2019 IL App (1st) 171693-U

FOURTH DIVISION
May 23, 2019

No. 1-17-1693

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 14420
	)	
BRITTANI GRIEBAHN,	)	Honorable
	)	James N. Karahalios,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

Held: We affirm defendant's convictions based on our determination that sufficient evidence supported her convictions and she cannot establish that she was denied the effective assistance of trial counsel.

¶ 1 Following a bench trial, defendant Brittani Griebahn was convicted of possession of a controlled substance with intent to deliver and two counts of possession of a controlled substance.[1] She was sentenced to concurrent terms of 20 years' imprisonment and 6 years' imprisonment, respectively. On appeal, defendant challenges the sufficiency of the evidence

[1] The circuit court merged one count of possession of a controlled substance into the conviction for possession of a controlled substance with intent to deliver.

supporting her convictions and asserts that she was denied the effective assistance of trial counsel. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 The record discloses that defendant was arrested and charged with multiple narcotics-related offenses based on an international package intercepted at O'Hare International Airport by U.S. Customs and Border Patrol. The Mount Prospect Police Department subsequently conducted a controlled delivery of the package to defendant at the address listed on the package and executed a search warrant on the apartment once the package was opened.

¶ 4 At defendant's bench trial, U.S. Customs and Border Patrol officer Jeffrey De La Cruz testified that, on July 16, 2015, he was screening international mail at O'Hare International Airport when his assisting canine alerted to a padded mailer, which De La Cruz identified at trial. De La Cruz opened the package and discovered a DVD case inside which contained methylenedioxymethamphetamine ("MDMA"), a controlled substance commonly known as ecstasy. The package was addressed to defendant at 1094 South Tamarack Drive, #485, in Mount Prospect, Illinois. The return address on the package was: "Julia Klein, Grupellostrase 95, 43210 Dusseldorf, Germany." De La Cruz placed the item in a detention room and it was transferred to the Department of Homeland Security.

¶ 5 Mount Prospect police detective William Ryan testified that when the Mount Prospect Police Department received the package from the Department of Homeland Security, they obtained an anticipatory search warrant for defendant and the apartment and a court order allowing the police to place electronic monitoring devices inside the package.

¶ 6 U.S. Postal Inspector Michael Todd was part of the narcotics investigation team that operated in conjunction with the Mount Prospect Police Department. Todd testified that he was

assigned to deliver the package. He has been involved in over 100 controlled delivery investigations and served as the delivery officer on dozens of occasions. Todd placed a light sensor and a trip wire sensor in the package, which would be triggered when the package was opened and the DVD case removed.

¶ 7 Todd testified that he first attempted to deliver the package on July 22, 2015, at 12:30 p.m., dressed as a postal service employee, but no one answered the door of apartment #485. He left a postal re-delivery slip on the apartment door, requesting the recipient to call the listed phone number for delivery of an international package. Todd received a call to that number at approximately 1:30 p.m. Defendant identified herself by name and asked if the package could be left without having someone present to sign for it. Todd explained that this was not possible because it was an international package. They arranged for re-delivery the next day within an hour of 12:30 p.m.

¶ 8 On July 23, 2015, Todd returned to the Mount Prospect Police Department and once again retrieved the package. He testified that at that time, they were able add theft detection powder inside the package by prying the mailer open slightly and dusting the powder onto and inside the DVD case. They resealed the package and then checked the exterior with an ultraviolet light to ensure no powder was on the outside.

¶ 9 Todd testified that he returned to the apartment dressed as a postal worker. He was accompanied by detective Ryan. Ryan testified that they arrived at the apartment building shortly before noon on July 23, 2015, and they observed that defendant returned from a jog around 12:15 p.m. The team waited until 12:55 p.m. before attempting to deliver the package to ensure there were no "additional people coming or going."

