2017 IL App (1st) 142849-U

SIXTH DIVISION
MARCH 17, 2017

No. 1-14-2849

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 2902
	)	
DWAYNE ANDERSON,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The police stop of the vehicle in which defendant was a passenger was lawful pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), and defendant's motion to suppress was properly denied; defendant's trial counsel was not ineffective for failure to offer evidence that allegedly showed an informant's tip was unreliable; the DNA fee is vacated and credit is given against other assessments; the mittimus is corrected to reflect a single count of drug possession.

¶ 2 Following a bench trial, defendant Dwayne Anderson was found guilty of Class 4 possession of heroin and sentenced to two years in prison. On appeal, defendant contends that the trial court should have granted his pretrial motion to quash arrest and suppress evidence

because the testimony showed that the police lacked reasonable, articulable suspicion to stop the vehicle in which he was a passenger, and his resulting arrest and the seizure of contraband were the fruits of the unlawful traffic stop. Defendant also asserts that his trial counsel was ineffective for failing to proffer evidence that the informant's tip leading to the vehicle stop was unreliable. In addition, defendant challenges the imposition of a $250 DNA analysis assessment and requests credit against other assessments. Defendant further contends the mittimus should be corrected to reflect that his conviction was for a single count of possession of a controlled substance. We affirm defendant's conviction for possession of a controlled substance, amend the assessment of fines and fees, and correct the mittimus.

¶ 3 Defendant was charged by information with possession of 1 gram or more but less than 15 grams of heroin with intent to deliver, a Class 1 felony, in violation of section 401(c)(1) of the Illinois Controlled Substances Act. 720 ILCS 570/401(c)(1) (West 2012). Defendant's counsel filed a pretrial motion to quash arrest and suppress evidence. At the hearing on the motion, Chicago Police Officer Albert Wyroba testified that in January 2013, he was conducting a narcotics investigation. Pursuant to that investigation, he had a conversation with a registered confidential informant whom he had used previously. The information Wyroba had elicited from the informant in the past had led to successful arrests and prosecutions for narcotics offenses. The informant told Wyroba that an individual with the nickname of "G" was picking up narcotics from 1528 North Keating and dropping them off in the area of Lavergne and Iowa. "G" was known to travel in a white station wagon. From prior knowledge obtained from a contact card search and a search of the police database, Wyroba determined that defendant was "G".

¶ 4 Based on the gathered information, on January 11, 2013, Wyroba set up surveillance in the area of 1528 North Keating. Wyroba and two other officers, Lesch and Delcid, were in an

unmarked police vehicle near that address. At 11:03 a.m., Wyroba was driving the police vehicle when he observed a white station wagon occupied by four individuals. Defendant was in the front passenger seat. Wyroba made an in-court identification of defendant as the individual he saw in the vehicle. The station wagon, which was northbound on Keating coming from Le Moyne, pulled over and parked on the west side of Keating. Wyroba observed defendant get out of the station wagon and walk toward a residence. About a minute later, defendant returned and re-entered the front passenger seat. As the station wagon pulled away and continued north on Keating, Wyroba drove the police vehicle west to Cicero Avenue and headed north on a path parallel to that of the station wagon, which turned west in an alley toward Cicero. Wyroba drove his police vehicle into the alley and maneuvered it toward the front of the station wagon, partially blocking it. Wyroba and his two partners exited their vehicle and approached the station wagon. Wyroba was wearing a bullet-proof vest and his police star and gun were visible. He walked up to the front of the station wagon and went around to the passenger side where he observed defendant drop two plastic bags from the vehicle's window onto the ground. Wyroba retrieved the bags, which contained 30 tinfoil packets containing a white powder. Based on his experience, he believed the white powder to be suspect heroin.

¶ 5 At the conclusion of the hearing, the State moved for a directed finding in its favor. After hearing arguments and considering case law, the court granted the State's motion and denied defendant's motion to quash arrest and suppress evidence.

¶ 6 At the subsequent bench trial, Officer Wyroba testified that he had been a police officer for over nine years and had made over a thousand narcotics-related arrests, including over 20 arrests for possession of narcotics with intent to deliver. As part of his police training, he had interviewed individuals, many of them convicted felons, who were involved in the selling and

distribution of narcotics. He was familiar with the way narcotics were packaged for individual consumption and for distribution. Following this preliminary testimony, the court ruled that Wyroba was an expert in the field of narcotics sales and distribution.

