2017 IL App (1st) 142147-U

No. 1-14-2147

Order filed February 17, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 13 CR 12812
	)	
DERRICK HICKS,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: State presented *prima facie* foundation for admission of controlled substances into evidence, so that defendant was not denied a fair trial nor was counsel ineffective when counsel did not make a foundational objection.

¶ 2 Pursuant to a 2014 jury trial, defendant Derrick Hicks was convicted of delivery of a controlled substance (less than one gram of heroin) and sentenced as a mandatory Class X offender to six years' imprisonment. On appeal, defendant contends that the court deprived him of a fair trial by admitting the heroin evidence without an adequate foundation as to the chain of

custody, and that counsel was ineffective for not objecting to the admission of the heroin on the basis of the inadequate foundation. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with delivery of a controlled substance (DCS) and possession of a controlled substance with intent to deliver (PCSI) for allegedly delivering, and possessing with intent to deliver, less than a gram of heroin.

¶ 4 At trial, defense counsel made an opening statement noting that the State would present only police testimony – no video or audio recordings, no fingerprints, no statement by the alleged drug buyer – linking defendant to drugs, and asking the jury to find him not guilty.

¶ 5 Police officer Brian Kane testified to being the surveillance officer in a narcotics-enforcement team on June 5, 2013. From his vantage point in a parked car, he had an unobstructed view of defendant engaging in three similar transactions, a few minutes apart, that he suspected were drug sales. Separately, three people approached defendant and spoke with him briefly. After meeting each person, defendant went to a nearby fencepost, picked up an item at its base, tore off a piece of the item, and returned the larger item to the base of the fencepost. Each time, defendant returned to the person and accepted money from the person in exchange for something in defendant's hand. Officer Kane could not tell what that object was, nor how much money each person paid for it. Officer Kane reported each such transaction to other officers by radio. After the third transaction, he described the third buyer, reported his direction after the transaction, and told officers to arrest him some distance away. (Officer Kane had not described the other two buyers to other officers, and could not recall if the second buyer was a man or woman.) A short time later, Officer Kane viewed the third buyer in custody and identified him to officers as the third buyer. Officer Kane also observed officers detain defendant at the scene of the three transactions, and observed Officer Maurice Guerin recover an item from the base of the

aforesaid fencepost. Officer Kane never lost sight of defendant, never observed anyone but defendant and Officer Guerin by the fencepost, and never observed anyone near defendant but the three buyers and the officers.

¶ 6 Officer Maurice Guerin testified to detaining the third buyer as directed and described by Officer Kane, learning later that his name was Nathaniel Guy. As Officer Guerin approached Guy, he dropped "an item" to the ground. Officer Guerin detained Guy and recovered the item, a "clear zip-lock bag with a smaller zip-lock bag with a spade on it, containing a white powder substance" that he suspected to be heroin; "there was also a clear piece of tape on the plastic bag." Officer Guerin told Officer Kane by radio that he recovered suspected narcotics. Officer Guerin then detained defendant, who matched the description given by Officer Kane. After another radio call from Officer Kane, Officer Guerin went to a fencepost located near defendant and found two "clear zip-lock bags with *** the black spades containing the white powder substance *** encased in a clear white tape." There was nothing else at the base of the fencepost but grass. Defendant was arrested, and $192 in cash was recovered from him.

¶ 7 Officer Guerin gave the bag he recovered from Guy, and the two bags he found at the fencepost, to Officer Kathleen McCann to be inventoried. Officer Guerin watched Officer McCann inventory the three bags. He described the inventory process as placing an item in an inventory bag, filling out a form on the bag "with all the pertinent information," creating an inventory on a police computer, and placing the bag and inventory into a vault "where somebody from Forensic Services comes and picks it up and takes it to the Illinois State Police Crime Lab for testing." Officer Guerin identified People's Exhibit 1, an inventory bag with an inventory number containing another bag with a black spade on it, as the bag dropped by Guy. Officer Guerin testified that the bag of suspected heroin was substantially the same as when he recovered

it from Guy. Officer Guerin also identified People's Exhibit 2 as the two bags he found at the fencepost, and testified that they were in the same, or substantially the same, condition as when he found them.