¶ 10 At approximately 12:55 p.m., Todd left to deliver the package while Ryan remained in the postal service vehicle. Todd testified that when he knocked on the apartment door, Marek Mikolajczyk answered the door. Todd testified that he asked Mikolajczyk if he was expecting an international package and Mikolajczyk responded that he was. Todd asked him to sign for it and asked if he had the re-delivery slip. Mikolajczyk responded that he thought the slip was in the apartment, and turned to go back in, but Todd pulled one out of his pocket and told Mikolajczyk that he could sign that one instead.

¶ 11 Todd testified that he returned to his vehicle and three to four minutes later, both the light and the trip wire sensors were activated, indicating that the package had been opened. A team of Mount Prospect police officers then executed the anticipatory search warrant on the apartment. When Todd returned to the apartment, he found defendant was inside. He examined both defendant's and Mikolajczyk's hands under an ultraviolet light and observed that defendant's hands had a large amount of a substance that appeared to be consistent with theft detection powder on them. Mikolajczyk's hands had only a small amount, just "three very small specks." Todd was cross-examined extensively regarding theft detection powder and the manner of inserting it into the package and DVD case. Todd conceded that he did not know what other substances would appear under an ultraviolet light and that he could not be sure if defendant or Mikolajczyk had a substance on their hands that would be visible under such a light prior to the time the package was opened.

¶ 12 Mount Prospect police detective Jonathan Juhl testified that he assisted in the controlled delivery narcotics investigation and search warrant execution on July 23, 2015. Juhl and his partner were stationed behind the apartment building as other officers executed the warrant inside. Juhl observed a window screen fly out of a second floor window, and then a small

package came out through the window. Juhl recovered the package, and observed that it was a DVD case. Inside the case appeared to be narcotics, which he turned over to Ryan.

¶ 13 Ryan testified that he assisted in executing the search warrant on the apartment along with other officers. He testified that the officers knocked on the door, announced their office, and stated that they had a warrant, but no one answered. The officers forced their way inside after repeating this information without response. Once inside, Ryan observed defendant and Mikolajczyk in a bedroom, laying on a bed. Ryan observed that the window above the bed was open, that the window screen was missing, and the blinds were hanging unevenly and appeared to be damaged. After defendant and Mikolajczyk were secured, Ryan looked out of the window and observed what appeared to be the window screen and the DVD case laying on the grass below.

¶ 14 Ryan testified that he searched the apartment and underneath the kitchen sink he discovered a plastic bag containing six yellow and two orange pills. Inside a kitchen cupboard, Ryan recovered a large amount of clear, empty capsules, digital scales, a cannabis grinder, and pipes commonly used to smoke cannabis. In addition, on the kitchen counter, he found the black mailer that the DVD case had been packaged in and the re-delivery mail slip that Todd had left the day before.

¶ 15 Ryan testified that he subsequently spoke with defendant at the police station after she was advised of her *Miranda* rights. When asked about the package, defendant replied that "the package wasn't meant for anyone else and that Marek, her boyfriend, shouldn't be getting arrested." Mikolajczyk was released without charge.

¶ 16 On cross-examination, Ryan agreed that a "receiver" was a person who received a package containing controlled substances, that a receiver may provide a false name or address in

order to remain anonymous and then intercept the package, and that a package may move to a different location from the one it is addressed. Ryan testified that he had a photograph of Mikolajczyk before the search because Ryan found Mikolajczyk's name from a prior 911 call or a call for service at that address when he was preparing an informational package for the search warrant. Ryan denied that he obtained Mikolajczyk's photograph because Ryan knew Mikolajczyk was the brother of the sender, Klein. Ryan did not investigate whether Klein had any relationship to anyone in the Chicago area. Ryan did not search Mikolajczyk's or defendant's phone for international calls. He did not find large amounts of money, any weapons, or security alarm equipment in the apartment, which would have been typical signs of a narcotics dealer. Ryan testified that as of the date the police executed the warrant, defendant was the only resident of the apartment. At some point in the investigation, Ryan discovered that Mikolajczyk lived in Schaumburg.