¶ 7 In January 2013, Wyroba had developed information from his conversations with several individuals recently arrested for possession and delivery of heroin. As a result of those conversations, Wyroba's investigation focused on defendant, whom he identified at trial. Wyroba's inquiry led him to converse with a confidential informant who had given him reliable information in the past that had led to 5 to 10 narcotics-related arrests. Following that conversation, Wyroba set up a narcotics surveillance on January 11, 2013, with Officers Delcid and Lesch.

¶ 8 During the surveillance, Wyroba saw the station wagon parked at the target address of 1528 North Keating. He observed defendant leave the vehicle, run into the gangway of that address, and reappear a few minutes later to re-enter the passenger side of the vehicle. Wyroba repeated his earlier testimony of stopping the station wagon. The driver of the station wagon was a woman, and defendant was seated next to her. In the back seat, a male subject was seated behind the driver, and another man, Jamie Fountain, was sitting behind defendant. Wyroba knew Fountain from the area of Lavergne and Augusta. Fountain was not Wyroba's confidential informant. Wyroba observed defendant "reach his hand out the window and drop two golf ball sized objects" which Wyroba recovered within a minute. The front passenger-side window was open; the rear passenger-side window where Fountain was sitting was not open. The two recovered items were clear plastic bags, each containing 15 tinfoil packets of suspect heroin. In his opinion, the items were packaged for street-level sales. Wyroba kept the items in his custody and control until another officer inventoried them.

¶ 9 The parties stipulated that if Paula Szum were called as a witness, she would be qualified as an expert in forensic chemistry and would testify that she received the 30 inventoried packets. She opened, weighed, and tested the contents of 11 of the packets, and her opinion, within a reasonable degree of scientific certainty, was that the 11 items tested positive for 3.3 grams of heroin. It was further stipulated that an adequate chain of custody was maintained at all times. Following the stipulation, the State rested. Defendant's motion for a directed finding was denied.

¶ 10 Jamie Fountain was called as a defense witness and testified that he knew defendant. When asked whether he was with defendant at 11 a.m. on January 11, 2013, Fountain invoked his right under the fifth amendment not to answer any questions about what happened that day.

¶ 11 Arthur Murray was also called to testify for the defense. He was currently in a work-release program in anticipation of being paroled from the Illinois Department of Corrections. Murray identified defendant in court as someone he had known "for awhile" as they "practically grew up" together. On January 11, 2013, at about 11 a.m., Murray was in the back seat of a white Taurus station wagon. Defendant was in the front passenger seat and his girlfriend was driving. Fountain had entered the back seat at or near Augusta and Lavergne and was sitting next to Murray. From there the station wagon traveled to Le Moyne and Keating. The vehicle parked and everyone remained inside. A man came up to the car and handed Fountain two bundles of heroin. Murray described the man as defendant's cousin but did not know his name. Each of the two bundles contained 15 or 20 bags of heroin. Then the station wagon drove off. When the police "cornered" the vehicle in the alley near Cicero, Fountain threw the two bundles out onto the ground from the back passenger side. The police ordered everyone to get out and stand against a wall in the alley. The police pulled Fountain aside and spoke with him. Then they placed handcuffs on defendant who was the only person arrested.

¶ 12 On cross-examination, Murray acknowledged that before the trial that morning he had a conversation with the prosecutor, Mr. Tristan, and Tristan's partner, Joseph Wasserman. Murray denied telling Tristan that defendant got out of the vehicle and went into the gangway, came back, and handed the two packs of heroin to Fountain. Murray testified he had told Tristan it was Fountain who left the station wagon and it was Fountain who threw the packs of heroin out of the vehicle. Murray admitted to have been convicted of retail theft in 2009 and of possession of a controlled substance in 2013. Following Murray's testimony, the defense rested.

¶ 13 In rebuttal, Joseph Wasserman testified he was a student at Marquette Law School and a law clerk for the State's Attorney's Office pursuant to Supreme Court Rule 711 (eff. July 1, 2013). Wasserman was present when the prosecutor, Mr. Tristan, had a conversation that morning with Arthur Murray about the events of January 11, 2013, in which Murray told Tristan the following. The occupants of the vehicle were defendant, Fountain, defendant's girlfriend, and himself. Defendant was in the back seat. Before the police pulled the vehicle over, it had made a stop and defendant had left the vehicle. The others remained in the vehicle. Defendant came back with two ball-like items that were clear plastic, held together with a pink wrapper like a knot, and inside was a white substance. Defendant gave the items to Fountain and, after the vehicle was pulled over by the police, Fountain threw them out the window.

