2017 IL App (1st) 142415-U

No. 1-14-2415

Order filed March 13, 2017

FIRST 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 15649
	)	
RODERICK CHARLESTON,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction where his trial counsel was not ineffective for failing to challenge a juror, and modify the fines and fees order.

¶ 2 Following a jury trial, defendant Roderick Charleston was convicted of delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2012)) and sentenced to 10 years' imprisonment. On appeal, he argues his trial counsel was ineffective for failing to strike a juror

who was ultimately seated on the jury, several fees were improperly assessed, and he should be awarded presentence incarceration credit on his fines and fees order. We affirm and modify the fines and fees order.

¶ 3 Defendant was charged by indictment with one count of delivery of a controlled substance (between 1 and 15 grams of heroin) (720 ILCS 570/401(c)(1) (West 2012)) and one count of delivery of a controlled substance (between 1 and 15 grams of heroin) within 1000 feet of a school (720 ILCS 570/407(b)(1), (c)(1) (West 2012)) stemming from a controlled narcotics purchase by a Chicago police officer in Chicago on July 25, 2013. The State proceeded to trial on the delivery of a controlled substance (between 1 and 15 grams of heroin) charge.

¶ 4 During jury selection, the trial court's procedure was to conduct *voir dire* of 14 venirepersons at a time then proceed to chambers with the attorneys and defendant to select a panel of jurors. During the court's questioning, venireperson R.D. informed the court her brother was a police officer in the suburbs. The following colloquy occurred between the court and R.D.:

> "[THE COURT:] Okay. Do you know any police officers, lawyers, or judges?
>
> [R.D.:] Just the police officers that are in school that I see everyday.
>
> My brother though was a former police officer in the northwest suburbs.
>
> [THE COURT:] Is there anything about those relationships that would affect your ability to be fair?
>
> [R.D.:] My brother's position at one point in the police department was undercover for narcotics.
>
> [THE COURT:] Okay. Well, could you put that aside and be fair to both sides in this case?

[R.D.:] I hope so.

[THE COURT:] Is there any doubt in your mind whether or not you –

[R.D.:] It was a tough life. I had to watch him move from house to house because of the type of people that he had to deal with. It was scary.

[THE COURT:] Well, is there anything about the nature of the charge that would affect your ability to be fair and impartial? I guess that's related to that.

[R.D.:] No.

[THE COURT:] No?

[R.D.:] No.

[THE COURT:] Would you use sympathy, bias, or prejudice in reaching your decision?

[R.D.:] No.

[THE COURT:] Would you wait for all the evidence, the arguments of the attorneys, and my instructions of the law before making up your mind?

[R.D.:] Absolutely.

[THE COURT:] Would you follow the law as I give it to you even if you might disagree with it?

[R.D.:] Yes.

[THE COURT:] Will you consider the evidence in light of your own observations and experiences in life and use your common sense?

[R.D.:] Yes.

[THE COURT:] If after you heard everything, you believed that the State has proved its case beyond a reasonable doubt, will you sign a guilty verdict?

[R.D.:] Yes.

[THE COURT:] On the other hand, if after hearing everything, you do not believe the State has proved its case beyond a reasonable doubt, will you sign a not guilty verdict?

[R.D.:] Yes.

[THE COURT:] Will you be fair to both sides?

[R.D.:] Yes.

[THE COURT:] Is there anything I have not asked you about that would affect your ability to be fair?

[R.D.:] No.

[THE COURT:] Is there anything that I should know that might affect your ability to serve?

[R.D.:] No."

¶ 5 In jury selection, the court granted defense counsel two of three requested motions to dismiss for cause and counsel used six of her seven peremptory challenges. Two jurors and two alternates still needed to be impaneled. The State accepted R.D. as a panel member and tendered her to the defense. The following exchange between defense counsel and the trial court then occurred:

"[DEFENSE COUNSEL:] So [R.D.] comes to us.

We would ask to question more, since we don't have a full panel.

[THE COURT:] Excuse me?

[DEFENSE COUNSEL:] We would ask before we get [R.D.], we would ask that the Court question additional ones because that's just three.

[THE COURT:] No. You have to make your decision now.

[DEFENSE COUNSEL:] Judge, that was, for the record, over the Defense objection.

(SHORT PAUSE.)

[DEFENSE COUNSEL:] Judge, I'll say over objection, but we will accept [R.D.].

[THE COURT:] Well, it's not over objection. You know you have a strike to use. You know my procedure in picking juries. You have done it here several times. I've always required both sides if there's an open panel to make their decisions on those jurors that they can know whether or not to come back.

[DEFENSE COUNSEL:] Judge, just –

[THE COURT:] It's not unusual. It's how I do it in every trial.