¶ 17 The parties stipulated to the chain of custody of the package between the Department of Homeland Security and the Mount Prospect Police Department. They also stipulated that the bag inside the DVD case contained 70 grams of MDMA and that the pills inside the plastic bag that were tested contained alprazolam.

¶ 18 Defendant did not present any evidence. In closing, defense counsel argued that Mikolajczyk was the guilty party.

¶ 19 Following oral arguments, the circuit court found defendant guilty of two counts of possession of controlled substances and one count of possession of controlled substances with intent to deliver. The court found that the evidence established beyond a reasonable doubt that the package was clearly intended to go to defendant at that address as it was addressed to her and she was present at that address and had just returned from a jog when the police executed the

search warrant. The court held that Todd identified defendant as the woman who called him after he left the re-delivery slip attached to her apartment door, and even if he had not identified her voice, other circumstantial evidence proved that it was her because it was a woman's voice who called Todd, not a man's, and the slip was left on her door and subsequently found on the kitchen counter inside her apartment. The circuit court found that defendant knew it was an international package. The court found that the evidence showed that the package had been opened because the sensors were triggered and the DVD case and drugs were thrown out of the window when the police knocked on the apartment door, which also demonstrated consciousness of guilt. The court observed that defendant's refusal to come to the door while the police were knocking showed consciousness of guilt. The court held that the evidence showed that defendant was the one who opened the package, not Mikolajczyk, because he had only three specks of powder on his hands while she had powder "all over her hands." In connecting defendant to the narcotics and the apartment, the court also cited the fact that the window through which the DVD case was thrown was above defendant's head as she lay on the bed, the re-delivery slip was found in the kitchen, and the evidence showed that Mikolajczyk lives in Schaumburg. The circuit court also held that the evidence established the intent to deliver beyond a reasonable doubt because of the drug supplies and equipment found under the kitchen sink and in the cupboard which could be used to repackage and sell the drugs in smaller quantities. In addition, the court cited defendant's statement that the package was not meant for her boyfriend.

¶ 20 Following her conviction, defendant filed a motion for a new trial, which the circuit court denied. The court sentenced defendant to 20 years' imprisonment for the conviction of possession of a controlled substance with intent to deliver and a concurrent term of 6 years' imprisonment for the conviction of possession of a controlled substance.

¶ 21 Defendant also filed motions for a new sentencing hearing and for resentencing, which were both denied. She filed a timely notice of appeal.

¶ 22 II. ANALYSIS

¶ 23 A. Sufficiency of the Evidence

¶ 24 Defendant argues on appeal that the State failed to prove beyond a reasonable doubt that she constructively possessed the package or the controlled substances because the State did not show that she had "control of the premises." She asserts that the evidence instead showed that Mikolajczyk had a clear and obvious relationship to the apartment, the package, the controlled substances, and the drug paraphernalia.

¶ 25 "[T]he State carries the burden of proving beyond a reasonable doubt each element of an offense." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979)). "Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *Id.* (citing *Jackson*, 443 U.S. 318-19). "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *Id.* at 225. "This standard of review applies regardless of whether the evidence is direct or circumstantial and regardless of whether the defendant was tried before the bench or a jury." *People v. Wise*, 2019 IL App (2d) 160611, ¶ 12.

¶ 26 To prove defendant guilty of possession of a controlled substance with intent to deliver, the State is required to show that "(1) the defendant had knowledge of the presence of the controlled substance, (2) the controlled substance was in the immediate control or possession of the defendant, and (3) the defendant intended to deliver the controlled substance." *People v.*

Minniweather, 301 Ill. App. 3d 574, 578 (1998). See 720 ILCS 570/401(a)(7.5)(a)(i) (West 2014) (possession with intent to deliver more than 15 but less than 100 grams of MDMA). Similarly, unlawful possession of a controlled substance required the same elements above except without the intent to deliver. *People v. Eghan*, 344 Ill. App. 3d 301, 306 (2003); 720 ILCS 570/402(c) (West 2014).

