2019 IL App (3d) 170139-U

Order filed August 23, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
	)	Bureau County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0139
v.	)	Circuit No. 16-CF-47
	)	
MIGUEL A. REYNOSO,	)	Honorable
	)	Cornelius J. Hollerich
Defendant-Appellant.	)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err when it denied defendant's motion to quash his arrest and suppress evidence seized from a search of his vehicle as the police had probable cause for the search and arrest and the stop was not impermissibly prolonged. Defendant received ineffective assistance of counsel where counsel failed to challenge the State's evidence regarding the substance discovered in defendant's vehicle and the chain of custody.

¶ 2 Defendant Miguel Reynoso was convicted of unlawful possession of a controlled substance with intent to deliver more than 400 but less than 900 grams of fentanyl following a

stipulated bench trial and sentenced to a 12-year term of imprisonment. Reynoso appealed. We reverse and remand.

¶ 3 FACTS

¶ 4 Defendant Miguel Reynoso was stopped for speeding by Trident Drug Task Force agent Robert Cessna. Task force agent Michael Hammen joined Cessna at the stop and conducted a free-air sniff with his drug detection dog, Bailey. The dog alerted to the trunk and rear passenger areas of the vehicle. Cessna and Hammen searched the vehicle and discovered a hidden compartment in which they found three kilo-sized packages they believed to be a controlled substance. The substance was field tested at the Princeton Police Department and Reynoso was charged by information with possession with intent to deliver more than 900 grams of cocaine. 720 ILCS 570/401(a)(2)(D) (West 2016). The grand jury thereafter returned an indictment for the same charge. At a status hearing, the State told the court that it had received a report from the Illinois State Police (ISP) crime lab which indicated the forensic scientist tested one of the seized packages and found it contained 1007.4 grams of fentanyl. The State reindicted Reynoso with one count of possession with intent to deliver more than 900 grams of fentanyl. 720 ILCS 570/401(a)(1.5)(D) (West 2016).

¶ 5 Reynoso filed a motion to quash his arrest and suppress the evidence, arguing the police lacked probable cause to stop or detain him or to search his car. A hearing on Reynoso's motion took place and the following evidence was presented. Cessna testified he was on routine patrol in an unmarked squad car investigating drivers who were speeding or committing other traffic violations. He was parked on the eastbound lanes of Interstate 80 (I-80) near the overpass at mile marker 68 when he noticed a vehicle traveling eastbound that he thought was speeding. He

activated his radar gun, which indicated the driver was going 75 miles per hour in a 70 miles per hour zone. Cessna estimated that he caught up to Reynoso's vehicle around mile marker 70-1/2.

¶ 6 After pulling Reynoso over, Cessna obtained Reynoso's driver's license and insurance information. The vehicle Reynoso was driving had Pennsylvania dealer plates and his driver's license was issued by New York state. He told Cessna that he had been visiting family in California for the Fourth of July holiday and was returning to his home in the Bronx. He had borrowed the car from his uncle, who owned a car dealership in Pennsylvania. Reynoso could not remember his uncle's name. Reynoso appeared "more nervous" than is typical in a traffic stop. His hands were shaking and his breathing was labored. Cessna noticed a number of energy drink cans in the passenger side but was not sure if he connected them to Reynoso's nervous behavior.

¶ 7 Cessna decided to issue a warning ticket to Reynoso and returned to his squad car to check Reynoso's driver's license and vehicle registration. He was in his squad car doing so when Hammen arrived, although he could have been still in the process of returning to his car. He did not know whether he had completed a check on Reynoso's documents before or after Hammen came on the scene. Generally, it took Cessna approximately 5 to 10 minutes to complete a license and warrant check and write a warning ticket. He estimated it took longer on Reynoso's stop because of the dealer plates on the vehicle, which were not matched to the vehicle's vehicle identification number. The checks on Reynoso and the vehicle returned clear. Cessna estimated he had one-third of the warning ticket completed when the dog alerted. He finished writing the ticket later.

¶ 8 Cessna estimated the free-air sniff took less than one minute and that five to six minutes had passed between when he stopped Reynoso and when Bailey alerted. He and Hammen

returned to Reynoso's car and told him the dog had alerted and that they would be searching the vehicle. Cessna began searching the rear passenger compartment and Hammen searched the trunk. Both men smelled what they believed to be the odor of fresh spray paint coming from the back seat. The substance they found field tested positive as almost 1000 grams of cocaine. Hammen told him that Foster field tested the substance at the police department and identified it as cocaine. The lab results on the substance later identified it as fentanyl.

