FIRST DIVISION
December 3, 2018

No. 1-16-1113

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. 15 CR 5681
	)	
VINCENT ROSS,	)	Honorable
	)	Mauricio Araujo,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Griffin and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for possession of a controlled substance with intent to deliver is affirmed. We reject his claim that his trial counsel was ineffective for failing to file a motion to suppress his statements to officers, made in the absence of *Miranda* warnings, because these statements were not made during an interrogation and their suppression would not have changed the outcome of his trial.

¶ 2 Defendant Vincent Ross was convicted in a bench trial of possession of a controlled substance (cocaine) with intent to deliver (720 ILCS 570/401(c)(2) (West 2014)). Due to his criminal background, Mr. Ross was sentenced as a Class X offender to six years in prison. On appeal, Mr. Ross contends his trial counsel was ineffective for not filing a motion to suppress a

statement in which he acknowledged possession of the narcotics. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Mr. Ross was charged with possession of between 1 and 15 grams of cocaine with intent to deliver. The crime was alleged to have occurred at about 8 p.m. on March 8, 2015. At trial, Chicago police officer Cox testified that, at that time, he was acting as a surveillance officer and working with four other officers in an undercover narcotics investigation team. Officer Cox testified that he had made hundreds of narcotics-based arrests in his 12 years as a police officer.

¶ 5 Officer Cox was observing the area of 4314 West Cermak Road. He wore civilian clothes and was in a covert vehicle. The area was well-lit. Officer Cox saw Mr. Ross standing near 2201 South Kolin Avenue, which is at the southeast corner of Cermak and Kolin. Officer Cox was standing on the north side of Cermak, a four-lane road, and he estimated he was between 100 and 130 feet away from Mr. Ross. Officer Cox used binoculars at times during this surveillance.

¶ 6 Mr. Ross was wearing a black jacket with a large white "P" on it. An unidentified man approached Mr. Ross and handed him United States currency. Mr. Ross accepted the money from the man and walked to the north side of Cermak to a flower pot on the porch of 4314 West Cermak. At that point, Mr. Ross was 15 feet away from Officer Cox, who observed Mr. Ross reach into the flower pot and remove an item. Mr. Ross then crossed back to the south side of Cermak and handed the item to the unidentified man. Officer Cox testified he did not lose sight of Mr. Ross during these actions.

¶ 7 Within 10 minutes of that transaction, Officer Cox observed two additional transactions involving other buyers. During the second and third transactions, Mr. Ross again crossed the street and retrieved an item from the flower pot at 4314 West Cermak.

¶ 8 Officer Cox relayed Mr. Ross's description and location to his team members as the

transactions occurred. When Officer Cox arrived at 2201 South Kolin, he directed Officer Pruger to the flower pot at 4314 West Cermak. From the flower pot, Officer Pruger recovered a clear plastic bag containing suspect cocaine.

¶ 9 On cross-examination, Officer Cox said his view of Mr. Ross was unobstructed. Officer Cox could not see the denominations of the bills collected by Mr. Ross or hear any conversations he had with the individuals who approached him. Officer Cox saw Mr. Ross hand each individual a "small item." Officer Cox acknowledged no narcotics were recovered from Mr. Ross and that he lost sight of the flower pot when he left his surveillance location to meet the other officers after the transactions. He did not see Officer Pruger remove the plastic bag from the flower pot.

¶ 10 Officer Pruger testified he was working as an enforcement officer on the narcotics surveillance team. After Officer Cox called him, he met Officer Cox several blocks away from the intersection of Cermak and Kolin and then went to the intersection. There, Officer Pruger saw Mr. Ross wearing a black jacket with a large white "P" on it. No one else in the area was wearing a similar jacket.

¶ 11 Officer Pruger said he and Officer Cox detained Mr. Ross, and Officers Salgado and Ramirez, two additional team members, arrived at the scene. Officer Pruger went to 4314 West Cermak and retrieved from the flower pot a large zip-top bag that sat on top of the dirt in the pot. The large bag contained 11 smaller bags. No one was on the porch when he retrieved the bag, and he kept the bag in his care and control until he returned to the police station. On cross-examination, Officer Pruger acknowledged he did not observe the transactions and that people other than Mr. Ross could have had access to the flower pot.