¶ 14 After closing arguments, the court found defendant guilty of the lesser-included offense of possession of a controlled substance. The court based its ruling on the testimony of Officer Wyroba that it was defendant who threw the drugs out of the car window. The court found that Arthur Murray's testimony for the defense was impeached by Joseph Wasserman. Subsequently, defendant's written posttrial motion was denied and the court sentenced defendant to two years

in prison on the charge of possession of a controlled substance. Defendant was credited with 33 days spent in custody prior to sentencing.

¶ 15 On appeal, defendant contends that the trial court improperly denied his motion to quash arrest and suppress evidence because the police lacked reasonable suspicion to stop his vehicle. He asserts that Officer Wyroba's suspicion rested on a tip from an anonymous informant whose reliability the State failed to establish. We do not find defendant's contention persuasive. Evidence adduced at the pretrial hearing on the motion to suppress, together with evidence heard at trial, established reasonable suspicion for the vehicle stop. We may consider evidence adduced at trial to affirm the denial of a pretrial motion to suppress. *People v. Centeno*, 333 Ill. App. 3d 604, 620 (2002).

¶ 16 The fourth amendment to the United States Constitution protects people against unreasonable searches and seizures. U.S. Const., amend. IV; *People v. Sanders*, 2013 IL App (1st) 102696, ¶ 13 (citing *People v. Gherna*, 203 Ill. 2d 165, 176 (2003)). Under the fourth amendment, reasonableness generally requires a warrant supported by probable cause. *Sanders*, 2013 IL App (1st) 102696, ¶ 13 (citing *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001)). However, *Terry v. Ohio*, 392 U.S. 1 (1968), recognized an exception to the warrant requirement. Pursuant to *Terry*, a law enforcement officer may, under appropriate circumstances, briefly detain a person for questioning if the officer reasonably believes that the person has committed or is about to commit a crime. *Id.* at 21-22. The United States Supreme Court has observed that the usual traffic stop is more analogous to a *Terry* investigative stop than to a formal arrest. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998). Stopping a vehicle and detaining its occupants constitutes a "seizure" within the meaning of the fourth amendment and, therefore, a vehicle stop is subject to the fourth amendment requirement of reasonableness. *People v. Jones*, 215 Ill. 2d

261, 270 (2005). Accordingly, a vehicle stop is analogous to a *Terry* stop and generally is analyzed under *Terry* principles. *Id.*

¶ 17 A *Terry* stop may be initiated based upon information the police receive from a member of the public. *Sanders*, 2013 IL App (1st) 102696, ¶ 15. However, "[a]n informant's tip to police must bear some indicia of reliability to provide a sufficient basis for a *Terry*-type seizure." *Village of Mundelein v. Thompson*, 341 Ill. App. 3d 842, 850 (2003). A reviewing court should consider an individual's "veracity, reliability, and basis of knowledge" when analyzing a tip given to a police officer. *People v. Sparks*, 315 Ill. App. 3d 786, 792 (2000). A tip's reliability is sufficiently supported when accompanied by "predictive information and readily observed details" that officers can subsequently confirm. *Sanders*, 2013 IL App (1st) 102696, ¶ 15. In reviewing a trial court's ruling on a motion to suppress, we give great deference to the trial court's factual findings and reverse those findings only if they are against the weight of the evidence, but we review *de novo* a trial court's ultimate decision to grant or deny the motion. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006); *People v. Close*, 238 Ill. 2d 497, 504 (2010). In reviewing the denial of a motion to suppress, this court may rely on trial testimony to affirm the trial court's denial of the motion. *People v. Centeno*, 333 Ill. App. 3d 604, 620 (2002).

¶ 18 Defendant argues that the stop of the station wagon was improper because the informant's tip to Officer Wyroba lacked reliability and, consequently, Wyroba lacked the reasonable suspicion required to stop the vehicle. Defendant portrays the informant as anonymous and argues that his anonymity weighs against his or her reliability. This court has made the distinction between a confidential informant, whose identity is known to the police officer but concealed from the court and an anonymous informant, who is "unknown to both the investigating officer and the magistrate." *People v. Bryant*, 389 Ill. App. 3d 500, 518-19 (2009).

This court has recognized the "difference between an anonymous tip and one from a known informant whose reputation can be ascertained and who can be held accountable if a tip turns out to be fabricated." *Sanders*, 2013 IL App (1st) 102696, ¶ 19. In the instant case, the informant was known to Wyroba and had supplied him with information in a number of previous investigations.