¶ 9 Hammen testified he was on mobile patrol traveling east on I-80 traffic detail with Bailey, a drug-detecting dog whose job was to perform free-air sniffs of vehicles stopped by Cessna. At the time of Reynoso's stop, the certificate for Bailey was valid, meaning the dog had passed a standardized test where she correctly detected the presence of five illegal narcotics in a controlled environment. Bailey was trained to detect 10 illegal drugs: cocaine, crack cocaine, heroin, black tar heroin, methamphetamine, methamphetamine "ice", cannabis, hashish, Ecstasy and psilocybin. Bailey was not trained to detect fentanyl.

¶ 10 When he arrived at the traffic stop, Hammen readied Bailey, and without touching base with Cessna, walked to Reynoso's car and ordered the dog to "seek dope." Hammen observed the free-air sniff, noticing that Bailey began to intently sniff at the rear of the car and sat after sniffing along the lower seam of the driver's side trunk. Bailey was trained to sit when she discovered the strongest odor of drugs and Hammen took her actions to mean that she had detected one of the drugs she was trained to sniff out. He ordered Bailey to continue the search and she alerted at the front seam of the passenger's side rear door. Hammen had no other indications of unlawful activity, although he did observe a roll of duct tape on the passenger seat and another empty roll elsewhere in the vehicle. Reynoso did not appear nervous. He told

Hammen that his cousin previously smoked cannabis in the car as an explanation for the dog alert.

¶ 11 During the search, Hammen noticed that a piece of carpet had been placed over an area where a speaker should have been and he pulled it down. It detached from the seam, revealing a strip of glue that was still tacky and a freshly-painted piece of metal sealed with body putty. He and Cessna both thought the carpet was covering a secret compartment. Cessna pulled the backseat forward, exposing two hydraulic cylinders that moved the seat electronically. Cessna removed the packages, all of which were vacuum-sealed; two were wrapped in electrical tape.

¶ 12 Both Hammen and Cessna, based on their drug enforcement experience, believed the packages contained a controlled substance but neither knew what substance. Cessna identified the substance as cocaine in the complaint he filed. Hammen testified at the grand jury that the substance field tested positive for cocaine. The drugs did not test positive for any other controlled substance. Hammen said although he did not weigh the drugs, he knew there was over 900 grams because he knew "what the weights were." The drugs were field-tested at the police station and both Cessna and Hammen were told that it tested positive for nearly 1000 grams of cocaine. Hammen explained that the drug packages were left in Reynoso's car, which Cessna drove to the Princeton Police Department. At some point Cessna turned the drugs over to an agent named Foster.

¶ 13 Following the testimony of the two agents, the trial court heard argument. Reynoso argued, in part, that the stop was impermissibly prolonged once Hammen arrived. The trial court rejected that argument, stating that Hammen testified it took him only four minutes to arrive at the traffic stop. The trial court further stated that it was familiar with the area and believed "the

amount of time it took Agent Hammen to get to the area would seem largely to coincide with the distance involved." The court denied Reynoso's motion to quash and suppress.

¶ 14 On the day of the trial, the State *nolle prosequied* both counts against Reynoso and charged him with one count of possession of more than 400 but less than 900 grams of fentanyl with intent to deliver. 720 ILCS 570/401(a)(1.5)(C) (West 2016). A stipulated bench trial took place. The stipulated evidence provided that Cessna and Hammen would testify as they did at the suppression hearing. In addition, Hammen would testify that based on his 20 years' experience in drug work, the amount of fentanyl was too large for personal consumption. Defense counsel offered a stipulation regarding the chain of evidence:

> "[I]f the officer who took the alleged controlled substance from the police—arresting police officer, there would be a chain—unbroken chain that would show that those substances were in fact delivered to the Illinois lab, and that we would then stipulate that if in fact someone from the Illinois state lab came to testify, they would testify to the results that [the prosecutor] has in his—I think they have a lab result they would like to submit."

The State offered a laboratory report from the ISP forensic scientist who tested one of the packages seized from Reynoso's car that was submitted to her on July 25, 2016, by Agent Brett Valle and tested as fentanyl weighing 1007.4 grams.

¶ 15 The trial court found Reynoso guilty of one count of possession of between 400 and 900 grams of fentanyl with intent to deliver. Defense counsel filed motions to reconsider the trial court's denial of the motion to suppress and to reconsider its finding of guilt. A hearing took place on both motions. Reynoso argued that the State failed to prove the drugs taken from Reynoso's car were the same drugs submitted to the crime lab, noting that the drug dog was not

trained to alert on fentanyl and the drugs taken from the car field tested positive for cocaine at the police station. The trial court denied both of Reynoso's motions and sentenced him to the agreed sentence of 12 years' imprisonment. Reynoso appealed.