¶ 27 "Possession may be actual or constructive and is often proved with circumstantial evidence." *People v. Jackson*, 2019 IL App (1st) 161745, ¶ 27 (citing *People v. Love*, 404 Ill. App. 3d 784, 788 (2010)). It is undisputed that defendant was not found in actual possession of the controlled substances. Thus, the State was required to show that she constructively possessed them.

¶ 28 Constructive possession occurs when "a defendant has the intent and capability to maintain control and dominion over the contraband." *Jackson*, 2019 IL App (1st) 161745, ¶ 27 (citing *Love*, 404 Ill. App. 3d at 788). Constructive possession may be proven "with evidence that the defendant had knowledge of the presence of the contraband and had immediate and exclusive control over the area where the contraband was found." *Id.* (citing *Love*, 404 Ill. App. 3d at 788). A defendant's knowledge can be inferred from "surrounding circumstances, such as the defendant's actions, declarations, or other conduct, which indicate that the defendant knew the contraband existed in the place where it was found." *Id*. The State proves the defendant had control by showing that she "has the capability and intent to maintain dominion and control over the contraband." *Id.* Proof of control over the premises where the contraband was found supports "an inference of knowledge and possession of that contraband." *Id.* (citing *People v. Givens*, 237 Ill. 2d 311, 335 (2010)).

¶ 29 In reviewing the trial evidence, we are mindful that "[k]nowledge and possession are factual issues, and the trier of fact's findings on these questions will not be disturbed unless the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt of the defendant's guilt." (Internal quotation marks omitted.) *People v. Tates*, 2016 IL App (1st) 140619, ¶ 17.

¶ 30 Viewing all of the evidence in the light most favorable to the prosecution, as we must, we find there was sufficient evidence to prove beyond a reasonable doubt that defendant constructively possessed the controlled substances. The trial evidence amply established beyond a reasonable doubt that defendant had the "intent and capability to maintain control and dominion over the contraband" (*Jackson*, 2019 IL App (1st) 161745, ¶ 27) in that she knew of the presence of the contraband and had "immediate and exclusive control over the area where the contraband was found" (*Love,* 404 Ill. App. 3d at 788). The package containing MDMA was mailed from Germany specifically to defendant, listing her name and residence. When Todd was unable to deliver the package on his first attempt, he left a re-delivery slip on her apartment door. That defendant called the telephone number listed on the slip shortly thereafter and identified herself by name strongly suggests that she resided at that apartment. Defendant was aware that it was an international package that required a signature. Defendant returned to the apartment after a jog shortly before the scheduled delivery time began the next day. This evidence strongly supports an inference that she resided at the apartment and had control over it, and it connects her to the package. The package was delivered shortly after her return and opened shortly after it was delivered. After the sensors were triggered, the police entered the apartment and found defendant laying on the bed in the bedroom under the window through which the window screen and DVD containing the MDMA had just been thrown. The police found the re-delivery slip in

the kitchen of the apartment, in addition to other drug paraphernalia. Thus, contrary to defendant's assertion, there was strong evidence demonstrating that defendant had knowledge of the presence of the controlled substances and control over the premises.

¶ 31 In addition, the fact that defendant did not open the door when the police repeatedly knocked, announced their office, and stated that they had a warrant, suggests consciousness of guilt, considering Mikolajczyk had just opened the door shortly before. *People v. Hart*, 214 Ill.2d 490, 519 (2005) (flight or attempt to hide may show consciousness of guilt). Further, her attempt to dispose of the DVD case containing the MDMA through the open window as police were attempting to enter the apartment obviously supports an inference of guilt. See *People v. Carodine*, 374 Ill. App. 3d 16, 25 (possession may be shown by "acts such as hiding or trying to dispose of the item.") And, despite defendant's attempt to distance herself from the package, we note that when the police held an ultraviolet light to defendant's hands, a large amount of what appeared to be the anti-theft powder was all over her hands. In contrast, only three small specks of powder were observed on Mikolajczyk's hands. This supported an inference that defendant was the individual who opened the package and DVD case.