¶ 8 Officer Kathleen McCann testified that Officer Guerin gave her "a clear plastic zip-lock bag [with] black spades on it and clear tape" containing white powder and "two clear plastic zip-lock bags imprinted with the black spades [and] clear tape on it, [with] white powder inside both of those bags." She placed the single item "into the clear plastic bag that's in front of you," marked the bag with the police case number and a unique inventory number for that bag, signed the bag, heat-sealed it, signed by the seal "so that nobody can tamper with my signature," and placed it in a vault. She then did the same for the other two bags, which received another unique inventory number. (She did not state either number in her testimony.) She explained that the evidence in the vault "goes to the Illinois State Crime Lab" for testing. She had constant "care and control" of the items from when Officer Guerin gave them to her until she put them into the vault. When presented with People's Exhibit 1, she identified it as "one clear plastic zip-lock bag I inventoried," identifying her own signatures on the bag. The exhibit was in the same condition as when she inventoried it, "except that there's another bag in here that I'm assuming the Crime Lab put in." When presented with People's Exhibit 2, she identified it as "the bag that I filled out after I placed the two clear zip-lock bags imprinted with the black spades." The exhibit was in the same, or substantially the same, condition as when she inventoried it. On cross-examination, she testified that she did not send the bags to be tested for fingerprints, and never sent suspected narcotics for fingerprint testing in her 22 years of police service.

¶ 9 Forensic chemist Christine Dillo-Benak of the Illinois State Police Crime Laboratory testified to her qualifications and was accepted as an expert witness by the trial court without

objection. She identified People's Exhibit 1 from "my markings here from when I took custody, and here when I sealed the case after I was finished with analysis." It was at trial in the same, or substantially the same, condition as when she last saw it. She had received the exhibit from evidence technician Henry Anderson at the "drug chemistry evidence vault." She identified the contents of Exhibit 1 from "my markings here as well." When she received the exhibit originally, she opened it and weighed the contents; there was 0.2 grams of powder. Three tests showed that the powder contained heroin. She then placed the powder and its packaging into a plastic bag, heat-sealed it, marked it, placed it "back into the inventory bag," and heat-sealed and marked it.

¶ 10 Dillo-Benak identified People's Exhibit 2 from "my markings here once again when I took custody, and the markings over the seal when I was finished." At trial, it was in the same, or substantially the same, condition as when she last saw it. She had received this exhibit at the "drug chemistry evidence vault" as well. She identified the contents of Exhibit 2 from "my markings across the seal once again." When she received the exhibit originally, she opened it and separately weighed the contents of each of the two smaller bags therein; there was a total of 0.4 grams of powder in the two bags. Three tests showed that the powder contained heroin. She then placed the powder from the two bags into two new bags, the packaging into another new bag, placed them all into a larger bag, heat-sealed it, marked it, placed it in the inventory bag, and heat-sealed and marked it.

¶ 11 People's Exhibits 1 and 2 were entered into evidence without objection.

¶ 12 In closing arguments, counsel argued that the State's case that defendant possessed and delivered heroin consisted only of testimony from Officers Kane and Guerin, and argued various alleged shortcomings and discrepancies in that testimony. Following instructions and deliberations, the jury found defendant guilty of DCS and not guilty of PCSI.

¶ 13 In the posttrial motion, defendant challenged the sufficiency of the trial evidence but not the foundation for the admission of any evidence. The court denied the motion and proceeded to sentencing, where defendant received six years in the Illinois Department of Corrections as a mandatory class X offender. This appeal timely followed.

¶ 14 On appeal, defendant contends that he was deprived of a fair trial by the admission of People's Exhibits 1 and 2 without an adequate foundation as to chain of custody, and that counsel was ineffective for not objecting to the admission of the exhibits on the basis of the inadequate foundation. Defendant acknowledges that these claims were not preserved in the trial court but argues plain error and trial counsel's ineffectiveness.

¶ 15 A claim that the State presented an incomplete chain of custody is not a challenge to the sufficiency of the evidence but its foundation and thus subject to forfeiture. *People v. Banks,* 2016 IL App (1st) 131009, ¶ 68 (citing *People v. Woods*, 214 Ill. 2d 455, 471 (2005)). "The chain of custody establishes a foundation for such evidence as reliable and admissible; it does not function as proof of the existence of an element of the crime of possession of a controlled substance." *People v. Alsup*, 241 Ill. 2d 266, 275 (2011). The application of forfeiture to such claims is particularly appropriate because a defendant's failure to object to a foundation at trial deprives the State of its opportunity to cure any deficiency in the foundation. *Banks*, 2016 IL App (1st) 131009, ¶ 71 (citing *Woods*, 214 Ill. 2d at 470). A chain of custody challenge may be reviewed for plain error in the rare case of a complete breakdown in the chain, such as when " 'the inventory number or description of the recovered and tested items do not match,' " so that " 'there is no link between the substance tested by the chemist and the substance recovered at the time of the defendant's arrest.' " *Banks*, 2016 IL App (1st) 131009, ¶ 68 (quoting *Woods*, 214 Ill. 2d at 471-72).