¶ 16 ANALYSIS

¶ 17 The issues on appeal are whether the trial court erred when it denied Reynoso's motion to suppress and whether he received ineffective assistance of counsel.

¶ 18 We begin with Reynoso's claim his motion to suppress was improperly denied. He submits that the trial court impermissibly relied on personal knowledge when it denied his motion to suppress and violated his due process rights in doing so. According to Reynoso, at issue in the motion to suppress was whether Cessna delayed giving Reynoso the warning ticket to allow Hammen to arrive and the court impermissibly relied on its knowledge of the area of I-80 where the stop occurred in reaching its determination. Reynoso acknowledges that his trial counsel did not object to the trial court's error, thus waiving it, but urges this court to review the issue as plain error. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (issues not objected to at trial are waived). He submits that a second-prong plain error analysis is appropriate because his fundamental right to due process and the fundamental fairness of the proceedings are implicated.

¶ 19 Under the plain error doctrine, a reviewing court may consider a forfeited error under two circumstances: where (1) the evidence at trial was closely balanced such that the error improperly tipped the scales of justice or (2) the error was so serious that it affected the trial's fairness or threatened the integrity and reputation of the judicial process. *Id*. at 178-79. In order for either prong to apply, there must first be error that is clear and obvious. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 20 The trial court's deliberations are limited to the record before it in a bench trial and the court denies a defendant's due process rights when it relies on private information or investigation, untested by cross-examination or evidentiary rules. *People v. Dunn*, 326 Ill. App. 3d 281, 286 (2001). A defendant suffers a due process violation where a trial court uses its personal knowledge to make its determination in a bench trial and a trial court's improper use of information outside the record is reviewable as plain error. *People v. Hamilton*, 361 Ill. App. 3d 836, 849 (2005).

¶ 21 A "free-air sniff" does not implicate a defendant's fourth amendment or privacy rights if the dog sniff takes place during an otherwise lawful traffic stop and the search does not prolong the duration of the stop. *People v. Bew*, 228 Ill. 2d 122, 131-33 (2008). The police cannot prolong the search after the initial reason for the stop in order to conduct a free-air sniff. *Rodriguez v. United States*, 575 U.S. ___, ___, 135 S. Ct. 1609, 1614-15 (2015). The relevant inquiry is whether the dog sniff prolonged the traffic stop, not whether it occurs before or after the officer issued the ticket. *Id*. at 1616.

¶ 22 Reynoso admits the free-air sniff did not unreasonably prolong the traffic stop but argues its permissibility was dependent on the trial court's assessment of the agents' testimony regarding the time frame of the stop. He submits that the trial court used personal knowledge in making the credibility determinations and violated his right to due process. Reynoso challenges the trial court's references to facts not in the record, including the existence of Route 89 interchange; the location of the interchange as compared to Cessna's location; the location of the county line; and the amount of time for Hammen to arrive at the stop. According to Reynoso, without the court's improper credibility determinations, the facts would establish the search was impermissibly prolonged.

¶ 23 We consider the court here did not answer the critical question of whether the stop was prolonged based on its own knowledge. Rather, the court relied on the evidence produced at the hearing, which corresponded with information it personally knew. Cessna testified that he was parked at mile marker 68, noticed Reynoso speeding and began following him at mile 70-1/2 for about three-fourths of a mile until he activated his lights and called in the stop. Hammen testified that he was stopped at mile marker 72 when he heard Cessna's call. It took him three to four minutes to travel the four to five miles to where Reynoso was stopped. He began the dog sniff immediately upon arriving at the stop and estimated that Bailey alerted within one minute. Cessna estimated the entire stop took five to six minutes from when he pulled Reynoso over to when Bailey alerted. The trial court outlined the information that was presented at trial, noting that the agents' estimations aligned with his knowledge of the area.

¶ 24 The trial court stated,

> "I don't know where [Hammen] was when he first overheard the radio traffic. Agent Cessna said he was at mile post 68. That's two miles west of the Route 89 interchange, which is mile post 70. Agent Hammen must have been pretty close to there. Mile post 72 is two miles east of mile post 70. It is just inside the Bureau County line from La Salle County. I'm pretty familiar with the general area. But travel times, just knowing the distance, the speed at 70 miles an hour, the amount of time it took Agent Hammen to get to the area would seem largely to coincide with the distance involved."

