2019 IL App (1st) 162342-U
No. 1-16-2342
Order filed August 26, 2019

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 15 CR 6512
	)	
DIAMOND DAVIS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge presiding.

JUSTICE GRIFFIN delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction because the record is insufficient to determine whether a motion to quash arrest and suppress the evidence would have been meritorious. Defendant's ineffective assistance of counsel claim is better suited to a collateral proceeding.

¶ 2 Following a bench trial, defendant Diamond Davis was convicted of the offense of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)) and sentenced to seven years' imprisonment. Defendant appeals his conviction and claims his counsel was ineffective for failing to file a motion to quash arrest and suppress the evidence. He asks us to reverse his conviction or remand his case to the trial court for a suppression hearing. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On the night of April 1, 2015, defendant led police officers on a foot chase, dropped his handgun and kept running until he was eventually arrested. Defendant was charged with a host of criminal offenses related to his possession of the handgun and his case proceeded to a bench trial on the following charges: one count of the offense of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)) and two counts of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)).

¶ 5 At trial, Chicago police officer Scott Konior testified that on April 1, 2015, at approximately 10:20 p.m., he and Officer Frank Iza[1] drove an unmarked vehicle westbound on Le Moyne Street toward Talman Avenue. They saw a group of men involved in a "[v]erbal altercation" on the southwest corner of Talman and Le Moyne. Konior could clearly see the group and though he could not hear the men's words, he "could tell it was heated." Konior turned left onto Talman, parked, and exited the vehicle with Iza. Defendant, who was wearing gloves, looked at the officers, "grabbed his right side like he was trying to hold something," and ran northbound. Konior clarified that defendant was not "holding up his pants," but rather "looked like he was trying to hold an object." Iza announced his office, yelled that defendant "has a gun," and chased defendant on foot.

¶ 6 Meanwhile, Konior returned to his vehicle and drove eastbound on Le Moyne to "cut off" the chase. Konior saw defendant on the south side of Le Moyne and lost sight of the chase "for a couple of seconds." Then, Konior turned right onto Rockwell and saw Iza handcuff defendant. Konior parked and exited his vehicle, and noticed Iza had a firearm in his back pocket. Iza

[1] While Officer Iza's first name is given as "Francisco" elsewhere in the record, the parties do not dispute that the names "Frank Iza" and "Francisco Iza" refer to the same person.

showed Konior the firearm, which Konior had not seen before. Defendant was transported to a police station, where Konior inventoried the items recovered from defendant: a firearm, ammunition, black gloves, and a ski mask that defendant wore around his neck. On questioning from defense counsel, Konior stated that defendant was the only member of the group of men who ran from the officers. Konior could not recall what defendant was wearing, but first saw the ski mask around his neck when he was arrested.

¶ 7 Iza testified that he was on patrol in a vehicle with Konior on the night of April 1, 2015, and observed three or four individuals involved "in a verbal altercation." Iza exited the vehicle and made eye contact with defendant. Defendant "reached to his right waistband area," held an object, and ran. Iza "believed that the defendant was concealing a handgun" and yelled, "he's got a gun" to Konior. Iza pursued defendant northbound on Talman and yelled, "Chicago Police, drop the gun, Chicago Police." Iza testified that he announced his office and made the demand "a few times." Defendant ran east down a gangway, turned south, and crossed Le Moyne.

¶ 8 From 10 to 12 feet away, Iza saw defendant "pull out" a firearm and toss it on the ground. Iza grabbed the firearm and continued to chase defendant eastbound down Le Moyne and southbound onto Rockwell. Iza arrested defendant and found six live rounds in the firearm. As he arrested defendant, Iza also noticed defendant was wearing black gloves and had a black mask around his neck. Iza confirmed that there were street lights on when he chased defendant, and he never lost sight of defendant during the chase.

¶ 9 On cross-examination, Iza confirmed the arrest report did not state that he saw a firearm on defendant's person, or believed that defendant was holding a firearm, when defendant started running. The arrest report also did not state that Iza told defendant to drop the firearm during the chase. Iza explained that "the arrest report is only probable cause."

¶ 10 The State entered into evidence the firearm and ammunition, the black gloves and mask, and defendant's certified convictions from two prior cases. The State rested, and the trial court denied defendant's motion for directed finding.

¶ 11 Devon Woods testified that at about 10:50 p.m. on the night of the incident,[2] he drove defendant and Garrett Ferguson to a party at a house. The three men exited the vehicle on Talman and walked to a group of "six or more people" outside the party. The group drank beer and talked. After 20 to 30 minutes, a vehicle slowly approached, which Woods testified "could mean a *** lot of things," including danger. Six to eight people, including Woods, ran away from the vehicle. Woods did not see defendant wear a ski mask or possess a firearm, and he did not see where defendant ran. On cross-examination, Woods stated that the vehicle pulled up with its lights off.

