2019 IL App (1st) 180337-U

No. 1-18-0337

Third Division
January 16, 2019

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re D.W., a minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County.
	)	
Petitioner-Appellee,	)	No. 17 JD 00963
	)	
v.	)	Honorable
	)	Daryl Jones,
D.W., a minor	)	Judge, presiding.
	)	
Respondent-Appellant.)	)	

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court did not abuse its discretion in limiting D.W.'s cross-examination of Officer Conner under the surveillance-location privilege where *in camera* hearing supported the State's argument for non-disclosure and the exact location was not essential to a fair determination.

¶ 2 Minor-Respondent D.W. was adjudicated delinquent for the possession of a controlled substance. He was sentenced to 30 days in the juvenile temporary detention center, with 25

days stayed, and electronic monitoring for three weeks after his release.[1] On appeal, D.W. contends that the trial court violated his Sixth Amendment right where his cross-examination of Officer Conner was limited by an improper application of the surveillance-location privilege. In the alternative, D.W. contends that the surveillance-location privilege should be rejected as a matter of law. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On May 5, 2017, 16-year-old D.W. was arrested after police officers detained him as a suspected drug dealer. The State subsequently filed a petition for adjudication of wardship and charged D.W. with one count of possession of a controlled substance. The following was adduced during the adjudication hearing on January 4, 2018.

¶ 5 Officer Conner testified that he and other officers were assigned to conduct a narcotics investigation on May 5, 2017. Conner was the sole surveillance officer with the others serving as enforcement officers. Around 5 p.m., Conner began surveillance of the 4100 block of West Adams Street, which was known for high levels of heroin trafficking. Approximately 30 minutes into his surveillance, Conner spotted D.W entering a vacant lot at 4142 West Adams.

¶ 6 According to Conner, D.W. was wearing a dark blue jacket with black sleeves and jeans. He entered the vacant lot and retrieved a strip of white tape containing miniature pink Ziploc bags from underneath a rock on the east side of the lot. After ripping a portion of the tape strip off, D.W. exchanged some of the bags with an unidentified woman for money and returned the rest of the strip back under the rock. Conner observed the entire transaction. He

[1]D.W. has acknowledged, and accordingly withdrawn, his appeal to modify the sentencing order to reflect his accurate sentencing credits as moot.

lost sight of D.W. after he walked towards the west side of the lot and Conner's view became obstructed by a building.

¶ 7 Conner radioed his team D.W. and the unidentified woman's directions of travel and a description of their clothing. D.W. was located and detained by Officers Loring, Grassi, and Meeks approximately one and a half blocks away around 4300 Jackson. Conner maintained his surveillance of the lot until Officer Haney arrived to retrieve the suspected drugs. Other than D.W., the unidentified buyer, and Haney, Conner did not see any other individuals around the lot. Haney entered the lot through a red gate at the south end of the lot and Conner directed him towards the rock. Conner observed Haney flip the rock over and retrieve the strip of tape which still had four mini Ziploc bags attached. After Haney secured the suspected drugs, Conner left his surveillance post to meet with the other officers.

¶ 8 Conner arrived at 4300 Jackson approximately fifteen minutes after his radio report and identified D.W. as the individual he saw dealing drugs in the vacant lot. D.W. was arrested and transported to the 11th district station. A custodial search revealed that D.W. was carrying $135 in cash. However, no drugs or other contraband were found on his person. The parties stipulated that the Ziploc bags recovered from under the rock tested positive for heroin and contained 3.4 grams in total.