¶ 19 We believe that the informant's reliability was sufficiently established so as to supply the police with reasonable suspicion that defendant had committed or was about to commit a crime. The evidence showed that while conducting a narcotics investigation, Wyroba developed information from recent arrestees engaged in the possession or delivery of heroin, and that information led him to focus his attention on defendant. Wyroba's investigation next led him to converse with a "registered" confidential informant who had supplied reliable information in the past that had led to 5 to 10 narcotics-related arrests. We note that a confidential informant is deemed more reliable than an anonymous informant. *Bryant*, 39 Ill. App. 3d at 518. Another indication of reliability is shown where, as here, the informant previously has provided reliable tips. See *People v. Beck*, 167 Ill. App. 3d 412, 419 (1988) (the informant had provided the officer with information which had led to arrests or convictions on at least four prior occasions).

¶ 20 The informant told Wyroba that an individual nicknamed "G" was known to travel in a white station wagon and was picking up narcotics from 1528 North Keating and delivering them at a location in the area of Lavergne and Iowa. From the police database and Wyroba's prior knowledge which he had obtained from a contact card search, Wyroba confirmed that defendant was "G". Consequently, Wyroba set up a surveillance of the Keating address. He observed defendant in a white station wagon which stopped at the very address on Keating which the informant said was the source of the heroin. Defendant exited the station wagon, went to the gangway of the building at that location, returned a few minutes later, and re-entered the station

wagon which drove away. A tip which is predictive of future behavior is placed higher on the reliability scale because it suggests the informant has knowledge not available to the public. *Alabama v. White*, 496 U.S. 325, 332 (1990). Wyroba's observations verified the information given to him by the confidential informant's tip, which correctly predicted defendant's identity, the vehicle defendant would use, and his stop at the Keating address to pick up heroin before going on to the delivery location. Consequently, Wyroba had reason to believe the informant was reliable enough to justify a *Terry* stop. *Id.* at 331. The details the informant supplied about defendant's drug-delivery routine, together with prior information from the informant that had led to narcotics arrests on several previous occasions, were sufficient to establish the reliability of the informant's tip and provided reasonable suspicion for Wyroba to stop the station wagon. Therefore, the trial court properly denied the motion to quash arrest and suppress evidence.

¶ 21 Defendant disputes that the evidence established the reliability of the informant's tip. He contends that the testimony failed to reveal the basis for the informant's knowledge; failed to show that Wyroba possessed the informant's name, address, cell phone number or other means of finding the informant; failed to reveal the informant's complete "track record" of successful prosecutions versus unfounded tips; failed to show the means of Wyroba's communication with the informant (*e.g.*, by telephone or face-to-face); failed to indicate whether the informant was paid or expected to be paid for his information; and indicated Wyroba failed to see whether defendant went where predicted with the heroin. We will not speculate on the basis of an incomplete record as to what the evidence might have shown. See *People v. Calderon*, 101 Ill. App. 3d 469, 475-76 (1981). The evidence that was presented, however, established that the information in the informant's tip was sufficiently reliable to allow Officer Wyroba to

reasonably infer that defendant was involved in criminal activity and justified a *Terry* stop. *Sanders*, 2013 IL App (1st) 102696, ¶ 31.

¶ 22 Defendant next argues that, if the trial court's denial of his motion to suppress was based on the theory that defendant abandoned the drugs, excusing an illegality in the traffic stop, the court was in error. At issue during the hearing was the applicability of the decision in *California v. Hodari D.*, 499 U.S. 621 (1991). There, the Supreme Court held that cocaine discarded by defendant while he was being chased by police was "not the fruit of a seizure" that should be excluded from evidence. *Id.* at 629. In the instant case, defense counsel brought up *Hodari D.* during argument on the motion, only to distinguish the case. Counsel argued that defendant never tried to run from Wyroba and that dropping the heroin from the car window did not constitute abandonment so as to excuse the unlawful stop of the vehicle.

¶ 23 It does not appear from the record that the trial court based its ruling on a theory that abandonment of the heroin excused an illegal vehicle stop. In any event, what is before us on review is the correctness of the trial court's ruling on the motion and not the reasoning the court employed. *City of Chicago v. Holland*, 206 Ill. 2d 480, 491-92 (2003). We may affirm the judgment below on any basis supported by the record. *People v. Johnson*, 208 Ill. 2d 118, 128-29 (2003). We have determined that the police had reasonable, articulable suspicion to justify the *Terry* stop of the station wagon and, consequently, the trial court properly denied the motion to suppress. Therefore, we need not reach defendant's alternate argument concerning abandonment.