[DEFENSE COUNSEL:] Judge, I think I've only picked with the Court once before, so I haven't done multiple juries. I don't recall whether we had an open panel, so I've just made my record.

We will accept [R.D.]."

¶ 6 After R.D. was selected, the court noted that "we still need to complete this panel of four and then two alternates." After six additional venirepersons were *voir dired,* defense counsel used defendant's final peremptory challenge on a juror, and the parties ultimately selected a full jury with two alternates.

¶ 7 At trial, Chicago police officer William LePine testified that, on July 25, 2013, around 3:30 to 4:00 p.m., he was working in the area of 3700 West Grenshaw as a surveillance officer on a team conducting controlled narcotics purchases. It was daylight out when LePine, positioned in a covert vehicle wearing civilian clothes, noticed a man, identified in court as defendant, "loitering" on the sidewalk. Defendant was moving around. He would stop and talk with two other individuals nearby and then walk away. He would stop a passing vehicle, speak to the occupant, and then walk away. LePine was about 30 to 60 feet away from defendant at all times, and would sometimes only see part of him because of trees or passing vehicles.

¶ 8 After observing defendant for about two minutes, LePine concluded that, based upon his experience and training, defendant was engaging in narcotics sales. LePine contacted his team and provided a description of defendant. Officer Ugarte, who was the undercover buyer, approached in a covert vehicle and parked in front of where defendant was standing. Defendant approached the vehicle, bent down a little, and reached his hand into the passenger side of the vehicle. Ugarte reached his hand towards defendant's hand before defendant backed away from the vehicle and Ugarte drove away.

¶ 9 LePine continued to observe defendant move around for about five minutes and, during this time, saw him approach other vehicles in a similar manner to how he approached Ugarte. Defendant also disappeared into a nearby alley for "seconds" before returning to the street. After encountering defendant, Ugarte had notified the team, and Officer Wherfel arrived and detained defendant. Ugarte then drove by and radioed that defendant was the person who had sold him suspect heroin. Defendant was then taken into custody and placed into Wherfel's car.

¶ 10 Chicago police officer Ugarte testified that, on July 25, 2013, he was working as a buy officer on a team including Officers LePine and Wherfel in the area of 3719 West Grenshaw. Ugarte arrived in a covert vehicle while wearing civilian clothes in order to appear as a drug user. He pulled up to a man standing on the sidewalk, who matched the description he received from Lepine. Ugarte engaged the man, identified in court as defendant, in conversation and said "D," a street term for heroin.

¶ 11 Defendant approached Ugarte's vehicle and asked "how many," to which Ugarte replied "three." Defendant reached into the passenger side window and handed Ugarte three bags with a Batman logo containing white powder of suspect heroin. Ugarte handed him $30 of Chicago Police Department funds. Defendant took the money, and Ugarte drove away. When Ugarte returned about five minutes later, he saw defendant detained, and indicated by radio that defendant had engaged in a positive narcotics transaction with him. Ugarte then inventoried the suspect heroin and submitted it to the Illinois State Police for laboratory analysis.

¶ 12 Forensic chemist Gail Gutierrez testified that she received three small bags with a Batman logo containing a powder substance. Testing and analysis indicated all three bags tested positive for heroin with a total weight of 1.4 grams.

¶ 13 Defense witness Patrick Wherfel, a Chicago police officer, testified he was working on July 25, 2013, as a narcotics officer with his partner, Sergeant Schnier, and Officers LePine and Ugarte. These team members met prior to proceeding to the area of 3700 West Grenshaw. In that area, Wherfel and Schnier stopped and detained a man, identified in court as defendant. Wherfel searched defendant but did not recover any narcotics or the prerecorded Chicago Police Department funds.

¶ 14 The jury found defendant guilty of delivery of a controlled substance. After defendant's written motion for a new trial was denied, the trial court sentenced defendant to 10 years' imprisonment and assessed fines and fees in the amount of $2,802. Defendant filed a timely notice of appeal.

¶ 15 On appeal, defendant argues he received the ineffective assistance of counsel where his trial attorney failed to strike for cause or use a peremptory challenge on juror R.D. He also argues the trial court improperly assessed several fees and he should be awarded his presentence incarceration credit.

¶ 16 A defendant has a constitutional right to the effective assistance of counsel. See *Strickland v. Washington,* 466 U.S. 668, 685-86 (1984). "Effective assistance [of counsel] amounts to competent, not necessarily perfect, representation." *People v. Garcia,* 405 Ill. App. 3d 608, 617 (2010). In order to establish that counsel is ineffective, the defendant must show both that (1) counsel's representation was deficient and (2) that deficiency prejudiced the defendant. *People v. Petrenko,* 237 Ill. 2d 490, 496 (2010) (citing *Strickland,* 466 U.S. at 694).

