2019 IL App (4th) 160560-U

NO. 4-16-0560

FILED
January 2, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
NOSHMA D. PHELPS,	)	No. 16CF37
Defendant-Appellant.	)	
	)	Honorable
	)	Charles M. Feeney III,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices DeArmond and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) defendant was not denied the effective assistance of counsel during the suppression hearing, (2) the trial court did not abuse its discretion in ordering defendant to serve consecutive sentences, and (3) defendant was not deprived of a fair sentencing hearing.

¶ 2 In May 2016, the State tried defendant, Noshma D. Phelps, on the following charges: unlawful possession of heroin with intent to deliver (720 ILCS 570/401(a)(1)(A) (West 2016)) (count I), obstructing identification (720 ILCS 5/31-4.5(a)(1) (West 2016)) (count III), unlawful possession of heroin (720 ILCS 570/402(a)(1)(A) (West 2016)) (count IV), unlawful possession of cocaine with intent to deliver (720 ILCS 570/401(c)(2) (West 2016)) (count V), and unlawful possession of cocaine (720 ILCS 570/402(c) (West 2016)) (count VI). Following a bench trial, the court found defendant guilty on all counts. In August 2016, the trial court found count IV merged into count I and count VI merged into count V. Accordingly, the court

sentenced defendant to a 20-year term of imprisonment on count I and a consecutive sentence of 15 years' imprisonment on count V. On count III, the court sentenced defendant to a concurrent term of 360 days in the Woodford County jail.

¶ 3 Defendant appeals, arguing (1) he received ineffective assistance of counsel during the hearing on his motion to suppress evidence; (2) the trial court abused its discretion in ordering him to serve consecutive sentences without considering the nature and circumstances of his offenses; and (3) the court erred by relying on, in aggravation, a sentencing factor inherent in the offense of possession with intent to deliver heroin. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In February 2016, the State charged defendant with (1) unlawful possession with intent to deliver 15 grams or more but less than 100 grams of a substance containing heroin (720 ILCS 570/401(a)(1)(A) (West 2016)) (count I); (2) unlawful possession with intent to deliver 15 grams or more but less than 100 grams of a substance containing cocaine (720 ILCS 570/401(a)(2)(A) (West 2016)) (count II); and (3) obstructing identification, a Class A misdemeanor (720 ILCS 5/31-4.5(a)(1) (West 2016)) (count III). In March 2016, a grand jury indicted defendant on counts I and II.

¶ 6 A. Motion to Suppress

¶ 7 On May 5, 2016, defense counsel filed a motion to suppress (1) statements made by defendant and (2) evidence obtained incident to his arrest. The motion alleged, in part, that a strip search of defendant (1) violated section 103-1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-1(c), (f) (West 2016)) and (2) "violated the defendant[']s Fourth and Fourteenth Amendment rights to be [free] from illegal searches and seizures and his right to due process guaranteed him by the U[nited] S[tates] Constitution in Art[icle] I[,] Sec[tion] 6 of the

Illinois Constitution." On May 13, 2016, the trial court held a hearing on the motion to suppress and heard the following evidence.

¶ 8 1. *Defendant*

¶ 9 Defendant testified that, on February 16, 2016, he was traveling down Interstate 74 from Joliet toward Peoria at approximately 1:40 a.m. According to defendant, he drove his son Noshma Lawson's tan 2004 Chevrolet Impala (Impala) at approximately 70 miles per hour in the right-hand lane. Defendant passed a police vehicle sitting on the median. As soon as defendant passed, the police officer, later identified as Officer Nathan Campbell, pulled into the left lane. Officer Campbell pulled alongside defendant's trunk, then pulled in behind defendant and turned on flashing blue lights. Defendant testified the officer did not turn on any lights until he got behind defendant's car.

¶ 10 According to defendant, Officer Campbell did not ask for a driver's license but asked for defendant's name. Defendant denied telling the officer his name was Ahmed Evans, which was defendant's cousin's name. Defendant also denied providing a false birth date. Officer Campbell asked defendant to step out of his vehicle, patted him down, took his jacket off, and patted him down a second time. After removing cash from defendant's pockets, the officer used a metal detector wand to see if defendant had any weapons. Defendant testified Officer Campbell handcuffed him and placed him in the back of the squad car. While in the back of the squad car, defendant watched other officers come up and search the vehicle he had been driving.