¶ 9 On cross-examination, Conner acknowledged that his report did not indicate the time he started his surveillance. He also explained that the report's listed date and time of occurrence indicated, as is typical in narcotics-related charges, the time that the suspect was placed into custody. In this particular case, although the drug transaction and D.W.'s detainment occurred at earlier times, D.W. was not arrested until Conner left the surveillance post and

identified him. Thus, the reports listed the same time for officer arrival at the scene, time of occurrence and time of arrest.[2]

¶ 10 Conner was asked about his surveillance location. The State objected arguing that such disclosure posed a significant safety risk to Conner and the officers for future investigations, as well as anyone who had cooperated or participated in the investigation. After excusing Conner from the courtroom, D.W.'s counsel responded to the State's assertion arguing that Conner never testified about any safety risk. Further, counsel argued that the standards for applying the surveillance-location privilege established in *People v. Criss*, 294 Ill. App. 3d 276 (1998), which only involved a hearing to determine probable cause, were inapplicable. Counsel asked the court to instead follow *People v. Knight*, 323 Ill. App. 3d 1117 (2001), and find that disclosure was required here because the State's case turned on a single officer's observation and there was no other way to challenge the testimony without knowledge of the surveillance location.

¶ 11 The trial court conducted an *in camera* hearing with Conner during which the surveillance location was disclosed. The trial court determined that disclosure would compromise the utility of the location. After weighing the public interest versus D.W.'s need to know the location, the trial court found that disclosure was not required. D.W.'s counsel reiterated the argument, asserting that under *Knight*, disclosure in cases with only one eyewitness is almost always granted. The trial court found that *Knight* was distinguishable and reaffirmed that D.W. had not overcome his burden to prove disclosure was necessary. The court limited cross-examination of Conner to topics such as the distance or any obstructions between the officer and subject, lighting conditions, and weather.

[2]A stipulation was later entered that the arrest report listed 5:50p.m. (1750 hours) for the time of arrest.

¶ 12 Cross-examination of Officer Conner continued and he testified that the vacant lot was on the north side of West Adams Street and he was positioned directly east of the lot. His surveillance location was approximately 15 feet from the rock where the heroin was recovered. The court did not allow counsel to ask questions about whether Conner was in an elevated position or on street level, nor whether he was in a vehicle or a structure. Conner testified that the surveillance location was decided with the team while they were out in the area and he set up his surveillance position alone. The weather was clear, it was light out, there were no obstructions between Conner and D.W. during the drug transaction, and Conner did not take any pictures or video recordings. Conner observed the single transaction and lost sight of D.W. and the buyer when they left the lot. Immediately after losing sight of D.W., Conner radioed his team. Conner did not see D.W. being detained.

¶ 13 Officer Haney testified consistently with Conner. Haney's role as an enforcement officer was to wait in the vicinity for reports and to investigate. Shortly before 5:50 p.m., Conner reported to the team members that he observed a suspected narcotics transaction. Haney and Officer Acevedo attempted to pursue the suspected buyer based on Conner's general description of the clothes she was wearing. After an unsuccessful search, Haney and Acevedo learned that Officers Loring and Grassi had detained the suspected seller around 4300 Jackson. Haney then worked with Conner to recover the remainder of the suspected narcotics. Haney further testified that he found nothing else in the lot nor did he see anyone else as he approached or left the lot. Haney reconvened with the other officers and returned to the 11th district. There, Haney turned over the recovered narcotics to Acevedo who inventoried the evidence.

¶ 14 On cross-examination, Haney was also questioned about the timeline of events according to the police reports. Haney estimated that the detainment occurred between 5:42-5:45 p.m. and the positive identification and subsequent arrest occurred at 5:50 p.m. He also estimated that the walk between the vacant lot and the location of detainment was one minute. He testified that he went to recover the narcotics before D.W. was positively identified by Conner. Haney noted that different officers can interpret the date and time of occurrence in different ways, but in his ten years of practice the report's date and time indicate "the time that we have the narcotics and realize they are suspect narcotics."

¶ 15 The court found that Officers Conner and Haney's testimony was credible. The court further noted that it was not concerned by the alleged discrepancies in the times reported in the official police record regarding the start of surveillance, the detainment and arrest of D.W., and the time the suspected narcotics were recovered. The court noted the only concern it had was the possible effect of the 15-minute lapse between Conner observing D.W. and later identifying him. However, the court determined that Conner's testimony gave no indication that he was mistaken or lying about identifying D.W. Thus, the court entered a finding of guilty on the possession charge and this appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, D.W. first argues that he was denied his constitutional right to confront witnesses against him where the trial court barred questions about the exact location Officer Conner used to conduct surveillance of the vacant lot. D.W. contends that there was little evidence tying him to the crime charged other than Conner's testimony. Thus, D.W. asserts that Conner's testimony was pivotal to the State's case and his defense was severely hampered when the court limited his ability to challenge the veracity of Conner's

observations. In the alternative, D.W. asks this court to reject the use of the privilege as a whole.