¶ 32 One of the strongest pieces of evidence against defendant was her own inculpatory statement to police when she was interviewed at the police station after the search. Defendant informed Ryan that "the package wasn't meant for anyone else and that Marek, her boyfriend, shouldn't be getting arrested." An admission by defendant was obviously strong evidence of her guilt. *People v. Banks*, 17 Ill. App. 3d 512, 514 (1974) (defendant's offer to accept blame for the theft if police would release the other defendants was "strong evidence" of guilt); *People v. McLaurin*, 331 Ill. App. 498, 503 (2002) (the defendant's behavior and comments at the scene

and hiding the drugs to avoid detection indicated his knowledge of the presence of the contraband and intent to maintain exclusive control over it).

¶ 33 Additionally, the evidence clearly supported an inference that defendant intended to deliver the controlled substances. Although defendant points out that the police did not find weapons, cell phones, police scanners, or ledgers of drug transactions in the apartment, other indicia of drug trafficking was discovered. In addition to the MDMA, the police recovered two large bags of clear capsules, a digital scale, drug paraphernalia, and the alprazolam tablets. See *People v. McDonald*, 227 Ill. App. 3d 92, 99-100 (1992) ("[T]ogether with the quantity of narcotics, the presence of drug trafficking paraphernalia routinely used to deliver drugs will support the trier of fact's finding of the intent to deliver such drugs."). On review, we make "all reasonable inferences from the record in favor of the prosecution." *Givens*, 237 Ill. 2d at 334. Given this evidence, it was reasonable to infer defendant intended to deliver the controlled substances.

¶ 34 Defendant argues that Mikolajczyk was actually the "moving force" behind the drug activity because he signed for the package and had a criminal background. Defendant presented this argument to the trier of fact, who rejected it in finding her guilty. In reviewing the trial evidence, it is not this court's function to retry the defendant on appeal. *People v. Schmalz*, 194 Ill. 2d 75, 80 (2000). Rather, we defer to the trier of fact's resolution of any conflicting evidence, weighing the evidence, and drawing reasonable inferences based on the facts presented. *People v. Bradford*, 2016 IL 118674, ¶ 12. In that endeavor, the trier of fact need not "search out all possible explanations consistent with innocence and raise those explanations to a level of reasonable doubt." *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. The trier of fact was not required to reject the State's evidence in favor of defendant's account.

¶ 35 The fact that Mikolajczyk was present in the apartment as well as defendant does not negate proof that she possessed the controlled substances. The uncontradicted trial evidence showed that Mikolajczyk lived in Schaumburg. Regardless, "[c]onstructive possession is not diminished by evidence of others' access to contraband." *Jackson*, 2019 IL App (1st) 161745, ¶ 27. Defendant's control over the controlled substances and premises could "include joint possession ***." *People v. Tates*, 2016 IL App (1st) 140619, ¶ 25. At any rate, "defendant's control of the premises is not dispositive. Rather, it is defendant's relationship to the contraband that must be examined." *Minniweather*, 301 Ill. App. 3d at 578.

¶ 36 Accordingly, ample evidenced demonstrated defendant's knowledge of and control over the controlled substances, her dominion over the apartment, and her intent to deliver the controlled substances. Contrary to defendant's assertion, the uncontradicted evidence, together with the reasonable inferences flowing from it, were sufficient to establish her constructive possession of the contraband. Based on the record, we cannot say that the evidence was so improbable or unsatisfactory as to give rise to a reasonable doubt about her guilt. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 37 We note that the cases upon which defendant relies are distinguishable from the present facts because, in contrast to the cases cited by defendant, ample evidence connected defendant to the apartment and the contraband here. See *People v. Ray*, 232 Ill. App. 3d 459 (1992) (finding that there was no evidence connecting three defendants to premises except a six-month-old cable television bill in one of the defendants' names); *People v. Fernandez*, 2016 IL App (1st) 141667, ¶¶ 20-24 (insufficient evidence of constructive possession of contraband concealed under a mattress in a house and under the hood of a vehicle in the garage, as defendant was observed driving a different vehicle, he was never observed in the house, and another individual was found

