2018 IL App (1st) 160268-U
No. 1-16-0268
Order filed December 11, 2018
Modified upon denial of rehearing January 15, 2019

Second 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. 14 CR 18663
	)	
NORMAN MARSH,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for armed habitual criminal affirmed where counsel was not ineffective for failing to advance at pre-trial hearing the argument that defendant was unlawfully seized without reasonable suspicion by officers blocking his path on the street. Even if the motion had been successful on that theory, the outcome of trial would not have been different.

¶ 2 Police officers arrested Norman Marsh after a traffic stop. During a search of the car Marsh was driving, the officers came across a 9mm semiautomatic handgun. Marsh was charged and found guilty of one count of armed habitual criminal, four counts of unlawful use of a

weapon by a felon, and two counts of aggravated unlawful use of a weapon. Marsh now argues that his trial counsel was ineffective for failing to argue at the motion to suppress that the police unconstitutionally seized him when the car was blocked, and he was detained.

¶ 3 We affirm. The outcome of trial would not have been different had the motion to suppress been granted on the theory Marsh advances now because uncontested testimony established Marsh confessed to possessing the handgun.

¶ 4 Background

¶ 5 Before trial, Marsh filed a motion to suppress evidence arguing that he was illegally seized and the car he was driving unlawfully searched in violation of the Fourth Amendment. He sought suppression of the presence of the gun found during the search of the car.

¶ 6 At a hearing, Marsh testified that at about 2:20 a.m. on October 9, 2014, while alone at a gas station, he ran into an "associate" named Joseph, who asked Marsh to drive his car to his girlfriend's house at the intersection of Iowa Street and Lawndale Avenue. Joseph got out and Marsh started driving home. Marsh drove south on Lawndale, a southbound one-way street. As Marsh was driving, he heard gunshots. He guessed that the shots came from behind him, but did not see anyone.

¶ 7 As Marsh continued, he saw a police car going north on Lawndale. Marsh "pulled over so [the police car] can get past." The police car "got on the side of [Marsh] *** then he backed up—he went forward, backed up, then cut [Marsh] off." Marsh could not keep driving because the police car blocked his path.

¶ 8 An officer came up to Marsh, pointed a gun at him, and told Marsh to "shut the car off." The officer ordered Marsh out of the car and searched it, finding a gun. The officer had not shown Marsh either a search warrant or an arrest warrant. Marsh denied bending over and

reaching toward the car's floor. He also denied having found the gun "right where [he] was sitting."

¶ 9 Officer Jose Fernandez testified that he and his partner, Officer Escamilla, dressed in full uniform, were on patrol in a marked police car, traveling east on Chicago Avenue. Fernandez heard three gunshots coming from the north, but could not tell their distance.

¶ 10 Within five seconds of hearing the shots, the officers turned north onto Lawndale, and saw a black Lexus driving south. Marsh was the only occupant. There were no other cars in the area, and Fernandez did not see anyone on the street. Fernandez activated the emergency lights when he was 10 to 15 feet from the Lexus. Fernandez agreed that the police car was blocking the "southward progress" of the Lexus and that there was no way for the Lexus to continue traveling south.

¶ 11 Fernandez got out and walked up to the Lexus to inquire about the shots he just heard. The streetlights illuminated the scene and Fernandez saw Marsh bent over making what he described as "furtive movements." Fernandez yelled, "Let me see your hands, let me see your hands." As Fernandez got closer, Marsh "put his vehicle in reverse," moved two to three feet, and then stopped. Marsh then complied and put his hands up.

¶ 12 Fernandez looked into the car with his flashlight. Nothing made him suspect that Marsh was armed or for him to fear for his safety. He was, nonetheless, afraid for his safety based on the gunshots, Marsh's furtive movements, and that Marsh's car was the only one coming down the block in the vicinity of the gunshots. Officer Escamilla, who had been walking up to the Lexus on the driver's side, ordered Marsh out of the car.

¶ 13 Fernandez saw a 9mm handgun in plain view on the driver's side floorboard. The gun would have been within arm's reach of Marsh. Fernandez examined the gun. It was loaded with

seven live rounds. Three spent shell casings of the same caliber as the handgun were found as well. Marsh was arrested.

