2016 IL App (1st) 141749-U

SECOND DIVISION
December 20, 2016

No. 1-14-1749

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	12 CR 12322
	)	
TONY RUCKER	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: Trial counsel was not ineffective for failing to file a motion to quash defendant's arrest and suppress evidence. Trial counsel was not ineffective for failing to object to the admission of unreliable evidence and for failing to adequately argue in mitigation. The $5 electronic citation fee is vacated.

¶ 2 Following a bench trial, defendant Tony Rucker was convicted of armed robbery (720 ILCS 5/18-2(a)(2) (West 2012)) and two counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) (UUWF) and was sentenced to 23 years' imprisonment for armed robbery and five years' imprisonment for UUWF, to be served concurrently. Defendant now

appeals his conviction and argues: (1) defense counsel was ineffective for failing to file a motion to quash arrest and suppress evidence; (2) defense counsel was ineffective for failing to object to the admission of unreliable evidence submitted by the State in aggravation and failed to adequately argue in mitigation; and (3) this court should vacate his $5 electronic citation fee because it is not authorized for felony convictions. For the reasons that follow, we affirm but correct the mittimus to vacate the $5 electronic citation fee.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with one count of armed robbery, two counts of UUWF and one count of aggravated unlawful restraint. The evidence presented at trial established the following. Kenneth Nowden went to 8002 South Ellis Street in Chicago on June 19, 2012, at approximately 6 p.m. to meet Shontay Dantzler. Nowden and Dantzler had met several days prior at a club and had been communicating by text message. Dantzler invited Nowden over that day, telling him to come inside the apartment building when he arrived.

¶ 5 When he arrived and went inside the building, Dantzler met him in the stairwell near a first floor apartment. They stood there and talked. Dantzler was playing with her phone and Nowden believed that she was texting someone else. About four or five minutes later, a man Nowden later identified as defendant came down the stairs and pointed a silver gun at him. Defendant instructed Nowden not to move and made other threatening comments. At the same time, two other men came in from outside of the building. They had t-shirts covering their faces. Defendant ordered the two men to go through Nowden's pockets. They did, and took Nowden's money and identification card. Defendant then ordered Nowden to turn over the cell phone that he was holding in his hand. Nowden gave defendant his phone and then ran from the building and got into his car and drove away.

¶ 6 Nowden stopped police officers about a block away and explained to them what had happened - that he had been robbed by a black male who was carrying a silver revolver, "wearing a white tank top and some jeans or shorts or whatever." The officers radioed for backup and stayed with Nowden. After a short while, other police officers returned with defendant in custody. Nowden identified defendant as the person who had robbed him at gunpoint. Police also showed Nowden a revolver, which he later identified as the gun that was used in the robbery.

¶ 7 Chicago police officer Victor Ramirez testified that he was working with his partner Officer Ruhnke on June 19, 2012, and responded to a flash message of a robbery shortly after 6 p.m. The offender was described as a "black male, wearing a white tank top and jeans, carrying a silver revolver." The flash message also indicated that the offender may be in the rear of the building at 8002 South Ellis, so Officer Ramirez and his partner went to that location.

¶ 8 As they approached the building from the rear, he saw two females standing on the second floor porch. They approached the women and learned that one of those women was Dantzler. In that instant, defendant, who matched the description of the offender given in the flash message, walked out of the second floor apartment onto the second floor porch. Officer Ramirez made eye contact with defendant before defendant ran back into the apartment. Officer Ramirez chased defendant. During the chase, Officer Ramirez saw that defendant had a gun in his waistband and saw defendant remove the gun from his waistband. Defendant ran into an apartment bedroom. Officer Ramirez saw defendant lift up a mattress and place the gun under it.

¶ 9 Officer Ramirez took defendant into custody and recovered the gun from under the mattress. Officer Ramirez brought defendant to where Nowden was waiting with other officers. The officers showed Nowden two individuals in the back of a squad car. Nowden positively

identified defendant as the person who was armed during the robbery. Nowden also identified the gun defendant placed under the mattress and Officer Ramirez recovered as the gun he saw during the robbery.

¶ 10 After Nowden identified defendant and the gun, Officer Ramirez went back to the apartment building where the crime occurred and arrested Dantzler. Inside Dantzler's purse, Officer Ramirez recovered defendant's identification card, her identification card and Nowden's identification card. Dantzler also had Nowden's cell phone hiding in her breast area, as well as $188 cash.