¶ 12 Garrett Ferguson testified that defendant, Woods and he were outside the party, in a group with 8 to 10 people, when a vehicle arrived. Ferguson did not know there were police officers in the vehicle, and he did not see any police officers exit the vehicle because he fled with the rest of the group. On cross-examination, Ferguson denied seeing defendant wear black gloves and a ski mask.

¶ 13 Torrey Davis[3] testified that he was outside the party with his sister and friends when he saw defendant, Woods, and Ferguson. He talked to defendant, who is his cousin. The police arrived, "[e]verybody just start[ed] running," and Davis ran towards North Avenue and Talman. He testified that everyone ran because they were drinking in front of a "government house" and would be arrested for trespass. On cross-examination, he stated that he ran in the same direction

[2] While Woods testified that the events took place on August 1, 2015, the parties do not dispute that Woods's testimony concerned events on April 1, 2015.

[3] We refer to Torrey Davis by his full name because he has the same last name as defendant.

as defendant, but confirmed that defendant "split off" from him toward Le Moyne. Torrey Davis also denied seeing defendant wear black gloves or a mask around his neck.

¶ 14 During closing arguments, defense counsel argued that once the police "think you are bad, they will say whatever they have to get you convicted ***." According to counsel, the police "started looking around to see if there was a gun" only after they caught defendant, and "if they stopped him and they found a gun anywhere in his path, they would say he dropped it."

¶ 15 The trial court found defendant guilty on all charges, explaining that it rejected the defense's theory that the police officers engaged in a "conspiracy" to "frame" defendant. Defendant filed a written motion for new trial, arguing that the police report contained pictures of defendant's tattoos, and that an attached oral statement made by defendant "acknowledges [defendant's] gang participation which was why these officers committed perjury."

¶ 16 During a hearing on the motion, defense counsel asserted that the police officers "put this on the defendant *** because they knew he was a gang member, they thought he was a gang leader." The trial court denied defendant's motion and stated that it found the police officers credible. The court merged the counts and sentenced defendant to seven years' imprisonment for the offense of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)).

¶ 17 Defendant appeals his conviction and claims that his counsel was ineffective for failing to file a suppression motion because "[t]he sole basis for the arrest was that [defendant] possessed a gun in public," which was no longer criminal conduct at the time of his arrest under *People v. Aguilar*, 2013 IL 112116 and its progeny.

¶ 18 ANALYSIS

¶ 19 To succeed on an ineffective assistance of counsel claim, defendant must demonstrate that: (1) "counsel's performance fell below an objective standard of reasonableness"; and (2) "a

reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 20 When, as here, an ineffective assistance claim is based on the failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must show "that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Henderson*, 2013 IL 114040, ¶ 15; *People v. Scott*, 2016 IL App (1st) 141456, ¶¶ 24-25 (applying standard in *Henderson* where defendant argued on appeal that trial counsel was ineffective for failing to file a motion to quash arrest and suppress identification and evidence). Accordingly, we first determine whether a motion to quash arrest and suppress the evidence would have been meritorious.

¶ 21 The fourth amendment of the United States Constitution and the Illinois Constitution both "guarantee the right of individuals to be free from unreasonable searches and seizures." *People v. Colyar*, 2013 IL 111835, ¶ 31; U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. "Reasonableness under the fourth amendment generally requires a warrant supported by probable cause." *People v. Flowers*, 179 Ill. 2d 257, 262 (1997). However, " '[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like,' " the United States Supreme Court " 'has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.' " *People v. Jones*, 215 Ill. 2d 261, 269 (2005) (quoting *Illinois v. McArthur*, 531 U.S. 326, 330 (2001)).

¶ 22 In assessing a search and seizure, Illinois courts have recognized at least three categories of police-citizen encounters: "(1) arrests, which must be supported by probable cause; (2) brief investigative detentions, which must be supported by 'a reasonable, articulable suspicion of criminal activity'; and (3) consensual encounters, which 'involve no coercion or detention and thus do not implicate fourth amendment interests.' " *People v. Jackson*, 389 Ill. App. 3d 283, 287 (2009) (quoting *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006)).

¶ 23 "A person has been arrested when his freedom of movement has been restrained by means of physical force or a show of authority." *People v. Melock*, 149 Ill. 2d 423, 436-37 (1992) (citing *United States v. Mendenhall*, 446 U.S. 544, 553 (1980)). "An arrest requires a stronger justification than an investigatory stop because an arrest is a lengthier seizure of the person." *People v. Leggions*, 382 Ill. App. 3d 1129, 1133 (2008).

¶ 24 "Probable cause to arrest exists where the facts and circumstances known to the police officer at the time of the arrest are sufficient to warrant a person of reasonable caution to believe that an offense had been committed and that the offense was committed by the person arrested." *People v. Sims*, 192 Ill. 2d 592, 614 (2000). While "[m]ere suspicion" does not rise to the level of probable cause, the police officer need not rely on evidence "sufficient to prove guilt beyond a reasonable doubt." *Id.* at 614-15. "[S]omething more than [a] mere hunch or suspicion of criminal activity is required." *People v. Harris*, 352 Ill. App. 3d 63, 66 (2004).