¶ 24 Defendant also contends that his trial counsel was ineffective for failing to elicit his address at the pretrial hearing. Wyroba testified the informant told him that defendant was picking up narcotics from 1528 North Keating and delivering them to a second specified location. Defendant claims that 1528 North Keating was his residence, an assertion based on a

police arrest report that was never introduced in evidence and the presentence investigation report created after trial. Defendant asserts that his address was general information anyone might possess and that if the trial court was informed during the hearing on the motion to suppress that he lived at the Keating address, the court would know the informant's tip was not such inside information as to establish his reliability and likely would have granted the motion to suppress.

¶ 25 A claim of ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under that test, a defendant must demonstrate that his counsel's performance was deficient and that this deficient performance prejudiced the defendant so that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010).

¶ 26 Defendant's argument is without merit. Assuming defense counsel had submitted defendant's address in evidence at the hearing, it would have had little impact on how the trial court would have assessed the reliability of the informant where the remaining information supplied by the informant (defendant's identity, the vehicle he traveled in, and the route he followed in delivering the heroin) was verified by Wyroba's observation. "One indicia of the reliability of information exists when the facts learned through police investigation independently verify a *substantial part* of the informant's tip." (Emphasis added.) *People v. Williams*, 305 Ill. App. 3d 517, 525 (1999). Because defendant has failed to establish a reasonable probability that eliciting his address would have prompted the court to grant the

motion to suppress, his failure to satisfy the second prong of *Strickland* defeats his claim of ineffective assistance of counsel.

¶ 27 Next, the parties agree that the imposition of a $250 DNA analysis fee pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2014)) must be vacated. Defendant previously had been convicted of three felonies: Class X manufacture and delivery of a controlled substance in 2001; Class 1 aggravated discharge of a firearm in 2003; and Class 4 possession of a controlled substance in 2011. We may presume that on each of those occasions he was required to submit a DNA sample and pay the appropriate analysis fee. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 37-38. Consequently, defendant was not required to submit another sample or pay another fee. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Accordingly, we order the circuit court clerk to vacate that portion of its order requiring defendant to pay the $250 DNA analysis fee.

¶ 28 Defendant asserts that the trial court improperly denied him presentence custody credit of $65 against two assessments which are labeled as fees but have been found to be fines subject to presentence custody credit. First, he was assessed a $50 court system fee. 55 ILCS 5/5-1101(c) (West 2014). He contends, and the State correctly concedes, that this assessment is a fine subject to offset by presentencing incarceration credit. *People v. Jones*, 223 Ill. 2d 569, 588 (2006); *People v. Blanchard*, 2015 IL App (1st) 132281, ¶¶ 20-22. Second, he was also assessed a $15 State Police operations fee. 705 ILCS 105/27.3a(1.5) (West 2014). He contends, and the State agrees, that this assessment also operates as a fine subject to offset. *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46. Defendant, who was awarded 33 days of presentence custody credit, was entitled to a credit of $5 for each day in custody. 725 ILCS 5/110-14(a) (West 2014); *People*

v. Williams, 409 Ill. App. 3d 408, 418-19 (2011). The $65 sum of these two fees is completely offset by defendant's $165 presentence credit.

¶ 29 Finally, defendant contends, and the State concedes, that the mittimus incorrectly states that his conviction was "MFG/DEL 1<15 GR HEROIN/ANALOG" when in fact he was convicted only of possession of heroin, not manufacture or delivery of heroin. Defendant was charged with possession of heroin with intent to deliver. The report of proceedings reveals that at the conclusion of the bench trial, the trial court ruled that defendant was guilty of the lesser included offense of possession of heroin. When the oral pronouncement of the court and the written order of commitment are in conflict, the oral pronouncement controls. *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). Thus, the mittimus should be corrected to reflect the proper judgment entered by the trial court. *People v. Hill*, 408 Ill. App. 3d 23, 32 (2011). We have the authority to correct a mittimus that misidentifies the offense of which defendant was convicted. *People v. Gorosteata*, 374 Ill. App. 3d 203, 230 (2007) (overruled on other grounds by *People v. Chambers*, 2016 IL 117911). Accordingly, we instruct the clerk of the circuit court to correct defendant's mittimus to reflect that defendant's conviction on count one was for possession of heroin.

¶ 30 Under our authority pursuant to Supreme Court Rule 615(b) (eff. Aug. 27, 1999), we vacate the portion of the fines and fees order assessing a $250 DNA analysis fee; we re-designate the $50 court system fee and the $15 State Police operations fee as fines subject to offset by presentence credit; and we direct the circuit court clerk to correct the order accordingly. We further direct the circuit court clerk to correct the mittimus to reflect that defendant's sole conviction was for one count of possession of heroin. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 31 Affirmed; fines and fees order corrected; mittimus corrected.