¶ 11 Chicago Police Detective Kevin Haley testified that he was working on June 19, 2012, and interviewed defendant at the police station. Detective Haley read defendant his Miranda rights and defendant waived his rights and made a statement. According to Detective Haley, defendant said that he was living with Dantzler and her family and needed money. He knew Nowden was coming over because he texted him from Dantzler's phone, luring him there under false pretenses. The other two men were in on the plan to rob Nowden. As soon as he saw Nowden arrive and approach the building, defendant gave them a signal and then came downstairs with the gun and demanded Nowden's property. Rucker insisted that Dantzler was not involved in the robbery. Detective Haley typed his notes after the interview but did not give defendant the opportunity to review the notes or write his own statement.

¶ 12 The State entered a certified copy of defendant's felony conviction for attempt robbery in case 10 CR 11514. The court found defendant guilty of both armed robbery and UUWF. Defendant's motion for a new trial was denied. Defendant was sentenced to twenty-three years for armed robbery and five years for UUWF, to be served concurrently. It is from this judgment that defendant now appeals.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues that he received ineffective assistance of counsel when counsel failed to file a motion to quash arrest and suppress evidence and when he failed to object to the admission of unreliable evidence submitted by the State in aggravation and failed to adequately argue in mitigation.

¶ 15 When addressing a defendant's claim of ineffective assistance of counsel we must consider "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to prevail on a claim of ineffective assistance, a defendant must typically show that (1) counsel made errors so serious, and his performance was so deficient, that he was not functioning as the "counsel" guaranteed by the sixth amendment of the federal constitution, and (2) these deficiencies so prejudiced the defendant as to deprive him of a fair trial. *Id*. at 687.

¶ 16 Counsel's decision of whether to file a motion to quash arrest and suppress evidence is traditionally viewed as one of trial strategy and defense counsel enjoys the strong presumption that the failure to challenge the validity of a defendant's arrest or to move to suppress was proper. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000). To overcome these presumptions and prevail on a claim of ineffectiveness based on counsel's failure to file a motion to quash and suppress, the defendant must show a reasonable probability that the motion would have been granted and that the outcome of the trial would have been different if the motion had been granted. *Id*. The failure to satisfy either of these prongs precludes a finding of ineffective assistance. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 17 Defendant argues that trial counsel was ineffective when he failed to file a motion to

quash defendant's arrest and suppress the gun, the showup identification and his statement where the police did not have probable cause to enter the porch and then the apartment where defendant was arrested and the gun was recovered. Defendant argues that because the motion would have been granted and there was a reasonable probability that the outcome of the trial would have been different, counsel was ineffective. The State responds that defendant cannot establish prejudice because a motion to quash arrest and suppress evidence would not have been granted.

¶ 18 The Fourth Amendment generally requires that an officer obtain a warrant supported by probable cause before arresting an individual. *People v. Johnson*, 237 Ill. 2d 81, 89 (2010). However, a warrantless arrest does not violate the Fourth Amendment if "the arresting officer has probable cause to believe that the person to be arrested is committing or has committed a crime." *People v. Wetherbe*, 122 Ill. App. 3d 654, 657 (1984). "Probable cause exists when the totality of the facts and circumstances known to the officers is such that a reasonably prudent person would believe that the suspect is committing or has committed a crime." *People v. Montgomery*, 112 Ill. 2d 517, 525 (1986).

¶ 19 The fourth amendment protects "people, not places." *Katz v. United States*, 339 U.S. 347, 351 (1967). The "capacity to claim the protection of the Fourth Amendment depends *** upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). The question is then whether defendant had a reasonable expectation of privacy on the back porch of the second floor apartment.

¶ 20 It is well-established in Illinois that a defendant does not have a reasonable expectation of privacy on the back porch of a multi-unit dwelling where: (1) the porch was not closed off by any doors, screens or gates; and (2) no evidence was presented that the police deliberately

avoided the locked front gates to enter the unlocked back yard. *People v. Hunley*, 313 Ill. App. 3d 16, 23-24 (2000); see also *People v. Smith*, 152 Ill. 2d 229 (1992) (a defendant does not have a reasonable expectation of privacy in an unlocked residential common area that was shared by other tenants).

