2019 IL App (1st) 161260-U

No. 1-16-1260

Order filed January 29, 2019

Third 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 13197
	)	
NATHANIEL FRENARD,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's claim of ineffective of counsel fails where he cannot demonstrate counsel's failure to assert an entrapment defense at trial was unreasonable or that he was prejudiced by counsel's failure to assert such a defense.

¶ 2 Following a bench trial, defendant Nathaniel Frenard was convicted of delivery of a controlled substance (720 ILCS 570/401(d)(1) (West 2014)) and sentenced to six years' imprisonment. On appeal, defendant argues that trial counsel was ineffective for eliciting his

confession at trial but failing to assert an entrapment defense. For the following reasons, we affirm.

¶ 3 Defendant was charged with delivery of a controlled substance and possession of a controlled substance with intent to deliver stemming from an incident in which he had helped facilitate a narcotics purchase for an undercover police officer. At a status hearing prior to trial, defendant informed the court that he did not want to be represented by his public defender and claimed,

> "[DEFENDANT]: Because I asked for an indictment transcript and my charges, and them things there I can get. I know because I done did it, Judge, but like I say, I don't want [defense counsel] because she's talking more like on the police side than anything. I was entrapped. You know, I'm giving a defense for entrapment. That's why I'm not guilty for it by entrapment. And I don't want her. I don't want her, please."

¶ 4 The court admonished defendant regarding his right to counsel and proceeding *pro se*. Defendant acknowledged he understood, and the court allowed the Public Defender's Office to withdraw as counsel.

¶ 5 Later in the hearing, the following colloquy occurred.

> "[THE DEFENDANT]: And another thing that I want to do is by entrapment, not guilty by entrapment.
>
> * * *
>
> Because I was entrapped on this case.

[THE COURT]: Those are all things that you're going to be able to answer the State's request for discovery, tell them those types of things and make whatever motions you think are appropriate to your case.

[DEFENDANT]: And that's on the record, right, entrapment, not guilty by entrapment?

[THE COURT]: All right. Well, like I say, you have to file the appropriate motions. When you get all the paperwork next time you'll be able to do that.

[DEFENDANT]: That's what I want to prove me not guilty by."

¶ 6 At the next status hearing 10 days later, defendant requested reappointment of the Public Defender's Office. The same public defender was assigned to his case.

¶ 7 Prior to opening statements on the day of trial, defendant asked to speak to the court to complain about defense counsel. Defendant told the court defense counsel was not calling witnesses that he requested and failed to get "the police record" regarding "police conduct." Defendant then stated, "It is entrapment." Defense counsel informed the court that her investigator was in court and could attest to the numerous times he attempted to locate defendant's proposed witnesses. Defendant thereafter elected to have a bench trial.

¶ 8 The defense proceeded on a reasonable doubt theory of the case. In her opening statement, defense counsel stated defendant was not facilitating the sale of narcotics. Rather, counsel asserted that defendant was approached by an undercover officer and asked the officer for a ride home. During the course of the ride, the officer stopped and bought narcotics, which the officer shared with defendant for his personal use.

¶ 9 Chicago police officer Anthony Ceja testified that, on July 11, 2014, at around 7:30 p.m., he was working undercover as a purchasing officer for a narcotics team near the 3500 block of West Grenshaw Street. Ceja was driving an undercover vehicle and observed a man, later identified as defendant, on the sidewalk near Roosevelt Road and Whipple Street. After Ceja parked the vehicle, defendant walked up and asked what Ceja was "looking for." Ceja responded he wanted "saw buck blows," a street term for $10 bags of heroin, but defendant told him there were none in the area. However, defendant stated he would take Ceja to "get some stuff."

¶ 10 At the time, defendant was two feet from Ceja, and speaking to him through the car window. Defendant got into the front passenger seat of the vehicle and directed Ceja to the area near Grenshaw and St. Louis Avenue, which was approximately a two-minute drive. Defendant got out of the vehicle and asked "how many" Ceja wanted. Ceja wanted "four" and defendant asked for money. Ceja gave defendant $40 in prerecorded funds.

¶ 11 Defendant walked to a vacant lot, and sat next to a woman. He and the woman exchanged money for small, white items. Ceja could see defendant and the transaction the entire time because he was located approximately 20 feet away. When defendant returned to Ceja's vehicle, he tendered four ziplocks bags with an "alien head logo" and containing white powder substance that Ceja suspected was heroin.