¶ 25 "[A] determination of probable cause is governed by commonsense, practical considerations, and not by technical legal rules." *Sims*, 192 Ill. 2d at 615. "A police officer's factual knowledge, based on prior law-enforcement experience, is relevant to determining whether probable cause existed." *Harris*, 352 Ill. App. 3d at 67. While "a defendant's flight from police can be considered as an additional factor in determining probable cause" (*People v. Jones*,

196 Ill. App. 3d 937, 956 (1990)), "flight alone is not necessarily indicative of criminal activity" (*People v. Peete*, 318 Ill. App. 3d 961, 966 (2001)).

¶ 26 At trial, Officers Konior and Iza testified that they were driving an unmarked vehicle and saw a small group of men in a "verbal altercation." Iza exited his vehicle and made eye contact with defendant. Defendant "reached to his right waistband area," held an object, and ran. While chasing defendant on foot, Iza repeatedly yelled, "Chicago Police, drop the gun, Chicago Police." He observed defendant toss a firearm onto the ground, which Iza picked up. Defendant did not stop, but rather kept running and was eventually arrested by Iza.

¶ 27 The State argues that the police officers had probable cause to arrest defendant once he tossed a firearm on the ground while running from Iza. Defendant, on the other hand, argues that he tossed the firearm in compliance with the orders of Iza, who repeatedly yelled at defendant to "drop the gun."

¶ 28 From this record, it is not clear how long Iza chased defendant, how much time passed before defendant dropped the gun and what statements were made, if any, before defendant was arrested. Because these issues were not developed before the trial court, the record does not reflect sufficient testimony or factual determinations to establish whether Iza could have reasonably interpreted defendant's actions as surreptitiously disposing of the firearm, an act which would have been inconsistent with the lawful possession of a firearm, or mere compliance with Iza's orders. Without additional factual context, we cannot determine whether defendant's conduct, as a whole, would sufficiently support a belief "that an offense had been committed and that the offense was committed by the person arrested." *Sims*, 192 Ill. 2d at 614.

¶ 29 The parties dispute whether defendant's initial actions gave rise to a reasonable suspicion of criminal activity. See *People v. Gherna*, 203 Ill. 2d 165, 177 (2003) ("[A]n officer may,

within the parameters of the fourth amendment, conduct a brief, investigatory stop of a citizen when the officer has a reasonable, articulable suspicion of criminal activity, and such suspicion amounts to more than a mere 'hunch.' " (citing *Terry*, 392 U.S. at 27)). This dispute raises yet another set of circumstances missing from the record that are useful for resolving whether a motion to quash arrest and suppress the evidence would have been meritorious.

¶ 30 Namely, there is no information as to why the officers were patrolling in the specific area in which they saw defendant, whether they had received any information regarding the area or defendant, or whether they recognized defendant or any of the men who were with him. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (stating the fact that a *Terry* stop occurred in a " 'high crime area' " was relevant in determining the *Terry* stop's reasonableness); *People v. Lee*, 214 Ill. 2d 476, 485 (2005) (recognizing "[i]nformation from an informant" as one of multiple factors relevant for determining whether probable cause exists); *People v. Novakowski*, 368 Ill. App. 3d 637, 642 (2006) (finding probable cause existed where, among other factors, the officer knew the "defendant was a suspect in numerous residential burglaries").

¶ 31 We reject defendant's argument that "the police lacked probable cause to arrest" him because "there was no evidence that before the police arrested [defendant], had probable cause to believe that he lacked a firearm owner's identification card or a concealed carry license or was not supposed to have a firearm." This is a self-serving inference drawn from a lack of record evidence, which was perhaps attributable to the absence of any need on the part of the State to present such evidence to secure a conviction at trial. Defendant cannot "spin the lack of testimony about probable cause into a conclusion that *there was* no probable cause." (Emphasis in original.) *People v. Burnett*, 2019 IL App (1st) 163018, ¶ 14. The record before us does not clearly reflect what the officers' probable cause determination may have been based on.

¶ 32 "[I]neffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the claim." *People v. Veach*, 2017 IL 120649, ¶ 46. Here, the record does not provide adequate information for determining whether there was probable cause justifying defendant's arrest, and so we cannot determine on direct appeal whether a motion to quash arrest and suppress the evidence would have been meritorious. Accordingly, defendant's ineffective assistance of counsel claim is better suited to a collateral proceeding under the Post-Conviction Hearing Act (725 ILCS 5/122-1, *et seq.* (West 2016)). See *People v. Bew*, 228 Ill. 2d 122, 134-35 (2008).

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we affirm.

¶ 35 Affirmed.