¶ 21 The record in this case is lacking any evidence to establish that the police had to enter through a gate, not to mention a locked gate, or that the porch had any kind of gate. The two women standing on the second floor porch were visible to the police from the backyard, suggesting that the back porch was open. There is also no evidence that the police did anything but walk up the stairs of the porch with the intent to investigate the crime that had been reported to have occurred in that building. Therefore, we find that defendant had no reasonable expectation of privacy on the back porch and consequently defense counsel was not ineffective for failing to file a motion to suppress based on the officers' presence on the back porch.

¶ 22 Defendant also argues that Officer Ramirez did not have probable cause to enter the apartment even after he saw defendant on the back porch, even though defendant matched the general description of the offender.

¶ 23 At the very least, the police had reasonable suspicion to stop defendant when he availed himself to the occupants of the back porch because he matched the description of the offender. A *Terry* stop is a type of police-citizen encounter, which allows for a brief investigative detention, but must be supported by a reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); 725 ILCS 5/107-4 (West 2010). "An officer may make an investigatory stop if he or she reasonably infers from the circumstances that an offense has been committed or is about to be committed." *People v. Henderson*, 266 Ill. App. 3d 882, 885 (1994). The question is whether the facts available to the officer warrant a person of reasonable caution

to believe that the action which the officer took was appropriate. *People v. Houlihan*, 167 Ill. App. 3d 638, 642 (1988). An evaluation of a *Terry* stop necessarily entails balancing the need for the seizure against the invasion that the seizure entails. *Terry*, 392 U.S. at 21.

¶ 24 That reasonable suspicion turned into probable cause when defendant, who was present at the location of the crime and matched the description of the offender given to Officer Ramirez, made eye contact with Officer Ramirez and then fled into the apartment. Whether probable cause exists is determined by the totality of the circumstances. *People v. Earnest*, 224 Ill. App. 3d 90, 95 (1991) (citing *Illinois v. Gates*, 462 U.S. 213 (1983)). Flight or the use of evasive maneuvers from the police, although not determinative by itself, is a consideration in determining the existence of probable cause and when coupled with reasonable suspicion to stop an individual can constitute probable cause. *People v. Shelby*, 221 Ill. App. 3d 1028, 1044 (1991). The Supreme Court has said, "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea* and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." *Sibron v. New York*, 392 U.S. 40, 66-67 (2000); see also *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (holding that merely fleeing from police in a high-crime area provides police with reasonable suspicion that the individual was involved in criminal activity). All of the information known to Officer Ramirez, in conjunction with defendant's flight, gave Officer Ramirez probable cause to arrest defendant.

¶ 25 However, Officer Ramirez had to chase defendant into the apartment after defendant fled. Generally, a warrantless and nonconsensual entry into a suspect's home to make an arrest is prohibited by the fourth amendment, even with probable cause." *People v. Wear*, 229 Ill. 2d 545, 567 (2008) (citing *Payton v. New York*, 445 U.S. 573, 586-87 (1980)). Police officers may enter

a home without a warrant if exigent circumstances justify the entry. *People v. Foskey*, 136 Ill. 2d 66, 74 (1990) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971)). The most commonly referenced factors that may establish the existence of exigent circumstances include: (1) whether the offense under investigation was recently committed; (2) whether there was any deliberate or unjustifiable delay by the officers during which time a warrant could have been obtained; (3) whether a grave offense was involved, particularly one of violence; (4) whether the suspect was reasonably believed to be armed; (5) whether the police officers were acting upon a clear showing of probable cause; (6) whether there was a likelihood that the suspect would have escaped if not swiftly apprehended; (7) whether there was a strong reason to believe that the suspect was on the premises; and (8) whether the police entry, though nonconsensual, was made peaceably. *People v. Abney*, 81 Ill.2d 159, 169–72 (1980). Courts have also found exigent circumstances where police are in "hot pursuit" of a suspect who flees from a public place into his residence. *United States v. Santana*, 427 U.S. 38 (1976); *People v. Hunley*, 313 Ill. App. 3d 16, 25 (2000). The Supreme Court has held that, notwithstanding the warrant requirement, "a suspect may not defeat an arrest which has been set in motion in a public place *** by the expedient of escaping to a private place." *Santana*, 427 U.S. at 43. We have already determined that the officers had probable cause in this case.