¶ 17 "In demonstrating, under the first *Strickland* prong, that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy." *People v. Houston,* 226 Ill. 2d 135, 144 (2007). Further, with respect to the second prong, "the prejudice prong of *Strickland* is not simply an 'outcome-determinative' test but, rather, may be satisfied if [the] defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Jackson,* 205 Ill. 2d 247, 259 (2001). A defendant must

establish both prongs set forth in *Strickland* in order to prevail on his ineffective assistance of counsel claim. See *People v. Colon,* 225 Ill. 2d 125, 135 (2007).

¶ 18 Defense counsel's actions during jury selection involve matters of trial strategy and therefore are "virtually unchallengeable." *People v. Manning,* 241 Ill. 2d 319, 333 (2011). Although a prospective juror may be removed for cause when that person's "views would prevent or substantially impair the performance of his duties as a juror," that juror need not be removed for cause when he provides an equivocal response. *People v. Buss,* 187 Ill. 2d 144, 187 (1999) (quoting *People v. Armstrong,* 183 Ill. 2d 130, 143 (1998)), *abrogated on other grounds, People v. Sorenson,* 196 Ill. 2d 425 (2001). In fact, "[a]n equivocal response by a prospective juror does not necessitate striking the prospective juror for cause where the prospective juror later states that he will try to disregard his bias." *People v. Hobley,* 159 Ill. 2d 272, 297 (1994).

¶ 19 Defendant argues that, based on R.D.'s responses during *voir dire*, his attorney was ineffective for failing to challenge juror R.D. for cause. Specifically, defendant argues R.D. was sympathetic toward undercover narcotics officers because her brother was one and it was "a tough life" and "scary." We disagree with defendant's characterization of the colloquy between the trial court and R.D. While R.D. initially provided equivocal responses regarding whether she could be fair, ultimately she said she could be fair and impartial to both sides. See *Manning,* 241 Ill. 2d at 334 ("[t]he entire voir dire of [a potential juror] should be considered in evaluating whether and to what extent [the potential juror] exhibited bias against defendant"). Moreover, an equivocal response alone does not necessarily require a prospective juror to be removed. See *Buss,* 187 Ill. 2d at 187.

¶ 20 Viewing the totality of the *voir dire*, R.D. affirmatively indicated she would be fair and impartial to both sides and would not use sympathy, bias, or prejudice in reaching her decision. She stated she would hear all the evidence before deciding guilt and would apply the law given by the trial court even if she disagreed with it. Finally, she stated that, if the State failed to prove its case beyond a reasonable doubt, she would sign a "not guilty" verdict. Given that R.D.'s responses indicated she would be fair and impartial, we cannot say defense counsel's performance was deficient by failing to strike R.D. for cause. See *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007) ("To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy").

¶ 21 Defendant also argues that defense counsel was ineffective for failing to use a peremptory challenge on R.D. However, as previous discussed, R.D. affirmatively stated she would be fair and impartial and would not use bias or prejudice in evaluating the evidence. Counsel could, therefore, reasonably find use of a peremptory challenge unwarranted.

¶ 22 Moreover, the record indicates that, at the time R.D. was questioned, defendant had only one peremptory challenge remaining with two jurors and two alternates left to be seated. It is certainly conceivable that, given R.D.'s later responses indicating impartiality, defense counsel believed it was best to impanel R.D. and save the last peremptory challenge to use against a potentially biased juror. See *People v. Bowman,* 325 Ill. App. 3d 411, 428 (2001) ("The decision whether to exercise an available peremptory challenge is a strategic one"); see also *Manning*, 241 Ill. 2d at 336 (finding that counsel's decision to reserve two remaining peremptory challenges with three more jurors left to be seated was not unreasonable). Indeed, defense counsel did use the remaining peremptory challenge on another prospective juror. Accordingly,

as R.D. indicated she could be impartial and trial counsel reasonably chose to reserve the last peremptory challenge, defendant is not able to establish his counsel's representation was deficient and thus, he cannot establish an ineffective assistance of counsel claim. See *Houston*, 226 Ill. 2d at 144-45.

¶ 23 Defendant argues counsel's failure to strike for cause or use a peremptory challenge was the result of "ignorance of the law" where counsel stated she would accept R.D. "over objection." Specifically, he argues counsel was hesitant about R.D. serving because she could not be fair and therefore wanted to screen more prospective jurors before making a decision on R.D. Viewing counsel's comment in context, the record shows defense counsel's objection pertained to the jury selection procedure, not to any particular reservations regarding R.D. We also reject defendant's contention that counsel believed stating "over objection" was a way to challenge prospective jurors and thus demonstrates she was ignorant of the law. Counsel had previously used multiple peremptory challenges and successfully moved to strike two other jurors for cause. Counsel was therefore fully aware of the proper procedure for challenging jurors, and her "objection" was directed at the court's procedure for selecting a jury, not R.D.'s suitability as a juror.