¶ 11 After the officers searched the vehicle, Officer Campbell got into his squad car and took defendant to Woodford County jail. The officer pulled into the sally port at the jail, removed defendant from the squad car, and searched the backseat. Defendant was asked to

remove his shoes and was patted down "again and again." Defendant testified Officer Chad Pyles informed him there was a " 'policy to strip search you when you pass through these doors.' " Defendant did not agree to a strip search. Officers then took defendant to a shower room and performed a strip search.

¶ 12 According to defendant, Officer Pyles and Officer Wahls were present in the shower room during the search. The door to the shower room was open, but no one passed by the door because it was 2 a.m. Defendant took off each piece of his clothing and handed it to Officer Pyles until he was naked. Neither officer touched defendant or used weapons to force him to disrobe, but the officers had their hands on their tasers. Defendant testified he thought the officers had their hands on their tasers because he did not agree to a strip search and told officers they needed a written consent to strip search him. Defendant felt as though he was in a no-win situation and he did not want to get an electric shock because he had heart problems.

¶ 13 Once defendant was nude, the officer told him to turn around, squat, and spread his buttocks. At that point, officers observed a piece of a plastic bag protruding from defendant's anus. Defendant removed the plastic bag and handed it to Officer Pyles. At the conclusion of the strip search, defendant put his own clothes back on before being taken to an upstairs conference room. Defendant was subsequently taken back downstairs and booked into the jail.

¶ 14 2. *William McWhirter*

¶ 15 William McWhirter, an officer with the East Peoria Police Department, testified he was assigned to a task force through the Illinois State Police that focused on narcotics and gun crimes. McWhirter testified that in February 2016, he was conducting a narcotics distribution case involving defendant and had obtained a search warrant to place a global positioning system (GPS) device on a gold 2004 Impala that defendant frequently drove. While monitoring the

GPS, McWhirter saw the vehicle "drive up to Chicago, stay a very short time, and come right back." According to McWhirter, this was a common pattern with narcotics dealers.

¶ 16 On February 16, 2016, McWhirter followed the travel pattern of the 2004 Impala and, as the vehicle came back south from Chicago, he contacted Woodford County law enforcement. McWhirter met Officer Campbell at the Busy Corner restaurant in Goodfield, Illinois, and explained the situation. Although McWhirter did not get into specifics, he told Campbell that he had conducted purchases of narcotics from defendant and defendant was known to sell heroin. McWhirter hoped to get probable cause to stop the 2004 Impala and he showed Campbell a photograph of defendant, whom McWhirter suspected was driving the vehicle. McWhirter also informed Campbell that defendant had a suspended driver's license. According to McWhirter, Campbell identified defendant as the driver of the vehicle and made a traffic stop.

¶ 17 After the traffic stop was completed, McWhirter and his partner went to the scene to assist with bringing the vehicle to the Woodford County jail. Once at the jail, McWhirter searched the vehicle and noticed an odor of cannabis. According to McWhirter, defendant was taken into the jail and searched. Officer Pyles gave McWhirter the contraband found on defendant's person, which he took to an evidence processing room. McWhirter separated heroin, soft cocaine, and crack cocaine, weighed the substances, and field-tested the substances. McWhirter testified the substances came back positive for heroin and cocaine.

¶ 18 3. *Nathan Campbell*

¶ 19 Nathan Campbell, an officer with the Woodford County Sheriff's Department, testified that on February 16, 2016, he met McWhirter in the Busy Corner restaurant's parking lot in Goodfield. According to Campbell, McWhirter was following a vehicle suspected to have

drugs and he wanted Campbell to make a traffic stop. Campbell stopped his squad car on the median of Interstate 74 and pulled onto the highway once the vehicle in question passed him. The vehicle was traveling under the speed limit and Campbell did not observe any traffic violations. However, McWhirter showed Campbell a photograph of the suspect and informed him the suspect had a suspended driver's license. Campbell pulled alongside the vehicle and turned on his alley light, which illuminated the driver. Because Campbell recognized the driver from the photographs, he pulled the vehicle over based on defendant's suspended driver's license.