¶ 26 Citing *Santana*, 427 U.S. 38 (1976), the State claims that a warrantless arrest upon probable cause of an individual in a public place, such as a doorway, does not violate the fourth amendment and therefore an analysis of exigency is unnecessary. In *Santana*, officers went to the defendant's home on information that the defendant had marked money in her possession which had just been used to make a heroin buy. When officers arrived at the defendant's residence, they saw the defendant standing in the doorway holding a brown bag that they suspected contained

narcotics. When officers approached her and announced their office, the defendant retreated into the vestibule of her home. The officers followed through the open door and caught the defendant in the vestibule. *Id*. at 45. The *Santana* court upheld the arrest. The court characterized the threshold of defendant's doorway as a public place because the defendant knowingly and voluntarily exposed herself to the public by choosing to stand there. *Id.* The court stated,

> " 'What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection.' *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. *Hester v. United States*, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924). Because the arrest was set in motion while the defendant was in this public place and because officers were in hot pursuit, the defendant could not defeat the arrest by simply escaping to the vestibule." *Id*. at 43.

¶ 27 "Hot pursuit" means "some sort of a chase," but it need not be an extended pursuit through the public streets. *Santana*, 42 U.S. at 43. The Supreme Court has explained that "hot pursuit" involves an immediate or continuous pursuit of a suspect from the scene of a crime. *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984). Here, Officer Ramirez's pursuit of defendant was certainly immediate and continuous. The officers arrived on the back porch and as they did so defendant exited the apartment door onto the porch. Defendant made eye contact with Officer Ramirez and then fled back into the apartment. See *Santana*, 427 U.S. at 40 (officers immediately followed defendant through the open doorway of her home); *Wear*, 229 Ill. 2d at 568 (officer immediately followed defendant through the front-door of his home); People v. *Tillman*, 355 Ill. App. 3d 194,196 (2005) (officers chased suspects up a staircase and followed

them through an apartment door).

¶ 28 Other exigent circumstances can be considered here and weigh in the State's favor as well. As mentioned above, the police were acting upon a clear showing of probable cause, and Officer Ramirez knew defendant was in the apartment. The offense was under investigation, and Officer Ramirez entered the apartment peacefully through the open door.

¶ 29 In order to determine that the officers acted reasonably, "[t]he circumstance must militate against delay and justify the officers' decision to proceed without a warrant." *Foskey*, 136 Ill. 2d at 75. Here, when the police arrived on the back porch to investigate the crime reported, defendant, who matched the description of the offender, fled into the apartment after making eye contact with Officer Ramirez. Under circumstances like this, police officers may reasonably believe that further delay would threaten their safety or encourage defendant to use the weapons against them or to affect an escape. See *Warden v. Hayden*, 387 U.S. 294, 299 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others"). Based on the foregoing, we find that Officer Ramirez was acting reasonably and that exigent circumstances justified his warrantless entry into the home.

¶ 30 Having found that Officer Ramirez was properly in the home, it follows that the recovery of the handgun from underneath the mattress was also proper. As stated above, Officer Ramirez had probable cause to arrest defendant. "A search incident to a valid arrest is proper if the search is conducted either contemporaneously or immediately prior to the arrest." *Tillman*, 355 Ill. App. 3d at 200. And, "[s]earching a person or a place under a suspect's control, without a warrant, is lawful when the search is made subsequent to a lawful arrest and is conducted with the goal of locating other items connected to the crime." *Id.* Therefore, we conclude that counsel was not

ineffective for failing to file a motion to quash and suppress where there was no reasonable probability that the motion would have been granted.

¶ 31 Defendant also argues that he was denied his right to effective assistance of counsel during his sentencing hearing because trial counsel failed to object to the admission of unreliable evidence submitted by the State in aggravation and failed to adequately argue in mitigation. Defendant contends that at sentencing, the State described the facts surrounding defendant's prior conviction for attempt robbery "without indicating from where the information was obtained or providing any corroborating evidence. The State's description amounted to double hearsay and was not reliable." Defendant faults counsel for failing to object to the State's summation of the facts of his prior attempt robbery and for conceding the seriousness of these offenses and claims that counsel's shortcomings resulted in a longer sentence being imposed.