¶ 14 The State argued that the officers' actions were justified. Defense counsel agreed that the officers "certainly can stop [Marsh's] vehicle," but once Fernandez was able to shine his light in the car and see no evidence of criminal activity, it was unlawful for the police to continue to detain Marsh and search the car. The trial court found that, under the circumstances, the officers' actions were "appropriate based upon the movements of the defendant prior to the officers removing him from the car," and denied Marsh's motion.

¶ 15 Bench Trial

¶ 16 At trial, Marsh and Officer Fernandez testified nearly identically to their testimony at the suppression hearing. Officer Escamilla testified that he read *Miranda* warnings to Marsh both before they went to the police station and after arriving. Marsh understood the warnings and agreed to talk to Escamilla. Marsh gave a statement explaining that a man named Joseph asked Marsh to drive his car to his girlfriend's house at the intersection of Iowa Street and Lawndale. Joseph got out, and started arguing with his girlfriend. Joseph told Marsh to drive around the block. Marsh climbed into the driver's seat from the passenger's seat, when he saw a semiautomatic gun. Marsh drove away and fired three shots into the air.

¶ 17 At the close of its evidence, the State introduced two certified statements of conviction in 01 CR 11188-01, a Class 1 conviction for delivery of cocaine, and 04 CR 26224-01, a Class 2 conviction for arson. The State also introduced certification from the Illinois State Police that, as of October 31, 2014, Marsh had never been issued a FOID card. In addition to Marsh's testimony, the defense introduced a certified record from the State of Ohio showing that the registered owner for the black Lexus was a man other than Marsh.

¶ 18 The trial court found Marsh guilty saying, "There's a reason lawyers tell their clients not to say anything. It happened again in this case. The statement made and the information provided by the officer could only have come from [Marsh]." The court denied Marsh's motion for a new trial and sentenced him to six years in the Department of Corrections. Marsh timely appealed.

¶ 19 Analysis

¶ 20 Marsh contends that officers unlawfully seized him at the moment they activated their emergency lights, blocking him. He argues there was no reasonable suspicion at that moment because he was far away from the location of the suspected gun shots, obeying all traffic laws, and behaving normally. Marsh recognizes that his theory was forfeited since trial counsel "only contested the actual search of the vehicle." He urges us to analyze his fourth amendment claim anyway, asserting that trial counsel was ineffective for having not advanced it. As a remedy, Marsh requests we "suppress the gun" and reverse his convictions outright.

¶ 21 The State responds that Marsh's fourth amendment claim is meritless: Marsh was not seized until after the officers observed furtive movements. Specifically, the State contends that Marsh's act of backing up two to three feet after seeing the officers constituted a failure to submit to the officers' authority as required by *California v. Hodari D.*, 499 U.S. 621 (1991). The State argues that Marsh was not seized until his car came to a complete stop, at which time the officers' seizure was valid based on the gunshots they heard, the late hour, Marsh's furtive movements, and his presence as the only person in the area at the time. The State also recognizes that Marsh's theory has been forfeited and urges us to find that counsel was not ineffective for failing raise it.

¶ 22 We agree with both parties that Marsh's theory on appeal has been forfeited. We agree with the State that trial counsel was not ineffective for failing to advance that theory in the trial

court. Regardless of the relative merit of Marsh's fourth amendment claim, no possibility exists of a different trial result even had the motion to suppress succeeded.

¶ 23 Forfeiture

¶ 24 As both parties acknowledge, the fourth amendment claim Marsh raises has been forfeited. It is well-settled that a defendant must raise an issue both at trial and in his or her post-trial motion to preserve it for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Marsh's motion for a new trial did not allege the trial court's error in denying his motion to suppress, leading to forfeiture.

¶ 25 Even if Marsh had included a claim related to the trial court's ruling on his suppression motion, it would still be forfeited because he pursues a new theory on appeal. See *People v. Hughes*, 2015 IL 117242, ¶ 40 (applying forfeiture to claim where defendant advanced different "reasons for suppression in the trial and appellate courts" because claims were "wholly distinct."). Marsh's claim before us shifts the point of seizure back in time, a critical aspect of any fourth amendment inquiry. *Terry v. Ohio*, 392 U.S. 1, 21-2 (1968) (validity of seizure analyzed by facts known to officer "at the moment of the seizure"). Because a new argument about the point of seizure is completely transformative of the fourth amendment claim, we find the theory Marsh now raises has been forfeited along with the claim more generally.