¶ 20 Campbell performed a traffic stop and approached the passenger side of the vehicle. Campbell informed defendant he pulled him over because of the suspended driver's license, and he noticed the smell of burnt marijuana in the vehicle. Campbell testified, "[A]t that time I realized well, I know MEG [(Metropolitan Enforcement Group)] deals with drugs, but they didn't really tell me what we were looking for here, so it actually kind of spooked me a little bit." Campbell was concerned defendant might have a gun, so he asked for the car key and defendant's name. Defendant gave the name Ahmed Evans but could not provide information that matched records regarding Evans's height, weight, last arrest, or social security number. When Campbell ran defendant's name, records showed his driver's license was suspended. At that point, Campbell arrested defendant for driving on a suspended license and "some form of obstruction there for the [*sic*] providing the false name."

¶ 21 Campbell handcuffed defendant and searched him before placing him in the rear seat of the squad car. Campbell did not recall using a wand to search defendant. Nothing of evidentiary value was found on defendant's person. Campbell also "lightly" searched defendant's vehicle and found Baggie corners and "small roaches, burnt marijuana cigarettes."

Campbell testified the contents of the car were so small that officers did not bother to take it as evidence.

¶ 22 Campbell transported defendant to the Woodford County jail. According to Campbell, officers suspected narcotics were involved but were unsure whether the contraband might be in the vehicle somewhere or on defendant's person. Campbell testified, "So when I brought [defendant] in it was Deputy Pyles [who] was doing the searching, and I just told him [']hey, be real thorough with the search. We're looking for dope, and we haven't found it yet.['] And he was wearing really baggy clothes, and it can be very difficult to locate things in clothes when they're that much bigger than what they should be."

¶ 23 Campbell was not involved in any further search of defendant's person. At some point, Campbell was made aware that contraband was found on defendant's person. Campbell was told the contraband was a plastic bag containing heroin and cocaine. The contraband was turned over to McWhirter, and Campbell showed him where the field test kits were kept.

¶ 24 4. *Chad Pyles*

¶ 25 Chad Pyles, a deputy with the Woodford County Sheriff's Department, testified that on February 16, 2016, he had contact with a person later identified as defendant. Pyles met Campbell in the sally port of the jail. Campbell informed Pyles that defendant was suspected of peddling drugs and instructed Pyles to search defendant very thoroughly. Pyles took defendant to an intake vestibule and conducted a pat-down search. After that initial search, Pyles took defendant to a shower room to perform a strip search.

¶ 26 According to Pyles, the shower room was approximately five feet by seven feet and had a bench, shower, toilet, and sink. The door had a small, covered window to allow officers to look into the room to see if an inmate was ready to come out. Pyles and defendant

entered the shower room, and Pyles pulled the door as closed as possible without locking himself inside. Defendant removed his clothes and Pyles asked him to lift his testicles and move his penis. Pyles then asked defendant to perform a 360-degree turn. Defendant turned halfway and then turned back around, and Pyles observed a golf-ball-sized object protruding from defendant's buttocks.

¶ 27 Pyles testified he did not need defendant to spread his buttocks to see the object. Pyles asked defendant what was between his buttocks and defendant "took a deep sigh" before handing the object to Pyles. Pyles wrapped the object in the sterile gloves he was wearing and gave the contraband to Campbell or McWhirter. After inspecting defendant one last time, Pyles instructed him to put his clothes back on and escorted him to a holding cell. Pyles estimated the search lasted between 5 to 10 minutes and was conducted the way strip searches were normally performed.

¶ 28 According to Pyles, strip searches help ensure the safety of the jail. During a strip search, officers search for weapons, contraband, and health risks. At the time Pyles searched defendant, he assumed defendant was going into general population. Pyles stated, "I didn't specifically know the charge, but that's what I thought."

¶ 29 Pyles testified the normal booking procedure involved an initial pat-down search before entering "demographics" into the computer system, including information about the offender's personal property, health, and mental health. According to Pyles, if an offender is going into general population, the jail policy was to conduct a strip search. If someone is detained on misdemeanor or traffic charges, officers try to give ample opportunity for the person to obtain bond to leave jail, rather than searching them and putting them in general population. Pyles testified there was no discussion as to whether defendant would be able to make bond.

¶ 30 Pyles testified he did not know that a strip search needed to be approved by the shift supervisor. However, the shift supervisor that night was "in central *** monitoring all cameras and opening and closing all doors." The shift supervisor knew about the strip search but did not approve it in writing. Pyles informed the shift supervisor he was taking defendant to the shower room and the shift supervisor had to unlock one door to facilitate Pyles's movement to the shower room.