¶ 12 Defendant directed Ceja to take him to Roosevelt and Pulaski Road so he could get to a bus. Ceja drove defendant to that area, and defendant exited the vehicle. Approximately 15 minutes had elapsed between the time Ceja first observed defendant and when he dropped defendant off. Ceja thereafter radioed his team to inform them that a "positive narcotics transaction occurred." He gave the team a description of defendant and his location and

identified defendant after enforcement officers placed him in custody. Enforcement officers recovered narcotics from defendant's person. Those narcotics were also packaged in "alien head" ziplock bags. Ceja later inventoried the four bags given to him by defendant and sent them to the Illinois State Police crime lab.

¶ 13 On cross-examination, Ceja testified there was a liquor store near where he initially parked his vehicle. He could not recall whether there were men in front of the store or whether a man approached his vehicle and asked whether he wanted to purchase a loose cigarette. Defendant asked him for a ride after Ceja asked for narcotics. Ceja could not recall that defendant had trouble walking. Ceja acknowledged that he asked for four bags, and defendant had five bags on him when he was arrested. Ceja was approximately 40 feet from defendant when he identified him for enforcement officers.

¶ 14 Chicago police officer Cesar Kuri testified he was working as an enforcement officer near the 4000 block of West Roosevelt on the day in question. Kuri placed defendant in handcuffs and transported him following Ceja's identification. He also performed a custodial search of defendant and recovered five ziplock bags containing white powder heroin from defendant's right sock. The bags had an alien head logo that made them distinctive. Ceja showed him the bags of suspect heroin purchased from defendant and they were identical to the bags Kuri recovered during the custodial search. Kuri later inventoried the bags.

¶ 15 On cross-examination, Kuri testified that Ceja did not show him the bags of narcotics prior to defendant's arrest. Rather, Ceja showed him the bags at the police station. Kuri did not believe that prerecorded funds were found on defendant. He did not recall defendant walking with a cane.

¶ 16 The parties stipulated that, if called, forensic chemist Moses Boyd would testify that he received two inventories in this case. One inventory contained five bags with alien head logos. Each of the five bags contained a white powder substance, which altogether tested positive for the presence of .9 of a gram of heroin.

¶ 17 The second inventory contained four bags with alien head logos and white powder substance. Boyd tested one of the four bags, which tested positive for the presence of .1 gram of heroin. Boyd did not test the remaining three bags. The total weight of the second inventory was .6 of a gram.

¶ 18 Following the close of the State's evidence, defense counsel moved for a directed finding, arguing the State "failed to meet their burden." The court denied the motion.

¶ 19 Edward Pride testified that he knew defendant for four or five years from "the neighborhood." On the evening of July 11, 2014, Pride was with defendant and several other men outside the liquor store near Roosevelt and Whipple. While standing outside, a man drove up in a van and Pride attempted to sell him some cigarettes. Defendant asked the man for a ride and told Pride he would see him later. Pride did not hear the man ask defendant for narcotics or to take him to purchase heroin, nor did he observe defendant give the man heroin. After that incident, Pride next saw defendant two or three months later when defendant asked him to testify on his behalf.

¶ 20 On cross-examination, Pride acknowledged that he did not get in the van and did not know what occurred after it drove away.

¶ 21 Defendant testified that he was with seven or eight people near Roosevelt and Whipple on July 11, 2014. They were selling cigarettes, drinking wine, and "singing old songs." A man in

a van drove up and "asked [defendant] about something." The man wanted cigarettes so defendant walked up to the vehicle. The man then asked if defendant knew where he could "get some drugs." Defendant told him he did not know where to buy drugs, but asked for a ride to Roosevelt and Pulaski because his legs were hurting. The man agreed to give defendant a ride. Once inside the van, the man told defendant how sick he was and that he shot drugs into his feet. Defendant again told the man that he did not know where to buy drugs. The man pulled the vehicle over and defendant said, "well, you must know the spot. *** [T]hey sell them right there."

¶ 22 The man asked defendant to purchase the drugs for him because he was "hurting" and claimed "they" would not sell him drugs because he was white. The man additionally said that he was giving defendant a ride, so defendant said, "I tell you what, man. I will gone get 'em for you because I got to get to Pulaski."

¶ 23 The man gave defendant $40 to purchase the drugs and defendant left his own $50 on the car seat to show the man he was "not going anywhere" because he was trying to get home and was "hurting." Defendant exited the vehicle and sat down near a woman he did not know. He asked the woman, "where they at[?]" and she responded, "I got them." Defendant gave her the $40 and she gave him nine "nickel bags." The man wanted "dime bags" but the woman had nickel bags. He could buy eight nickel bags for $40, but by spending $40 he received an extra nickel bag.

¶ 24 Defendant brought the drugs back to the van and placed them on the dashboard. The man in the van gave defendant five of the bags, which defendant accepted because he was an addict. The man agreed to drive him to Roosevelt and Pulaski. After letting defendant out in a parking

lot, some police officers pulled up and arrested him under the pretense of stealing from a store. An officer searched defendant and recovered two bags of narcotics from defendant's shoe. The police later recovered the other three bags after "stripping searching" him.