¶ 26 Ineffectiveness of Counsel

¶ 27 Marsh asks us to excuse his forfeiture due to his counsel’s ineffectiveness in failing to advance his fourth amendment argument. Claims of ineffective assistance of counsel are evaluated under the two-prong test first announced in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Henderson*, 2013 IL 114040, ¶11. To satisfy *Strickland*, a defendant must show that his or her counsel's performance fell below an objective standard of reasonableness

and that there is a reasonable probability that, had counsel performed competently, the outcome of trial would have been different. *Henderson*, 2013 IL 114040 at ¶ 11. There are no disputed facts and counsel's ineffectiveness was not litigated in the trial court, so our review is *de novo*. *People v. Wilson*, 392 Ill. App. 3d 189, 192 (2009).

¶ 28 When a defendant claims that counsel failed "to litigate a Fourth Amendment claim properly" he or she must show (i) the merit of the unargued claim and (ii) a reasonable probability the trial's outcome would have been different had the evidence been suppressed. *Henderson*, 2013 IL 114040 at ¶¶ 14-15 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)). Failure to satisfy either prong dooms an ineffectiveness claim. *Id.* at ¶ 11.

¶ 29 Marsh's allegation of ineffectiveness can be resolved simply, because he has suffered no prejudice. *People v. Harris*, 164 Ill. 2d 322, 349 (1994) (finding that, for purposes of *Strickland*, "if no prejudice ensued, a claim may *** be disposed of on that ground alone"). In this regard, there is yet another forfeiture problem with Marsh's argument, this time relating to the suppression remedy. Throughout both of his briefs, he only asks this Court to suppress "the gun." Marsh has not argued that his statement to Officer Escamilla also should have been suppressed as fruit of the poisonous tree. Because arguments not made in this Court are forfeited, Ill. S. Ct. Rule 341(h) (7) (eff. May 25, 2018), we will assume for the purposes of Marsh's ineffectiveness argument that the statement admitting possession of the gun would have been admitted even if the motion to suppress had been granted.

¶ 30 In a petition for rehearing, Marsh argued that we improperly relied on the sufficiency of the remaining evidence (the statement) and the *corpus delicti* rule to find that he had not suffered prejudice from trial counsel's alleged ineffectiveness. While we ultimately reach the same

conclusion, we agree with Marsh that the language should have been more precise. We will explain our reasoning in greater detail.

¶ 31 As to the outcome of trial, we must consider whether there is a reasonable probability that the outcome would have been different had the relevant evidence (the gun) been suppressed. *Henderson* 2013 IL 114040 at ¶ 15. While Marsh correctly notes in his rehearing petition that the question is not one of the sufficiency of the remaining evidence, *People v. Brown*, 358 Ill. App. 3d 580, 596 (2005), our inquiry must nonetheless account for the remaining evidence. *People v. Martin*, 2017 IL App (4th) 150021, ¶ 34 ("we must still examine the evidence presented at trial to consider whether [the allegedly improper evidence] undermined the outcome of the trial."). We are concerned not with the "sufficient evidentiary basis to convict," but with the fundamental fairness of the proceeding and our confidence in the result. *People v. Moore*, 279 Ill. App. 3d 152, 161-62 (1996).

¶ 32 Under these principles, our view of the sufficiency of the remaining evidence cannot be dispositive. When we determine whether there was a reasonable probability that the outcome would have been different, we need not be convinced that the outcome of the proceeding more likely than not would have been different. See, *e.g.*, *United State ex rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003) (citing, among others, *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)). In other words, prejudice can result even if the odds of acquittal had counsel performed effectively, appear below 50%. *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

¶ 33 Marsh argues that the outcome of trial would likely have been different because, without the gun, the State's case was purely circumstantial. We note that the State's case was circumstantial even with evidence of the gun as the gun was never introduced at trial. Essentially, the State's case boiled down to the officers testifying that they heard and saw the gun

and Marsh's admission to possessing it. Marsh, for his part, denied ever giving a statement, denied ever firing a gun, and did not testify that he knew a gun was in the car. In other words, this case was a contest of credibility with or without the gun. The trial court expressly resolved that credibility dispute, without ever mentioning the evidence of the gun, and found, "There's a reason lawyers tell their clients not to say anything. It happened again in this case. The statement made and the information provided by the officer could only have come from [Marsh]." The surrounding evidence well-supports the conclusion, even without consideration of the gun.