¶ 31 5. *Trial Court's Ruling*

¶ 32 During argument at the hearing on the motion to suppress, defense counsel argued Officer Pyles did not have probable cause to conduct a strip search. The trial court and defense counsel then had the following exchange:

> "THE COURT: Where didn't he have probable cause? I mean, where does it say that he has to have probable cause to do the search? Do you have some case that says if you violate this State statute, or you violate the Woodford County policy, that that evidence is suppressed? The statute itself doesn't say that.
>
> MR. LANKTON: It doesn't say that.
>
> THE COURT: So do you have some case law that says that?
>
> MR. LANKTON: There should be some consequence for—
>
> THE COURT: There is a consequence. There is a consequence. But I don't see anywhere—I am anxious to hear is there a case law that says—because this isn't the constitution. You're not arguing the constitution, so far as I am hearing. I'm

hearing you are arguing a statute. Do you have something that says the violation of that statute results in the suppression of evidence?

MR. LANKTON: I do not, Judge."

¶ 33 In ruling on the motion, the trial court noted McWhirter informed Campbell that he had a search warrant to track the vehicle via GPS. The court found Campbell had independent probable cause to pull defendant over after he pulled alongside the vehicle and recognized the driver from the photographs McWhirter showed him. When Campbell pulled defendant over, he smelled marijuana in the vehicle. Campbell arrested defendant for driving with a suspended license and for lying about his name. At the jail, Campbell informed Pyles that defendant was believed to be involved in the distribution of drugs. Additionally, the court noted Pyles did a pat-down search and, believing defendant was going into general population, conducted a strip search pursuant to the written policy of the jail.

¶ 34 The trial court concluded that, even if the statute had been violated, the remedy was not suppression of the contraband. Rather, the statutory remedies included a criminal offense against Deputy Pyles and potentially a civil action. The court noted "the fruit of the poisonous tree doctrine supports that motion to suppress that evidence if we violate the constitution. Violating that statute is not violating the constitution." Accordingly, the court denied the motion to suppress.

¶ 35 B. Bench Trial and Verdict

¶ 36 On May 18, 2016, the State filed additional charges for unlawful possession of 15 grams or more but less than 100 grams of a substance containing heroin (720 ILCS 570/402(a)(1)(A) (West 2016)) (count IV), unlawful possession with intent to deliver 1 gram or

more but less than 15 grams of a substance containing cocaine (720 ILCS 570/401(c)(2) (West 2016)) (count V), and unlawful possession of less than 15 grams of a substance containing cocaine, a Class 4 felony (720 ILCS 570/402(c) (West 2016)) (count VI). That same day, the court, on the State's motion, dismissed count II.

¶ 37 Also in May 2016, the trial court held a bench trial on count I and counts III through VI. Defendant did not testify on his own behalf, but the other witnesses who testified at the suppression hearing testified consistently at the bench trial. In addition to the Baggie corners and burnt ends of marijuana cigarettes, Campbell testified he found three cellular telephones in defendant's vehicle.

¶ 38 McWhirter testified he received the contraband Pyles found on defendant's person, which contained three different suspected narcotics. According to McWhirter, he separated heroin, soft powder cocaine, and harder-cooked crack cocaine. McWhirter testified he interviewed defendant the day of his arrest and defendant admitted the narcotics were his. Defendant told McWhirter the narcotics were for his personal use and cost him "a couple hundred dollars." McWhirter testified the amount of narcotics found on defendant was not consistent with spending just a few hundred dollars. According to McWhirter, a half gram of heroin would be consistent with personal use.

¶ 39 The State presented expert testimony regarding the substances recovered from defendant's person. According to the expert witness, the narcotics in People's exhibit No. 1 included 18.7 grams of heroin. The expert stated, "People's [e]xhibit No. 2 contained a knotted but torn-open plastic bag that contained five plastic bags that contained an off-white chunk substance." The expert testified she tested and weighed the contents of two of the five bags and found 6.5 grams of a substance containing cocaine. Finally, People's exhibit No. 3 contained 0.9

grams of a chunky off-white substance packaged in six bags. The expert testified she only tested the substance found in two of the bags in exhibit Nos. 2 and 3 "because [she] had gotten over 5 grams of cocaine, and there was no opportunity to get to the next weight limit of 15 grams."