¶ 25 Defendant had never seen the man before and testified that the man "tricked" him into buying drugs. Defendant denied selling drugs, and testified his "motive wasn't about no drugs"; rather, his "motive was about going home taking [his] pills." He never planned to sell the man drugs and did not have drugs on his person. Additionally, defendant denied keeping any of the money the man gave him to purchase narcotics.

¶ 26 On cross-examination, defendant testified that the man "invited" him to get into the vehicle and "enticed" him to purchase narcotics by "saying how sick he was" and "would [defendant] go and purchase four blows for him[?]" Defendant reiterated that he was "tricked" into getting out of the vehicle.

¶ 27 During closing arguments, defense counsel argued that Officer Ceja's version of events conflicted with Pride's testimony. She emphasized that defendant never intended to sell or deliver narcotics. Counsel then stated, "This is in fact the officer enticing or tricking [defendant] into actually going to purchase the narcotics for him and then giving him a share when they are not saw bucks, they are nickel bags. Based upon that information, we would ask for a not guilty."

¶ 28 The court found defendant guilty of delivery and possession of a controlled substance. In so finding, the court stated that it believed Ceja and Kuri "without qualification," and was uncertain about Pride's memory of the events. Further, regarding defendant's testimony, the court noted, "[E]ven if you had five different witnesses here, based on your testimony, you testified that you delivered the drugs to the officer."

¶ 29 The court subsequently denied defendant's motion for a new trial, merged the counts, and sentenced defendant, as a Class X offender based on his criminal history, to six years' imprisonment on the delivery count.

¶ 30 On appeal, defendant contends defense counsel was ineffective for failing to raise an entrapment defense, where the record shows defendant claimed to have been entrapped prior to trial and testified at trial that he was tricked into delivering heroin to the undercover officer.

¶ 31 To demonstrate ineffective assistance of counsel, defendant must show that (1) his attorney's performance was deficient and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson,* 192 Ill. 2d 93, 107 (2000).

¶ 32 Regarding the first prong, defendant must overcome the "strong presumption" that counsel's conduct was the result of sound trial strategy rather than incompetence. *People v. Clendenin,* 238 Ill. 2d 302, 317 (2010). "Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *People v. Morris*, 2013 IL App (1st) 110413, ¶ 74. On review, this court is "highly deferential" to trial counsel, "making every effort to evaluate counsel's performance from [her] perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344 (2007). Even where counsel "makes a mistake in trial strategy or tactics," counsel's performance is not necessarily ineffective. *Id.* at 355. Instead, constitutionally defective assistance occurs "[o]nly if counsel's trial strategy is so

unsound that [she] entirely fails to conduct meaningful adversarial testing of the State's case." *Id.* at 355-56.

¶ 33 In order to prove defendant guilty of delivery of a controlled substance, the State was required to show that the defendant knowingly delivered a controlled substance. 720 ILCS 570/401(d) (West 2014).

¶ 34 Here, Officer Ceja testified defendant approached his car, asked what he was looking for, and, in response to Ceja's request for "saw buck blows," offered to take him nearby to purchase "the stuff." Defendant got in the car with Ceja and then directed him to a vacant lot, where defendant exited the vehicle with $40, engaged in a narcotics transaction with a woman, and returned to the vehicle with four bags of suspected heroin that he gave to Ceja. Officer Kuri testified that he arrested defendant and recovered five bags of suspected heroin from defendant's shoe that matched the bags Ceja received from defendant. Thus, the State's evidence was sufficient to demonstrate defendant knew where to purchase heroin, facilitated the transaction by getting out of Ceja's vehicle and buying the bags from a woman, and then delivered the bags to Ceja.

¶ 35 Defense counsel's strategy was a reasonable doubt defense. In furtherance of that theory of defense, counsel attempted to elicit testimony from the officers that defendant had leg injuries and was only interested in obtaining a ride from Ceja. Counsel additionally called Pride, who contradicted Ceja's testimony that Ceja asked defendant about the purchase of narcotics. Further, counsel elicited testimony from defendant that he wanted a ride from Ceja because he was in pain, was not in possession of drugs when Ceja drove up, and was an addict. Counsel argued defendant did not intend to deliver narcotics, was tricked into facilitating the transaction, and

merely received a share of the narcotics. Thus, the record demonstrates counsel did "conduct meaningful adversarial testing of the State's case." *Perry*, 224 Ill. 2d at 355-56.