¶ 12 Officer Salgado testified he also acted as an enforcement officer and he was present,

along with Officers Cox, Pruger, and Ramirez, as well as a fifth officer, when Mr. Ross was detained. According to Officer Salgado, at the point that he was detained, Mr. Ross said to Officer Salgado and Officer Ramirez that he was "trying to make a few bucks" and that he "only served two cars" and the rest of the cash that was recovered from him was from shooting dice. Officer Salgado testified to those statements but made clear that he was not repeating "verbatim" what Mr. Ross had said. On cross-examination, Officer Salgado acknowledged that Mr. Ross had been handcuffed for "[a]bout a minute, minute and a half" and was "in custody" when he made these statements.

¶ 13 Officer Phillips testified he was acting as an enforcement officer during the surveillance and he saw Mr. Ross near 4314 Cermak. He recovered suspect narcotics from Officer Pruger at the police station, and they were placed in an inventory bag and sent to a lab for testing. On cross-examination, Officer Phillips said he did not see Mr. Ross holding any narcotics. He stated that $379 in United States currency was also recovered from Mr. Ross. The parties stipulated that the contents of the 11 zip-top bags were tested and found to contain 1.3 grams of cocaine. Mr. Ross's motion for a directed finding was denied.

¶ 14 The defense called Officer Cox, who said the arrest report he prepared indicated Mr. Ross made a statement and was then placed into custody. Officer Cox was not present for Mr. Ross's statement, which was related to him by Officers Salgado and Ramirez. When shown a copy of the report, Officer Cox acknowledged it did not contain any "chronology" regarding when Mr. Ross's statement was made in relation to when he was placed in custody.

¶ 15 At the close of evidence, the trial court made explicit findings that the police officers were credible and found Mr. Ross guilty of the charged offense. Mr. Ross filed a motion for a new trial, which was denied. Due to his prior criminal convictions, Mr. Ross was subject to a

mandatory Class X sentence. The court sentenced him to the minimum of six years in prison.

¶ 16 II. JURISDICTION

¶ 17 Mr. Ross was sentenced on March 24, 2016, and timely filed his notice of appeal that same day. This court has jurisdiction pursuant to article VI, section 6 of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6), and Illinois Supreme Court Rules 603 and 606, governing appeals from final judgments of conviction in criminal cases (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 18 III. ANALYSIS

¶ 19 On appeal, Mr. Ross contends his trial counsel was ineffective for failing to file a motion to suppress his statement acknowledging his sale of the narcotics. He asserts such a motion would have succeeded because he was in custody when he made his incriminating admissions to Officers Salgado and Ramirez, the officers' actions were the "functional equivalent of interrogation," and he was not given *Miranda* warnings before being detained. Mr. Ross argues that the admission of his statements prejudiced his case by establishing his intent to deliver the cocaine recovered from the flower pot.

¶ 20 The State responds that although Mr. Ross was in custody, he was not being questioned by the officers at the time he made the incriminating statement. The State also argues that Mr. Ross has not shown he was prejudiced by the absence of a motion to suppress where, even had his statement been suppressed, he would have been convicted based on the officers' testimony. We agree with the State.

¶ 21 A claim of ineffective assistance of counsel is evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish trial counsel provided ineffective assistance, the defendant must show that counsel's performance was so deficient that his representation fell below an objective standard of reasonableness, and that absent counsel's

deficient performance, a reasonable probability existed that the outcome of the proceeding would have been different. *People v. Domagala*, 2013 IL 113688, ¶ 36. The defendant must establish both of these prongs to sufficiently show ineffectiveness. *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 22 Where, as here, an ineffectiveness claim is based on counsel's failure to file a motion to suppress, the defendant must "demonstrate that the unargued suppression motion is meritorious and that a reasonable probability exists that the outcome of the trial would have been different had the evidence been suppressed." *Id*. ¶ 15. "Meritorious" means that the unargued motion "would have succeeded." *Id.* ¶ 12. A reasonable probability that the outcome would have been different occurs when the "probability is sufficient to undermine confidence in the outcome." *People v. Simpson*, 2015 IL 116512, ¶ 35.