¶ 18 We first address D.W.'s latter contention that the surveillance-location privilege should be rejected as a matter of law because it was not properly adopted and has been implicitly rejected by the Illinois Supreme Court. D.W. maintains that the creation of an evidentiary privilege is presumptively a legislative task unless it meets the test set forth by our supreme court's decision in *People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521 (1998). The State responds that the test for the adoption of a privilege cited by D.W. is limited and irrelevant to our analysis.

¶ 19 In *Birkett*, the court considered the City of Chicago's claim that certain documents were privileged under "a deliberative process privilege" that had been adopted in federal courts but had not been recognized in Illinois. *Id.* at 523-25. The court noted that evidentiary privileges are strongly disfavored and further explained that the creation of privileges is "presumptively a legislative task." *Id.* at 527, 533. The court outlined the elements required for an exception to recognize a new evidentiary privilege:

> "(1) the communications originated in a confidence that they will not be disclosed; (2) this element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by disclosure would be greater than the benefit thereby gained for the correct disposal of litigation." (Emphasis omitted.) *Id.* at 533, (quoting *Illinois Education Labor Relations Board v. Homer Community Consolidated School District No. 208* (*Homer*), 132 Ill. 2d 29, 35 (1989)).

D.W. asserts that the surveillance-location privilege fails this test. We acknowledge that the surveillance-location privilege does not pass muster under this test. However, we view the *Birkett* test as an acceptable method for determining if confidential communications should be considered privileged and protected from disclosure. We do not find that the test is applicable to every evidentiary privilege. See *Homer*, 132 Ill. 2d at 35 (framing the question as whether to "recognize a privilege to protect communications.") Therefore, we find the *Birkett* test to be inapplicable here because the potential communications privilege in *Birkett* and the surveillance-location privilege are so dissimilar that they cannot be evaluated under the same elements.[3]

¶ 20 D.W. further argues that in 2011 our supreme court excluded the surveillance-location privilege from the Rules of Evidence, despite making changes in other areas, and therefore did not consider the privilege to be a part of the current law in Illinois. See Ill. R. Evid. Committee Commentary (adopted Sept. 27, 2010) (the committee codified "the current law of evidence in Illinois whenever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principle of evidentiary law within the last 50 or so years"). The State responds that the language of Rule 501 leaves open the opportunity for our courts to apply the privilege as a thoroughly developed doctrine of common law. Rule 501 states "[e]xcept as otherwise required *** the privilege of a witness, person, government, state or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by Illinois courts in the light of reason and experience." Ill. R. Evid. 501 (eff. Jan. 1, 2011).

[3]D.W. also contends that the State's argument should fail because they have not suggested an alternative test to replace the Birkett analysis. However, we defer to the consistent body of law developed in our appellate court that the surveillance-location privilege should stand as is until either the legislature or Illinois Supreme Court articulate otherwise. See *infra* ¶ 21.

¶ 21 As we noted in *People v. Palmer*, 2017 IL App (1st) 151253, ¶ 23, "our supreme court has not cast doubt on the continuing viability of this body of law" despite the abundance of cases that have been decided in the appellate court between 1998, when the privilege was first recognized, and now. Our view of D.W.'s argument would be different if the surveillance-location privilege had been treated like the residual exception to the hearsay rule. The residual exception to the hearsay rule was not codified by the Rules Committee and our supreme court had expressly declined to adopt the exception in *People v. Olinger*, 176 Ill. 2d 326, 359 (1997). Under those circumstances, the omission from the codification of the Rules of Evidence in 2011 leads us to believe that Illinois does not recognize the residual exception to the hearsay rule. Conversely, the Illinois Supreme Court has been silent on the issue of the surveillance-location privilege. Therefore, we are loath to overturn two decades of jurisprudence on the argument that our supreme court has implicitly rejected the doctrine by omission from codification. In light of Rule 501's open-ended treatment of privileges under common law when not in conflict with other statutes, we reject the request to assign meaning to the supreme court's inaction and will continue to apply the doctrine as created by the consistent body of law in our appellate court.