¶ 36 Importantly, defendant's contention that he was entrapped is not, in itself, proof of entrapment or necessarily indicative that entrapment was a sound trial strategy. A decision regarding what theory of defense to pursue is within the realm of trial strategy. *Morris*, 2013 IL App (1st) 110413, ¶ 74. We cannot say counsel's reasonable doubt defense strategy was unreasonable, given the evidence against defendant, the absence of evidence of entrapment as discussed below, and that the outcome of the trial essentially came down to a credibility contest between the officers and the defense witnesses.

¶ 37 Defendant argues that, based on his evidence, counsel should have raised an entrapment defense and he was prejudiced by counsel's failure to do so. Defendant contends counsel should have known his testimony would prove the State's case against him because he claimed multiple times prior to trial that he was entrapped and that the police "tricked" him into delivering narcotics.

¶ 38 Section 7-12 of the Criminal Code of 1961 sets forth the defense of entrapment:

> "A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was pre-disposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense." 720 ILCS 5/7-12 (West 2014).

¶ 39 Thus, to prove entrapment, defendant would have had to present evidence showing that (1) the State induced or incited him to commit the offense, and (2) he was not predisposed to commit the offense. *People v. Placek*, 184 Ill. 2d 370, 380-81 (1998). Based on the evidence at trial, we do not find that defendant has shown a reasonable probability that the outcome of the trial would have been different had counsel raised the entrapment defense.

¶ 40 As previously established, Ceja testified that defendant asked him what he was looking for and, in response to Ceja's request for heroin, directed him to a nearby vacant lot, where he could "get some good stuff." Although defendant, by contrast, testified that he told the officer several times that he did not know where to buy narcotics, and only gave in to Ceja's request because he wanted a ride to the bus stop, we do not find this sufficient to establish entrapment. It was for the trier of fact to determine the weight of the evidence and the credibility of the witnesses and the trier of fact here, the trial court, credited Ceja's testimony over defendant's. Further, that Ceja approached defendant is, on its own, insufficient to prove entrapment. *People v. Ramirez,* 2012 IL App (1st) 093504, ¶ 31 (noting that entrapment does not exist merely because an agent of the State initiates a relationship leading to the offense).

¶ 41 Moreover, even if, as defendant claimed, he rejected Ceja's requests for heroin several times over the course of a two minute car ride, this does not establish that he was induced by police to commit the offense. See *e.g.*, *People v. Bonner,* 385 Ill. App. 3d 141, 145 (2008) (finding inducement where an informant "constantly" asked the defendant to sell drugs and performed sexual favors in exchange for defendant's selling drugs); *People v. Day*, 279 Ill. App. 3d 606, 611-12 (1996) (inducement found where defendant repeatedly rejected informant's requests to sell narcotics over a period of three months and acquiesced only after commencing a

dating relationship with informant); *People v. Poulos,* 196 Ill. App. 3d 653, 659-60 (1990) (finding inducement where defendant initially rebuffed informant but agreed to sell drugs after two months of repeated solicitations).

¶ 42 Crucially, Ceja's testimony showed defendant was predisposed to delivery narcotics. Predisposition is shown by evidence establishing that the defendant was willing and able to commit the offense without persuasion before his initial exposure to government agents. *People v. Sanchez*, 388 Ill. App. 3d 467, 474 (2009). Our supreme court has identified the following factors to be considered in assessing whether defendant was predisposed to commit a drug-related offense: (1) defendant's initial reluctance or ready willingness to commit the crime; (2) defendant's familiarity with drugs and his willingness to accommodate the needs of drug users; (3) defendant's willingness to profit from the illegal act; (4) defendant's current or prior use of illegal drugs; (5) defendant's participation in cutting or testing the drugs; and (6) defendant's ready access to a supply of drugs. *People v. Placek*, 184 Ill. 2d 370, 381 (1998).

¶ 43 Although defendant claimed to have rejected Ceja's pleas for heroin, the testimonial evidence overall established that defendant was willing to facilitate the transaction, was familiar with the street terms for heroin, and wanted to accommodate Ceja, who claimed to be "sick." It showed defendant accepted a share of the narcotics that he procured, was an admitted addict, and knew where and from whom to buy heroin. Defendant claims the applicable factors show only that he was a drug addict. However, there were two versions of events before the court, and it was for the court, as trier of fact, to weigh the evidence and determine witness credibility. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). The court expressly stated that it believed the officers' testimony "without qualification," indicating that it found Ceja's testimony more

credible than defendant's testimony. Thus, because the evidence could not establish entrapment, there is no reasonable probability that the outcome of defendant's case would have been different had entrapment been raised. We therefore find defendant cannot establish he was prejudiced by counsel's failure to raise an entrapment defense.

¶ 44 In sum, as counsel's performance was reasonable under the circumstances and defendant cannot demonstrate he was prejudiced by counsel's failure to raise the defense of entrapment, his claim of ineffective assistance of counsel fails.

¶ 45 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 46 Affirmed.