living in the house; although the defendant was in possession of keys to the house and there were some personal effects in the house, the connection was too tenuous to show control over the premises or knowledge of the contraband); and *People v. Terrell*, 2017 IL App (1st) 142726, ¶¶ 21-26, 30-31 (insufficient evidence of constructive possession of controlled substances where the defendant was in a truck parked in front of the apartment at the time the apartment was searched, the apartment lessee was present, none of the addresses listed on defendant's personal effects found in the apartment matched the apartment address, defendant's property was not found in the same room as the contraband, the contraband was concealed in a hidden compartment in a closet, and there was no evidence that defendant had ever entered the apartment).

¶ 38 In her reply brief, defendant also cites *People v. Smith*, 191 Ill. 2d 408 (2000). However, we find that case inapposite. In *Smith,* the defendant's conviction for armed violence was reversed on appeal where the defendant was seen dropping a weapon out of a second story window when he realized the police were approaching. *Id.* at 412. The court found that, contrary to the requirements of the offense of armed violence, the defendant did not have "immediate access to" or "timely control over" a weapon at the time the police entered the apartment, nor did he have the "intent and capability" to maintain control or possession of the weapon. (Internal quotation marks omitted). *Id.* The requirements of the offense of armed violence are plainly distinguishable from what is required to show constructive possession of a controlled substance in the present case.

¶ 39 B. Ineffective Assistance of Counsel

¶ 40 Defendant contends that her trial counsel provided constitutionally deficient assistance because he failed to challenge the validity of the anticipatory search warrant on grounds that it did not explicitly give police authorization to insert the theft detection powder into the package.

Defendant argues that she was prejudiced by this alleged error because the theft detection powder evidence was the State's strongest evidence connecting her to the MDMA.[2]

¶ 41 The State responds that a motion attacking the anticipatory search warrant would not have been successful because the warrant was valid, defendant's arrest was supported by probable cause, and defendant does not challenge the warrant's authorization of the use of the trigger signaling devices. The State asserts that use of theft detection powder is widespread and did not require authorization because it was not a device which explored the details of a home that would be unknowable without physical intrusion implicating Fourth Amendment concerns—the powder was only observed once the officers were already lawfully inside the apartment. The State argues that defendant cannot show prejudice because, even without the theft powder evidence, there was ample evidence of defendant's guilt.

¶ 42 To establish that defendant was denied her right to the effective assistance of counsel, she must establish both that her trial counsel's performance was deficient and that the deficiency prejudiced defendant. *People v. Wilkerson*, 2016 IL App (1st) 151913, ¶ 44; *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007). That is, a defendant must show that her counsel's performance fell below an objective standard of reasonableness given prevailing professional norms, and that, but for the deficient performance, a reasonable probability exists that the result of the proceeding would have been different. *Wilkerson*, 2016 IL App (1st) 151913, ¶ 45. Such a probability arises where it is sufficient to undermine confidence in the outcome. *Id.* A defendant must prove both prongs of the *Strickland* test; if a claim can be resolved based on a finding that the defendant suffered no prejudice, this

[2] We note that defendant argues that this court may determine whether this issue can be reviewed on appeal or requires collateral proceedings under *People v. Veach*, 2017 IL 120649, ¶ 46. We find that review on direct appeal is proper as the record relevant to her claims is not "incomplete or inadequate for resolving the claim[s]." *Id.*

court need not address whether counsel's performance was deficient. *Id.* ¶ 46 (citing *People v. Graham,* 206 Ill. 2d 465, 476 (2003)).