¶ 22 D.W. contends that his Sixth Amendment right to confrontation was infringed upon by the trial court's improper application of the surveillance-location privilege. Delinquent minors are afforded all of the basic constitutional rights granted to criminal defendants, with the exception of the right to a jury trial. *People v. Austin M.*, 2012 IL 111194, ¶ 76. These rights include the right to confront witnesses against the respondent and the related right to cross-examination. See U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. 1, § 8*; Crawford v. Washington*, 541 U.S. 36, 54 (2004). However, the right to cross-examination is not

absolute. *In re Manuel M.*, 2017 IL App (1st) 162381, ¶ 17. The trial court has broad discretion to limit the scope of cross-examination. *People v. Enis*, 139 Ill. 2d 264, 295 (1990). The right to cross-examination *i*s satisfied when the court allows the defendant to seek facts relevant to the credibility and reliability of the witnesses. *People v. Quinn*, 332 Ill. App. 3d 40, 43 (2002). A trial court's restriction of cross-examination will not be reversed without an abuse of discretion resulting in manifest prejudice. *People v. Price*, 404 Ill. App. 3d 324, 330 (2010)*; People v. Criss*, 294 Ill. App. 3d 276, 279–80 (1998).

¶ 23 Illinois recognizes a qualified privilege from disclosing secret surveillance locations in a criminal proceeding against the target of the surveillance. *Price*, 404 Ill. App. 3d at 330-31; *People v. Knight*, 323 Ill. App. 3d 1117, 1128 (2001); *Criss*, 294 Ill. App. 3d at 281. Contrary to D.W.'s argument, to successfully invoke the privilege at trial, the State must initially show only that the surveillance location was either on private property with the permission of the owner, or in a location that is useful and its utility would be compromised by disclosure. *Price*, 404 Ill. App. 3d at 31-32. The trial court should hold an *in camera* hearing, outside the presence of the defendant, where the witness must reveal the surveillance location. *Knight*, 323 Ill. App. 3d at 1127. The applicability of the privilege is decided on a case-by-case basis, with the trial court balancing the public interest with the defendant's need to prepare a defense and to engage in "accurate fact finding." *Quinn*, 332 Ill. App. 3d at 43. The court should consider the crime charged, any potential defenses, and the significance of the privileged information. *Id.* If the State meets its burden, the defendant can overcome the privilege by demonstrating the need for disclosure. *Criss*, 294 Ill. App. 3d at 281. The defendant's burden of proof is lower if the privilege is invoked at trial versus during a pretrial motion. *People v. Palmer*, 2017 IL App (1st) 151253, ¶ 28. At trial, defendant needs to show

only that the surveillance location is relevant and helpful to his defense, or is essential to the fair determination of the cause. *Id*. See also *People v. Price*, 404 Ill. App. 3d 324, 332-33 (2010).

¶ 24 Here, the State's invocation of the privilege at trial triggered an *in camera* hearing in which the surveillance location was revealed and the trial court found that the State met its initial burden of showing that disclosure would compromise the location's utility. The record on appeal includes the sealed transcript of the *in camera* proceeding, which we have reviewed, and we find that it supports the trial court's finding that the State met its initial burden for invoking the privilege. D.W. therefore was required to make a showing that the surveillance location was relevant and helpful to his defense, or was essential to the fair determination of the cause. After reviewing the record and the arguments on appeal, we find that D.W. has failed to overcome the State's invocation of the privilege.