¶ 25 The court's observations were based substantially on the record, unlike the court's findings in *Dunn*, 326 Ill. App. 3d at 286, on which Reynoso relies. In *Dunn*, the trial court relied on its own observations that the scene of the offense was well lit. *Id.* at 284. The trial court

further used its personal knowledge to support the State's evidence, finding that the defense failed to offer evidence to impeach the officer's testimony that he was able to see the offense take place. *Id.* at 286-87. The reviewing court determined any error by the court in relying on its personal knowledge was harmless because the result of the trial would not have been different. *Id.* at 287.

¶ 26 *Dunn* does not support Reynoso's argument. The facts outside the record about which Reynoso complains: the location of the Route 89 interchange, its proximity to the traffic stop, the location of the county line, and the amount of time for Hammen to arrive were irrelevant to the validity of the traffic stop or the issue of whether the stop was impermissibly prolonged. The court's acknowledgement of the area did not equate to using that knowledge to determine whether the stop was prolonged. See *Dunn*, 326 Ill. App. 3d at 287 ("the court is not immune from knowledge of the nature of an area in the city"). Contrary to Reynoso's claims, there was no dispute in the instant case as to when Hammen arrived. He said he heard Cessna call in the traffic stop; the call was made at 9:32 a.m. Hammen was four to five miles away from the stop and it took him three to four minutes to arrive there. When he arrived, Cessna was either entering his squad car to run Reynoso's information and write the warning ticket or was in the squad car doing so. Cessna said he was one-third of the way through writing the warning ticket when Bailey alerted, which was five or six minutes after he initiated the stop.

¶ 27 We find the trial court did not rely on personal knowledge in violation of Reynoso's due process rights. Because there was no error, plain error review is not warranted. We further find that the trial court's comments did not determine whether the stop was impermissibly prolonged. Rather, the court relied on the evidence presented by the agents to make its determination. It did not err when it denied Reynoso's motion to suppress. We observe, however, as noted by

Reynoso, the State failed to present the dash camera video or explain its absence. If the stop had been recorded and the dash camera video presented to the court, the timing of the stop and the free-air sniff would not be in dispute.

¶ 28 We next consider whether Reynoso received ineffective assistance of counsel. Reynoso argues that his trial counsel was ineffective where counsel stipulated that the evidence tested at the crime lab was the same evidence recovered from Reynoso's car and that there was a proper chain of custody of the evidence. According to Reynoso, his only viable strategy at trial was to argue the State failed to establish that the recovered and the tested substances were the same.

¶ 29 A defendant claiming he received ineffective assistance of counsel must demonstrate (1) that his counsel's representation fell below an objective standard of reasonableness and (2) the deficient representation caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish the first prong, the defendant must defeat the presumption that counsel's actions were a matter of trial strategy. *People v. Trice*, 2017 IL App (1st) 152090, ¶ 66. As to the second prong, the defendant must show that a reasonable possibility exists that the result of the proceeding would have been different had counsel not performed deficiently. *Id.* Counsel's role is to act as an advocate for the defendant, meaning counsel must hold the State to its burden of proof of guilt beyond a reasonable doubt. *United States v. Cronic*, 466 U.S. 648, 656 (1984). Counsel's role includes submitting the State's case to adversarial testing. *Id.*

¶ 30 Counsel's decisions regarding when and what to object are generally matters of trial strategy and not subject to an ineffective assistance challenge. *People v. Perry*, 224 Ill. 2d 312, 344 (2007) (citing *People v. Pecoraro*, 175 Ill. 2d 294, 327 (1997) and *People v. Graham*, 206 Ill. 2d 465, 478-79 (2003)). However, strategic decisions may amount to deficient performance when defense counsel acquiesces to the State's case. See *People v. Coleman*, 2015 IL App (4th)

131045, ¶ 78. Counsel's failure to investigate his client's case also amounts to deficient performance. *People v. Domagala*, 2013 IL 113688, ¶ 38 (citing *Brown v. Sternes*, 304 F.3d 677, 692 (7th Cir. 2002)).

¶ 31 To sustain a conviction for possession of a controlled substance, the State must establish the substance at issue is a controlled substance. *People v. Woods*, 214 Ill. 2d 455, 466 (2005) (citing *People v. Hagberg*, 192 Ill. 2d 29, 33-34 (2000) and *People v. Judkins*, 28 Ill. 2d 417, 420 (1963)). The State must also establish the chain of custody demonstrating that the substance tested was the same substance discovered on the defendant. *Woods*, 214 Ill. 2d at 467. The State must demonstrate that the police acted reasonably to ensure that the substance seized from the defendant was the same substance tested by the forensic chemist and that the substance was not likely tampered with or accidently substituted. *Id.* When a defendant stipulates to the chain of custody, the State does not have to lay a foundation for the drug evidence and the defendant cannot later argue that the State failed to carry its burden. *Id.* at 468-69. When parties stipulate to evidence, no proof of the stipulated facts is needed; the stipulation substitutes for proof and negates the need for evidence. *Id.* (citing 34 Ill. L. & Prac. *Stipulations* §§ 8, 9 (2001)).