¶ 43 "A trial counsel's failure to file a motion to suppress does not establish incompetent representation when that motion would be futile; as it is a matter of trial strategy to file such a motion, counsel's decision will be accorded great deference." *People v. Pacheco,* 281 Ill. App. 3d 179, 183 (1996) (citing *People v. Wilson,* 164 Ill. 2d 436, 454-55 (1994)). We indulge "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Wilkerson*, 2016 IL App (1st) 151913, ¶ 46. To prevail, "defendant must show that the motion would have been granted and that the outcome of the trial would have been different had the evidence been suppressed." *Pacheco,* 281 Ill. App. 3d at 183.

¶ 44 An anticipatory search warrant "is a warrant based upon an affidavit showing probable cause that at a future time certain evidence of a crime will be located with an identified person or in a specific place." *People v. Harris*, 2015 IL App (1st) 132162, ¶ 29 (citing *People v. Bui,* 381 Ill. App. 3d 397, 406 (2008); *People v. Carlson*, 185 Ill. 2d 546, 549 (1999)). Execution of an anticipatory search warrant is generally subject to a condition precedent, known as a "triggering condition," such as the occurrence of a specific event. *Id.* Such warrants "should be narrowly drawn to 'avoid premature execution as a result of manipulation or misunderstanding by the police.' " *Id.* (quoting *United States v. Brack,* 188 F.3d 748, 757 (7th Cir.1999)).

¶ 45 For example, in *Bui,* relied on by defendant, the police intercepted a package containing narcotics which was addressed to the defendant at a nail salon and bore a fictitious sender's name and return address. *Bui,* 381 Ill. App. 3d at 402. The police obtained permission to place an electronic monitoring filament in the package and secured an anticipatory search warrant to search defendant or anyone taking control of the package, the nail salon, and any other location

the package was "accepted into." *Id.* at 401. A few hours after the controlled delivery of the package to the salon, defendant arrived, picked up the package, drove away, and entered a new vehicle and then a private residence. *Id.* at 402. Shortly after, the signaling devices alerted that the package had been opened, so the police executed the warrant, arrested the defendant, and found additional narcotics in the defendant's bedroom. *Id.* The court found that the warrant had been validly executed, including the search of the residence, despite the fact that the search was executed at a location other than where the package was delivered and occurred hours later. *Id.* at 409. The court reasoned that to "accept" the package meant to "receive and open" it because it was addressed to a public address and because the monitoring devices were installed specifically for identifying who opened it. *Id.* at 409-10.

¶ 46 In *Harris*, also cited by defendant, the police intercepted a package containing narcotics and then obtained an anticipatory search warrant to search the addressee "S.Harris" or anyone taking possession following delivery, and to enter the listed address or any premises or vehicle the package was taken into. *Harris*, 2015 IL App (1st) 132162, ¶ 5. Police also obtained an order for installation of an electronic monitoring device and a breakaway filament inside the package. *Id*. Shortly after a controlled delivery to the listed address, the defendant drove up, picked up the package, placed it in the rear seat without opening it, and reentered his vehicle, but the sensors did not go off. The police decided to execute the warrant and arrested him. *Id.* ¶¶ 5-9. The court found that the motion to quash the defendant's arrest and suppress evidence should have been granted because the officers executed the warrant prior to the triggering event, *i.e.*, package must be "accepted" as indicated by activation of the signaling devices, and thus their conduct was premature and unauthorized by the warrant. *Id.* ¶ 31.

¶ 47 The cases cited by defendant simply address whether the police validly executed the anticipatory search warrants in accordance with their terms. Neither *Bui* or *Harris* establish what the defendant proposes, *i.e.*, that the police cannot "at their whim" insert " 'powders' of their choice, absent judicial empowerment, while preparing [anticipatory search warrant] packages." Thus, defendant fails to cite any authority to support this proposition.