¶ 25 During trial, D.W. argued that Conner's testimony was uncorroborated because he was the sole surveillance officer and therefore disclosure of the location to challenge Conner's testimony was helpful to his defense. D.W. argues on appeal that the trial court misinterpreted the holding in *Knight*. He asserts that he demonstrated a greater need for cross-examination than the defendant in *Knight* and therefore we should follow the court's ruling in *Knight* and vacate his conviction for an improper application of the surveillance-location privilege. However, D.W. fundamentally misunderstands the holding in *Knight.* "*Knight* does not stand for the proposition that [the defendant] must be allowed to cross-examine an officer about an exact surveillance location." *People v. Stokes*, 392 Ill. App. 3d 335, 342 (2009). Rather, *Knight* held that disclosure "must almost always" be ordered "where a defendant's need for the location information is so great that the case turns almost

exclusively on an officer's testimony." *Knight*, 323 Ill. App. 3d at 1127-28. D.W. argues that he has shown that his case turns "exclusively on an officer's testimony" because Conner was the only officer who saw the alleged drug transaction and identified D.W. We do not agree with D.W. that this is what the court meant in finding that a case turns exclusively on an officer's testimony.

¶ 26 In *Knight*, the officer testified that he was out on foot and observed defendant for five minutes prior to approaching him. 323 Ill. App. 3d at 1120. The officer stood approximately 50 feet away from the defendant and was not using any visual aids; nevertheless, he claimed that he saw a drug transaction between the defendant and an unknown buyer in a van. *Id*. The officer testified he saw "three-quarters of [the] defendant's face and had a clear view of the passenger side of the van." *Id*. at 1119. The officer then lost sight of the defendant because he returned to his car prior to approaching the defendant. *Id*. at 1120. He could not recall the type of jacket the defendant was wearing but believed the defendant matched the description of the person he observed. *Id*. A witness testified that the defendant was busy helping unload a church van at the arrest location and she did not see the defendant selling drugs. *Id*. Furthermore, the defendant and his girlfriend testified that there was a known drug dealer who was dressed similarly to the defendant. *Id*. Lastly, the defendant had no money or drugs on his person, the drugs were recovered from a nearby flowerpot, and there were multiple bystanders in the area. *Id*. Despite the alibi testimony, the potential for a case of mistaken identity, and the fact that no money or contraband was found on the defendant, the defendant was convicted. Thus, the defendant's conviction rested solely on the officer's testimony that he witnessed the drug transaction and positively identified the defendant as the drug dealer. Due to these circumstances, the need for cross-examination in *Knight* was essential because

challenging the officer's testimony by thoroughly questioning his vantage point from the surveillance location may have been the piece of evidence that could have tipped the scale toward the defendant's acquittal.

¶ 27 In this case, the testimony established that Conner saw D.W. enter a vacant lot and engage in a drug transaction. Although it took Conner approximately 15 minutes to rendezvous with the other officers to identify D.W., D.W. was detained by the other enforcement officers soon after the clothing description and direction of travel were given over the radio. A custodial search of D.W. revealed that he was carrying $135 in cash which was consistent with Conner's testimony. D.W. did not present any alibi evidence and although Conner lost sight of D.W., he had no trouble identifying D.W. Neither Conner nor Haney saw any other individuals near the lot that could have been mistaken for D.W. Conner also testified that there were no obstructions between him and D.W. whereas the officer in *Knight* admitted that a portion of the defendant's face was obstructed during the transaction. Haney also testified that he recovered the drugs under the rock and in a manner consistent with Conner's testimony. Thus, Conner's testimony was corroborated and we find that there was no evidence that seriously called into question the veracity and credibility of Conner's testimony. As the need for disclosure of the surveillance location was lower for D.W. than in *Knight*, the trial court did not severely hamper D.W.'s ability to challenge the officer's testimony or infringe on the right to confrontation.

¶ 28 D.W. incorrectly argues that the defendant in *Knight* had the opportunity to present other witnesses, and therefore the need for disclosure of the surveillance location and cross-examination was actually lower because the defendant could have relied on those witnesses to challenge the State's case. This is inaccurate as the real issue in *Knight* and similar cases is

that the officer's testimony was called into question, yet the defendant was still convicted. See *People v. Flournoy*, 2016 IL App (1st) 142356, ¶¶ 49-50 (contrasting cases where the defendant's need for disclosure and cross-examination was low because no evidence was presented that called into question the officer's ability to observe and/or money was recovered corroborating the officer's testimony with *Knight* where conviction "rested solely on the surveillance's officer testimony").