¶ 23 Mr. Ross contends that a motion to suppress his statements would have been meritorious because his statements were obtained as a result of a custodial interrogation during which he did not receive warning pursuant to *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). There is no dispute that statements obtained as a result of custodial interrogation are subject to suppression if the defendant did not receive proper warnings. *People v. Tayborn*, 2016 IL App (3d) 130594, ¶ 18. However, *Miranda* warnings are required only if the defendant is in custody and is being interrogated. The State does not dispute that Mr. Ross was in custody but contends that he spoke spontaneously without any interrogation by the police.

¶ 24 Mr. Ross claims that his detention, while the officers were removing the contraband from the flower pot, was the "functional equivalent" of interrogation. An interrogation is any practice that is reasonably likely to evoke an incriminating response from a suspect, and a custodial interrogation occurs when police initiate questioning of a person who has been taken into

custody or deprived of his freedom of movement in any significant way. *Id*. (citing *Miranda*, 384 U.S. at 444).

¶ 25 The record shows that Mr. Ross made statements acknowledging the drug transactions to Officers Salgado and Ramirez while he was in handcuffs. Thus, as the State concedes, he was not free to go and was in custody. However, there was no testimony suggesting that either of the officers questioned Mr. Ross at that time.

¶ 26 Mr. Ross argues that when the officers detained him at the scene in handcuffs for 60 to 90 seconds while another officer recovered the cocaine from the nearby flower pot, "they subjected him to the functional equivalent of interrogation because they should have been aware that it was reasonably likely that their conduct would elicit an incrimination response." Mr. Ross concedes that no Illinois case supports his position, but cites two decisions from other jurisdictions in which officers deliberately and strategically placed incriminating physical evidence in front of the defendants, thus prompting the defendants to provide inculpatory statements. See *Drury v. State*, 368 Md. 331, 341 (2002); *People v. Ferro*, 63 N.Y.2d 316, 319 (1984). We do not find either of these cases persuasive.

¶ 27 Of course, decisions of other states are not binding on this court. *People v. Harrison*, 2018 IL App (3d) 150419, ¶ 17. But, in any event, this case is different. The key to the courts' reasoning in those cases is that there was "no explanation" for the officer's conduct other than eliciting an incriminating statement (*Drury*, 368 Md. at 341), and that "the only possible object of the police action" was to get an incriminating statement (*Ferro*, 63 N.Y.2d at 323). In this case, in contrast, the police officers were simply holding Mr. Ross in handcuffs on the street where the drug transactions were alleged to have occurred for about a minute and a half while the cocaine was recovered from the flower pot. The testimony at trial does not suggest that the

police officers were strategically trying to elicit a statement. Rather, their actions were completely explicable as the necessary steps in the investigation prior to taking Mr. Ross to the police station.

¶ 28 Also, Mr. Ross must satisfy both parts of the *Strickland* test (see *Henderson*, 2013 IL 114040, ¶ 11), and because the evidence was more than sufficient to convict him without his incriminating statement, we cannot conclude that Mr. Ross was prejudiced by counsel's failure to file the motion to suppress, even if such a motion would have succeeded.

¶ 29 To prove Mr. Ross guilty of possession of a controlled substance with intent to deliver, the State must establish that he: (1) had knowledge of the presence of narcotics; (2) had possession or control of the narcotics; and (3) intended to deliver the narcotics. *People v. Branch*, 2014 IL App (1st) 120932, ¶ 10. As we noted in *Branch*, the trier of fact may "rely on reasonable inferences to determine knowledge and possession," and the intent to deliver is usually proved by circumstantial evidence because the first two elements are seldom subject to proof by direct evidence.

¶ 30 Here, Officer Cox testified he observed three transactions in which Mr. Ross accepted money from an individual, retrieved an item from the flower pot, and handed it to the individual. The officer's view of these transactions was unobstructed. The testimony of the other officers was consistent with that of Officer Cox, and the trial court found the testimony of the officers to be credible. A bag containing 11 small packets of cocaine was retrieved from the flower pot that Mr. Ross repeatedly walked up to. Thus Mr. Ross's statements to the officers were certainly not necessary to convict him. We cannot find that trial counsel's failure to seek suppression of Mr. Ross's statements was prejudicial under *Strickland*.

¶ 31 IV. CONCLUSION

¶ 32 For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

¶ 33 Affirmed.