¶ 24 Even assuming defense counsel's conduct in jury selection was not objectively reasonable, defendant's ineffective assistance of counsel claim still fails because he suffered no prejudice from the alleged error. See *People v. Metcalfe*, 202 Ill. 2d 544, 562-63 (2002) (determining counsel's performance was not deficient but still addressing the prejudice prong and finding "the evidence was more than sufficient to prove defendant guilty beyond a

reasonable doubt"). As in *Metcalfe*, the evidence at trial here was "more than sufficient" to prove defendant guilty beyond a reasonable doubt.

¶ 25 At trial, Officer LePine testified that he witnessed defendant approach Officer Ugarte's vehicle and engage in a hand to hand transaction with Ugarte. Further, Ugarte testified that he asked defendant for heroin and defendant asked him how much he wanted. Ugarte then exchanged $30 in Chicago Police Department funds for three bags containing white powder of suspect heroin. Based upon LePine's description of defendant, defendant was detained and identified by Ugarte as the person who sold him the suspect heroin. A forensic scientist later confirmed the bags each tested positive for heroin with a total weight of 1.4 grams. The evidence that defendant delivered a controlled substance was therefore overwhelming.

¶ 26 While defendant argues the evidence was not overwhelming because no narcotics or the Chicago Police Department funds were recovered from defendant, these items need not be recovered for a conviction to stand. See *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23 (finding that because a single eyewitness's testimony can sustain a conviction, corroborating physical evidence is not required); see *People v. Trotter*, 293 Ill. App. 3d 617, 619 (1997) ("there is no requirement that pre-recorded or marked funds used in a narcotics transaction be recovered for a conviction to stand"). There is "more than sufficient" evidence to find defendant guilty beyond a reasonable doubt of delivery of a controlled substance, and defendant therefore cannot establish the requisite prejudice required under *Strickland*. See *Metcalfe*, 202 Ill. 2d at 562-63. Accordingly, defendant's ineffective assistance of counsel claim fails.

¶ 27 Defendant argues three fees were improperly assessed and that his fines and fees order should be modified to reflect the accurate amount of presentence incarceration credit. Defendant

did not raise this challenge in the trial court. However, we may modify a fines and fees order without remand per Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999). We review *de novo* the propriety of the trial court's imposition of fines and fees. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 28 Defendant argues the $20 preliminary hearing fee imposed for "a preliminary examination for each defendant held to bail or recognizance" (55 ILCS 5/4-2002.1(a) (West 2012)) was improperly assessed because he was indicted. The State correctly concedes this charge is improper. Because defendant was charged by indictment, we vacate this $20 preliminary hearing fee. *People v. Smith*, 236 Ill. 2d 162, 174 (2010).

¶ 29 Defendant next argues, and the State correctly concedes, that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2012)) should be vacated. This fee is only imposed on a defendant "in any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision." 705 ILCS 105/27.3e (West 2012). Here, defendant was convicted of felony delivery of a controlled substance, an offense not listed in the statute. See 705 ILCS 105/27.3e (West 2012). Accordingly, we vacate this $5 fee. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115.

¶ 30 Defendant argues, and the State correctly concedes, that the $5 court services fee (55 ILCS 5/5-1101(a) (West 2012)) was improperly assessed because he was not convicted under the Illinois Vehicle Code. This fee is only authorized when a defendant is convicted of a violation of the Illinois Vehicle Code other than driving under the influence. 55 ILCS 5/5-1101(a) (West 2012). Defendant was convicted under the Criminal Code of delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2012)), which is not part of the Illinois Vehicle Code.

Accordingly, we vacate this $5 court system fee. *People v. Glass*, 2017 IL App (1st) 143551, ¶ 24.

¶ 31 Lastly, defendant requests his presentence incarceration credit. The parties agree defendant is entitled to $1,780 of credit to offset his fines because of the 356 days he spent in presentence custody. 725 ILCS 5/110-14(a) (West 2012) (a defendant incarcerated on a bailable offense who does not post bail and against whom a fine is imposed is allowed a $5 credit for each day spent in presentence custody). The fines and fees order lists a total balance of $2,802. However, as it lists $2,150 in fines subject to offset and $674 in fees, the correct total is $2,824. Vacating the aforementioned fees and applying defendant's presentence incarceration credit towards the fines, the fines and fees order should reflect a new balance of $1,014.

¶ 32 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County, vacate three improperly-assessed fees, and order the fines and fees order corrected to reflect the new fee amount and presentence credit.

¶ 33 Affirmed as modified.