¶ 16 When the State seeks to introduce an object into evidence, it must lay a proper foundation. *Banks*, 2016 IL App (1st) 131009, ¶ 69 (citing *Woods*, 214 Ill. 2d at 466). For readily-identifiable items with unique characteristics and a composition not easily changed, the State may establish through testimony that the item is the recovered item in substantially the same condition as when it was recovered. *Banks*, 2016 IL App (1st) 131009, ¶ 69. For items " 'not readily identifiable or *** susceptible to tampering, contamination or exchange,' " the State must establish a chain of custody " 'sufficiently complete to make it improbable that the evidence has been subject to tampering or accidental substitution.' " *Banks*, 2016 IL App (1st) 131009, ¶ 69 (quoting *Woods*, 214 Ill. 2d at 467, and *Alsup*, 241 Ill. 2d at 274). When the State establishes this *prima facie* case, the defendant then bears the burden of showing actual evidence of tampering, alteration, or substitution. *Banks*, 2016 IL App (1st) 131009, ¶ 69 (citing *Alsup*, 241 Ill. 2d at 274-75).

> " 'In the absence of such evidence [of tampering, alteration, or substitution] from defendant, a sufficiently complete chain of custody does not require that every person in the chain testify, nor must the State exclude every possibility of tampering or contamination. [Citation.] It is not erroneous to admit evidence even where the chain of custody has a missing link if there was testimony which sufficiently described the condition of the evidence when delivered which matched the description of the evidence when examined. [Citation.] At this point, deficiencies in the chain of custody go to the weight, not admissibility, of the evidence.' " *Banks*, 2016 IL App (1st) 131009, ¶ 69 (quoting *Alsup*, 241 Ill. 2d at 275).

The admission of evidence at trial is within the court's discretion, and we set aside the court's decision only for an abuse of discretion; that is, when the ruling was arbitrary, fanciful, or

unreasonable or when no reasonable person would agree with the trial court. *Banks*, 2016 IL App (1st) 131009, ¶ 70.

¶ 17 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that he was prejudiced thereby. *Banks*, 2016 IL App (1st) 131009, ¶ 123. In establishing the first prong, a defendant must overcome the presumption that counsel's conduct was the result of trial strategy and thus generally immune from an ineffectiveness claim. *Banks*, 2016 IL App (1st) 131009, ¶ 123. To establish prejudice, a defendant must show a reasonable probability that the result of the proceeding would have been different absent counsel's deficient performance, and specifically that the deficient performance rendered the result unreliable or fundamentally unfair. *Banks*, 2016 IL App (1st) 131009, ¶ 123 (citing *People v. Easley*, 192 Ill. 2d 307, 317-18 (2000)).

¶ 18 Here, Officers Guerin and McCann both testified that Guerin gave McCann three clear plastic zip-lock bags of white powder marked with black spades and having clear tape attached, and that McCann inventoried these items. Officer McCann testified to marking the inventory bags with her signatures and sealing them before placing them in a vault. Dillo-Benak testified that Exhibits 1 and 2 contained the items she found by testing to be heroin, identifying them by markings she herself had made after opening the inventory bags. Officer McCann at trial – that is, after Dillo-Benak performed her weighing and testing – identified Exhibits 1 and 2 as the evidence she had received and inventoried, based on her own signatures on the inventory bags. Thus, even absent express testimony on the inventory numbers, said absence not being the same as expressly non-matching inventory numbers as posited in *Woods*, we conclude that the State presented testimony sufficiently describing the condition of Exhibits 1 and 2 when delivered and

the matching description of said exhibits when examined. As a result, the State presented enough evidence to make it improbable that the heroin in Exhibits 1 and 2 had been subject to tampering or accidental substitution.

¶ 19 The State having presented a *prima facie* foundation for the heroin, a mere objection from counsel would have been unavailing. Instead, counsel would have had to present actual evidence of tampering with, or alteration or substitution of, the recovered items. Defendant did not present any such evidence at trial and does not claim on appeal that such evidence exists. As to ineffectiveness, counsel followed a sound trial strategy of challenging the evidence connecting defendant to the recovered items – the testimony of Officers Kane and Guerin – rather than challenging the evidence that the recovered items contained heroin. Lastly, as the State laid a *prima facie* foundation for the heroin, and defendant does not allege (much less present) any evidence of tampering or the like, defendant has failed to establish that counsel's performance rendered the result of his trial unreliable or fundamentally unfair. Thus, defendant was neither deprived of a fair trial, nor provided ineffective assistance by trial counsel, when counsel did not object to the heroin evidence and it was admitted into evidence at trial.

¶ 20 Accordingly, the judgment of the circuit court is affirmed.

¶ 21 Affirmed.