¶ 48 The State asserts that the theft detection powder did not require authorization because it did not implicate any Fourth Amendment rights, as it did not entail the government's use of a "device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion." *Kyllo v. United States*, 533 U.S. 27, 40 (2001). The Fourth Amendment "protects legitimate expectations of privacy rather than simply places." *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) (finding no legitimate expectation of privacy in the contents of a previously lawfully searched container that contained contraband where the police had resealed the container and conducted a controlled delivery).

¶ 49 However, we need not reach this issue because, even assuming that the officers erred in placing the theft detection powder in the package without court authorization, we would nevertheless conclude that there was no prejudice. The record supports that the anticipatory warrant was valid and supported by a sufficient factual basis and it was also executed in accordance with its terms. As such, a motion to quash would have been futile. *Pacheco*, 281 Ill. App. 3d at 183.

¶ 50 There can be no dispute that in the present case, unlike in *Harris*, and similar to *Bui*, there was no premature execution of the anticipatory search warrant, which permitted police to search "[a]ny person taking control of a US Post Service black envelope addressed to 'Brittani Griebahn, 1094 S Tamarack Dr #485, Mount Prospect, IL 60056, United States of America' " or

"[a]ny premise or vehicle that the above listed package has been delivered by law enforcement." In the complaint supporting the request for search warrant, Ryan averred that the package would be repackaged "with a court ordered signaling device secreted within it." The police did not execute the search warrant and enter the apartment until after the signaling devices were triggered.

¶ 51 Further, there was more than an adequate evidentiary basis to support issuance of the anticipatory search warrant under the facts of the case. The presence of MDMA in the package was discovered by federal authorities at the airport and Mount Prospect police then received the package and arranged for a controlled delivery as provided by the anticipatory search warrant. Defendant was specifically listed as the recipient on the package and it was not transported to another location. The warrant was narrowly tailored to authorize search of defendant or anyone taking control of the package and the listed apartment or any vehicle or premises where the package was delivered.

¶ 52 Moreover, there was sufficient evidence to establish defendant's guilt even without consideration of the theft detection powder evidence. We note that, before trial, defense counsel moved to quash arrest and suppress evidence, including her confession, on the basis that the arrest was outside the scope of the search warrant as her presence in the apartment was lawful and her behavior was innocent and did not give rise to probable cause or reasonable suspicion. The trial court held that the police had probable cause to arrest defendant with or without the search warrant, regardless of whether the police used the ultraviolet light or who answered the door initially. The court also found the search was proper whether it was to effectuate the search warrant or as incident to a lawful arrest. We also note that, before trial, counsel challenged the theft detection powder evidence on grounds that it lacked a sufficient scientific basis; as a result,

the State was not permitted to specifically refer to the substance found on defendant's hands as theft detection powder.[3]

¶ 53 Ultimately, the trial evidence showed that the package was addressed specifically to defendant, at the address where the package was delivered and ultimately opened. Defendant was connected to the address and the MDMA because she obtained the re-delivery slip on her apartment door and contacted Todd to arrange for re-delivery, she was observed returning to the apartment after a jog, she was found inside the apartment when the police executed the warrant, she was found on the bed under the open window through which the MDMA had just been thrown, and she essentially admitted to police that the package was intended for her and not Mikolajczyk.

¶ 54 Thus, there was sufficient evidence to support her arrest even absent the theft detection powder. On the record before us, defendant has not demonstrated that counsel's performance was constitutionally deficient, and she cannot show that had counsel challenged the theft detection powder as she asserts, there is a reasonable probability that the result of her trial would have changed. *Wilkerson*, 2016 IL App (1st) 151913, ¶ 45; *Pacheco*, 281 Ill. App. 3d at 183.

¶ 55 III. CONCLUSION

¶ 56 For the reasons set forth above, we affirm the judgment of the circuit court.

¶ 57 Affirmed.

[3] Additionally, the trial court suppressed a portion of the statements defendant made when she was interviewed at the police station. During trial, defendant reiterated his objections to these issues and also objected to the voice identification of defendant by Todd and Todd's testimony regarding the theft detection powder.