant). Therefore, in the instant case, the informant's information was corroborated prior to the request for a search warrant.

¶ 14 In concluding that a motion to quash the search warrant and suppress evidence in this case would have been non-meritorious and futile as the search warrant was based on probable cause, we find *Florida v. J.L.*, 529 U.S. 266 (2000) and *People v. Brown*, 343 Ill. App. 3d 617 (2003), relied on by defendant, distinguishable from the case at bar. In *J.L.*, 529 U.S. at 271-72, the United States Supreme Court found the anonymous informant's tip lacked reliability because, without providing any other information, the anonymous caller provided no predictive information and provided the police without means to test the informant's knowledge or credibility where the informant merely reported that a young black male wearing a plaid shirt was standing at a specific bus stop and carrying a gun. In *Brown*, 343 Ill. App. 3d at 626-27, the appellate court found the anonymous tip lacked reliability where the informant stated that the defendant was on his way from Chicago with a kilo of marijuana, but did not provide a specific time or place that the criminal activity would occur. *J.L.* and *Brown* are inapposite because, unlike the case at bar, the informants in *J.L.* and *Brown* did not appear before a magistrate, the informants did not describe the basis for their knowledge, and the officers did not obtain search warrants. Moreover, the informants in *J.L.* and *Brown* were truly anonymous, where, in the case at bar, there was nothing anonymous about the informant except that the identity of the person was kept secret in the text of the search warrant. See *Kornegay*, 2014 IL App (1st) 122573, ¶¶ 28-29 (distinguishing *J.L.* and *Brown* on similar grounds).

¶ 15 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 16 Affirmed.