¶ 32 The State asserts that this issue cannot be reviewed on direct appeal because of an inadequate record and argues that postconviction relief is the appropriate vehicle for Reynoso's claims. The State looks to *People v. Veach*, 2017 IL 120649, as support that this court should decline to review Reynoso's ineffective assistance claim. In *Veach*, the court rejected the fourth district's blanket rule that ineffective assistance claims were better considered for postconviction relief. *Id.* ¶ 48. It ordered the court to consider each case and claim of ineffective assistance on its own facts. *Id.* We find the record here, as in *Veach*, sufficient to address Reynoso's claims. *Id.* ¶ 51.

¶ 33 Cessna and Hammen testified at the grand jury proceedings and the motion to quash and suppress hearing that they discovered three packages of what they believed to be a controlled substance in Reynoso's car and that the substance field-tested positive for cocaine at the Princeton Police Department. Reynoso was charged with possession of cocaine. The forensic scientist at the crime lab tested one package and found it was fentanyl. The State additionally charged Reynoso with possession of fentanyl over 900 grams. Defense counsel sought time to research the ramifications of the different test results and charges but took no further action on the issue. On the day of trial, the State then charged Reynoso with possession of fentanyl between 400 and 900 grams and *nolle prosequied* the other charges.

¶ 34 At trial, defense counsel stipulated to the fentanyl and the chain of custody. However, counsel then argued in a posttrial motion that Reynoso's conviction could not stand because of the discrepancy in the drug evidence. That counsel stipulated to one thing at trial and then turned around and argued against it in a posttrial motion suggests that counsel performed deficiently. We cannot conceive of a reasonable strategy to explain counsel's actions. The State has not provided an explanation for Bailey alerting to a substance for which he was not trained to detect. Nor has the State explained how the drugs that field-tested positive as cocaine and were testified to be cocaine at the grand jury and motion to suppress hearing were ultimately found to be fentanyl.

¶ 35 Moreover, counsel's deficient performance prejudiced Reynoso. Had counsel not stipulated that the drugs were fentanyl and that there was a proper chain of custody, Reynoso could have challenged both aspects of the State's case. Bailey, the drug dog, was not trained to alert on fentanyl. The substance field-tested positive as cocaine at the police department. The State initially charged Reynoso with possession of cocaine with intent to deliver. It then charged

Reynoso with possession of fentanyl with intent to deliver over 900 grams but ultimately *nolle prosequied* those charges and recharged Reynoso with possession of intent to deliver more than 400 and less than 900 grams of fentanyl.

¶ 36 These facts raise an issue as to whether the State found cocaine or fentanyl in Reynoso's car. The trial court presumed the dog alert was valid, surmising that there had been cocaine in the vehicle at some point but it had already been delivered by Reynoso. Hammen said Reynoso admitted his cousin smoked cannabis in the vehicle as an explanation for the alert but Reynoso denied the statement. Moreover, there was a lack of testimony as to how the drugs were transferred at the police station and how they arrived at the crime lab. Hammen testified that Cessna gave the drugs to a police officer named Foster at the Princeton Police Department. The crime lab report showed the forensic scientist received the drugs from an agent Valle. Reynoso was arrested and the drugs were confiscated on July 7, 2016. They were delivered to the crime lab on July 25, 2016. No one produced an explanation for the delay or where the drugs were in the interim, or how they were transferred from Cessna to Foster to Valle. Indeed, the State presented little evidence regarding the chain of custody and what facts were presented were inconsistent. Under these circumstances, reasonable trial counsel would have challenged the State's case based on the chain of evidence. Significantly, the substance which was found in Reynoso's vehicle and for which he was initially charged with possessing was not the evidence that he was ultimately convicted of possessing. Had the chain of custody been challenged, the result of the proceeding would have been different since the State could not satisfy its burden of proving the substance seized was the substance tested. Because defense counsel failed to demand an explanation for the discrepancy, we find that he failed to advocate for Reynoso and instead provided him ineffective assistance.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court of Bureau County is reversed and the cause remanded.

¶ 39 Reversed and remanded.