¶ 29 D.W. relies on two cases decided in 2017 where the defendants' convictions were reversed as examples of factually identical cases and therefore support for overturning his conviction. However, we find these cases are distinguishable for the following reasons.

¶ 30 In *Palmer*, the officer testified that he was approximately 40 yards away and observing the defendant through binoculars around 11:00 p.m. 2017 IL App (1st) 151253, ¶ 4. He claimed to be hidden in the shadows of a vacant lot filled with vegetation although the area he observed the defendant in was illuminated by a street light. *Id.* ¶ 13. The court found that applying the surveillance-location privilege impaired the defendant from testing the officer's claim that the vegetation which concealed his presence did not impair his ability to observe the alleged drug transactions. *Id.* ¶ 35. Furthermore, the defendant in *Palmer* allegedly engaged in three drug transactions, but was only found with $20 on his person. *Id.* ¶ 7.

¶ 31 Additionally, in *In re Manuel M.*, the respondent was arrested for aggravated unlawful use of a weapon and unlawful possession of a firearm. 2017 IL App (1st) 162381, ¶ 1. The arresting officer testified that he saw respondent from a surveillance position in an elevated outdoors location approximately two blocks away. *Id.* ¶ 11. The officer observed respondent and two others endangering drivers and pedestrians by "flashing gang signs at passing vehicles causing the vehicles to swerve." *Id.* ¶ 6. After 15 to 20 minutes of observation,

which was not recorded in the official police report, the officer broke surveillance to drive to the park and arrest respondent for reckless conduct during which a custodial search revealed respondent's firearm. *Id.* ¶¶ 6, 11. The officer further testified that several buildings were situated between the park and his surveillance location, but claimed that his view through the binoculars was not obstructed. *Id.* The court found that respondent was denied his right of effective cross-examination because challenging the officer's ability to see the respondent "from more than a block away with buildings in between the observation point and the respondent was essential to challenging the officer's probable cause for respondent's arrest and subsequent search. *Id.* ¶ 22.

¶ 32 Here, D.W. asserts that Conner's testimony was questionable because he managed to remain concealed from D.W. even though he was within 15 feet and claimed to have clearly seen the miniature Ziploc bags and exchange of U.S. currency. He argues that the exact surveillance location had to be revealed in order for him to fully challenge this questionable testimony. We acknowledge that in *Palmer* the court noted that "asking a witness if his sight line was clear is pointless if the witness's answer cannot then be tested by specific questions based on his exact location." *Palmer*, 2017 IL App (1st) 151253, ¶ 32. However, having reviewed the hearing transcript, including the *in camera* proceedings, we find that the trial court correctly determined that revealing the exact surveillance location would have had little significance on supporting D.W.'s defense that Conner's testimony was implausible. This case is dissimilar from the testimony of the officers in *Palmer* and *Manuel M.*, who admitted that there were possible obstructions, but claimed nonetheless that their line of sight was clear enough to observe the alleged misconduct.

¶ 33 Lastly, it is apparent from the hearing transcript that the court considered and balanced the public's interest with the defendant's need to prepare a defense and to engage in accurate fact finding. Although the court did not explicitly address the factors such as the crime charged, any potential defenses, and the significance of the privileged information, the court concluded, as we do now, that the exact surveillance location bore little significance to the defenses D.W. could assert and that allowing further cross-examination would not be in the interest of the public. D.W. makes a brief argument that due to the nature of the neighborhood under surveillance there were a great number of locations available for the officers to engage in future surveillance. Thus, he contends that the public interest in keeping this specific location secret could not outweigh his right to cross-examine the witness. However, we review the trial court's decision to limit cross-examination for an abuse of discretion and only reverse if we find that the abuse of discretion resulted in manifest prejudice. We find no error in the trial court's exercise of discretion nor do we see how keeping the location secret prejudiced D.W., therefore we find no cause to reverse his conviction.

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, we find that the trial court correctly applied the surveillance-location privilege. Accordingly, the judgement of the circuit court of Cook County is affirmed.

¶ 36 Affirmed.