¶ 32 As discussed, in order to establish ineffective assistance of counsel, defendant must establish that counsel's performance fell below minimal professional standards and that a reasonable probability exists that the sentence was affected by counsel's poor performance. *People v. Orange*, 168 Ill. 2d 138, 168 (1995). Decisions regarding "what matters to object to and when to object" are matters of trial strategy. *People v. Pecoraro*, 175 Ill. 2d 294, 327 (1997). As a reviewing court, we are highly deferential to trial counsel of matters of trial strategy. *People v. Madej*, 177 Ill. 2d 116, 157 (1997).

¶ 33 In this case, counsel's decision to not object to the hearsay presented by the State during sentencing was not unreasonable and defendant did not suffer prejudice as a result of counsel's failure to do so. A court is permitted to consider hearsay information at sentencing. *People v. Harris*, 375 Ill. App. 3d 398, 409 (2007). The “ordinary rules of evidence which govern at trial are relaxed at the sentencing hearing.” *Id*. at 408. At sentencing, a “hearsay objection affects

the weight rather than the admissibility of the evidence." *Id*. We also note that the defendant makes no argument or claim that any statement or representation made in aggravation was incorrect.

¶ 34 Defendant also claims that defense counsel should have objected because the prosecutor did not present any witnesses or state from where he obtained the facts surrounding defendant's previous conviction. However, the record shows that defendant pleaded guilty in the case the prosecutor used to establish defendant's prior attempt armed robbery conviction. Before a final judgment can be entered of a plea of guilty, there has to be a factual basis for the plea. Illinois Supreme Court Rule 402(c) (eff. July 1, 2012). Clearly, the prosecutor used information that constituted the factual basis for defendant's plea when he informed the court of the circumstances surrounding defendant's prior conviction.

¶ 35 We cannot think of any reasonable trial strategy where it would be prudent for defense counsel to object to the introduction of the facts that served as the underlying basis for a defendant's prior plea of guilty during sentencing on a subsequent conviction, especially when the State introduced a certified copy of defendant's prior conviction at trial without objection. Therefore, we conclude that counsel was not ineffective for failing to object to admission of hearsay during sentencing, nor was counsel ineffective for failing to object to the State's introduction of the factual basis for defendant's plea of guilty to his prior armed robbery without live witnesses. Defendant suffered no prejudice.

¶ 36 Defendant also suffered no prejudice as a result of defense counsel's argument in mitigation. Defense counsel conceded in her argument in mitigation that defendant had done "dumb things" and "dangerous things to the community" and that he had a "bad record." Defendant argues that his record was minimal. He claims he had only one felony and two

misdemeanor convictions and none of his prior convictions involved violence that resulted in physical harm.

¶ 37 When these comments are read in the context of the entire argument in mitigation it is clear that counsel's argument did not prejudice defendant in any way. Defendant received a sentence of eight years for the armed robbery conviction which is two years above the statutory minimum. Given his earlier attempt armed robbery conviction, we cannot say defendant was prejudiced by his counsel's performance or, for that matter, by any aspect of the sentencing hearing. Defense counsel argued that defendant had no significant background, but acknowledged something quite obvious: that he had done dumb things that had been dangerous to the community. The court had already heard the circumstances surrounding defendant's prior attempt armed robbery conviction and defense counsel was merely acknowledging that fact. Defense counsel further argued that defendant was "an anomaly" because he was not involved with a gang and only had one felony conviction despite growing up in an area infested with gangs and crime. She argued that defendant was intelligent, had completed high school and had dreams for the future. She also argued that given the facts of the case, he may have been induced to commit the crime by the woman he was dating. Given the entirety of the argument and the fact that defendant himself told the court that he was "remorseful," had made "bad decisions" and apologized to "those people that this case *** affected" we cannot see how defense counsel's comments prejudiced defendant here.

¶ 38 Finally, defendant argues and the State agrees that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2012)) was erroneously imposed and should be vacated. See *People v. Moody*, 2015 IL App (1st) 130071, ¶ 85. Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) we correct the mittimus and instruct the clerk of the court to correct the fines and

fees order to reflect that we have vacated the $5 electronic citation fee.

¶ 39 CONCLUSION

¶ 40 For the foregoing reasons, we affirm defendant's conviction but vacate the $5 electronic citation fee and instruct the clerk of the court to correct the fines and fees order.