¶ 34 We discuss the *corpus delicti* rule only in support of our conclusion that it was reasonable for the trial court to rely solely on Marsh's statement to find him guilty. A defendant's out-of-court admission can serve as proof of his or her crime only if there is "evidence of corroborating circumstances which tend to prove the *corpus delicti* and correspond with the circumstances related in the confession." *People v. Lara*, 2012 IL 112370, ¶32 (quoting *People v. Perfecto*, 26 Ill. 2d 228, 229 (1962) (emphases omitted)). The State does not have to present direct evidence of corroboration and any evidence it does present suffices as long as it has a "loose tendency" to connect the confession to the crime. *Lara*, 2012 IL 112370 at ¶¶ 31-2

¶ 35 We are satisfied that sufficient evidence links Marsh's out-of-court statement to the circumstances of the offense. Marsh admitted that he found a gun in his friend's car after dropping him off at Iowa and Lawndale. Then, after getting in the driver's seat, Marsh "drove off" while firing three shots in the air. Officers Fernandez and Escamilla both testified that they heard "three loud gunshots" coming from the north on Lawndale. Fernandez turned north on Lawndale and saw Marsh driving south from the direction of the gunshots. The officers' testimony shows that they heard the same number of gunshots that Marsh admitted firing. The officers saw Marsh driving away from the direction the shots had come and from a street where

Marsh admitted he had just been. Even without evidence of the gun itself, a reasonable trier of fact could have found that the corroborating evidence established a connection between Marsh's confession and the circumstances of the offense. *Lara*, 2012 IL 112370 at ¶ 46 (describing relationship between *corpus delicti* rule and role of finders of fact).

¶ 36 Assuming counsel performed deficiently, we disagree with Marsh that a reasonable probability existed that the outcome of his trial would have been different had counsel performed effectively. The trial court resolved a credibility dispute and the court's resolution of that dispute had nothing to do with whether evidence of the gun was suppressed. *Contra, e.g., People v. Miller*, 2013 IL App (1st) 110879, ¶¶ 78-9 (finding outcome of trial would have been different where suppression of a statement could have tipped balance in "close" case and where suppression of statement would have called witness testimony into doubt).

¶ 37 On rehearing, Marsh relies on the recent decision in *People v. McLaurin*, where this court reversed a conviction for armed habitual criminal because the State failed to prove that the gun possessed by the defendant was a "firearm" within the meaning of the FOID Card Act. 2018 IL App (1st) 170258, ¶¶ 7, 22. *McLaurin* does not apply to our situation. Unlike *McLaurin*, Marsh gave a statement admitting to possessing the gun as well as to firing it. The officers confirmed the details of his statement by testifying that they arrested him immediately after hearing the same number of shots fired. By contrast, in *McLaurin*, the only testimony about the gun came from an officer who saw what she thought to be a gun from 50 feet away. *Id.* at ¶ 26. We disagree with Marsh that the State "would have faced similar difficulties" proving the presence of a firearm had the gun been suppressed.

¶ 38 Marsh's argument has been forfeited three ways: (i) his suppression argument is forfeited by failure to include it in his post-trial motion; (ii) his fourth amendment theory is forfeited by

trial counsel's decision not to advance it before the trial court; and (iii) any challenge to the suppression of his statement as fruit of the poisonous tree has been forfeited by appellate counsel's decision not to raise it before us. The layers of forfeiture leave the most significant piece of evidence—Marsh's statement to Escamilla—essentially insulated from our review. Because that evidence survives and it was reasonable for the trial court to rely on it, Marsh has suffered no prejudice from trial counsel's failure to raise his fourth amendment claim, regardless of its merit. Trial counsel was not ineffective, and we will honor Marsh's forfeiture. We, accordingly, do not reach the fourth amendment claim on the merits.

¶ 39 Affirmed.