¶ 40 Following argument, the court found defendant guilty on all counts. The court concluded the evidence was sufficient to convict defendant of possession of heroin and cocaine (counts IV and VI) based on defendant's admission to McWhirter and the circumstances under which defendant had the drugs in his possession. The court noted the possession charges were lesser-included offenses of counts I and V. The court further concluded the evidence was sufficient to convict defendant of possession with intent to deliver based on the totality of the circumstances, including the amount and value of the narcotics, the manner in which the cocaine was packaged, the different forms of cocaine, and the three cellular telephones found in the vehicle.

¶ 41 C. Sentencing

¶ 42 In August 2016, the trial court held a sentencing hearing. A presentence investigation report (PSI) indicated defendant had six children, five of whom were minors. Defendant was 37 years old and reported daily use of cocaine and heroin since the age of 19. Defendant was prescribed thorazine, Prozac, and trazodone for paranoid schizophrenia mood disorder. Defendant also took a blood pressure medication. The PSI indicated defendant was unemployed at the time of the offense but he received Social Security disability benefits.

¶ 43 The PSI indicated the following criminal history: two convictions in 1996 and 1997 for possession of a stolen vehicle; a 1998 conviction for manufacture or delivery of a controlled substance; a 2006 conviction for possession of 30 to 500 grams of cannabis; and a 2009 conviction for possession of a controlled substance. Defendant also had two misdemeanor

convictions in 2011 and 2012 for possession of cannabis and a 2003 misdemeanor conviction for resisting a police officer or correctional employee. Finally, defendant had numerous traffic misdemeanors, primarily for driving with a suspended license.

¶ 44 The trial court found no factors in mitigation. In considering the factors in aggravation, the court stated as follows:

> "The nature of being a drug dealer, especially of heroin, is that it threatens serious harm to those who would consume those substances. But—and then factor 2, the defendant received compensation. He didn't receive compensation. I don't find that that factor applies really. But it is—he intended to receive compensation and that, of course—but that's implicit in the offense. Factor 3 is obviously a significant factor. He had a prior history of criminal activity, and he has it in this very area of possession with intent to deliver. That's the Cook County case that was presented. Sentence is necessary to deter others. He has a prior history of criminal activity."

The court noted defendant had four prior sentences to the Department of Corrections, as well as other sentences that included jail time. Despite these prior sentences, defendant failed "to conform his conduct to the requirements of the law."

¶ 45 On the obstructing identification charge, the trial court sentenced defendant to 360 days in the Woodford County jail to be served concurrently with the felony offenses. The court noted the conviction for possession of heroin merged with the conviction for possession of heroin with intent to deliver. The court stated, "Heroin is an epidemic that is plaguing our

society, and we have people dying all the time because of heroin overdoses." Given defendant's criminal history, the court concluded a sentence of 20 years' imprisonment was appropriate. The court noted the conviction for possession of cocaine merged with the conviction for possession of cocaine with intent to deliver and sentenced defendant to 15 years' imprisonment.

¶ 46 The trial court considered section 5-8-4 of the Unified Code of Corrections (730 ILCS 5/5-8-4 (West 2016)) and determined the felony sentences should be served consecutively. In making that determination, the court stated as follows:

> "[T]he court finds that, having regard to the nature and circumstances of the offense, and the history and character of the defendant, that specifically that history and character is his numerous criminal offenses and his prior criminal history as demonstrated by the possession of a stolen vehicle and, more significantly, by the manufacture and delivery in a restricted area of the cocaine in Cook County, his felony possession of cannabis 30 to 500 grams in Peoria County, and his possession of a controlled substance in 2009 in Cook County for which he went to prison and yet did not gain any compliance with the law—and so the court finds that having regard to the nature and circumstances of the offense and, as I said, the history and character of the defendant, the court is of the opinion that consecutive sentences are required to protect the public from further criminal conduct by the defendant. I've tried to state that basis here in court on the record.

> I think the defendant is a menace to society. He doesn't care for the well-being of his fellow man in this country. He cares only for himself. And he would spew his poison upon all of society for his own benefit. His record demonstrates that, his conduct demonstrates that, and it is incumbent upon the court within the confines of the law and due fairness—and I haven't sentenced him to the maximum sentence, so I think that that's a certain amount of fairness that's been given to him—that he be removed from society in conformance with the law."

¶ 47 This appeal followed.

¶ 48 II. ANALYSIS

¶ 49 On appeal, defendant argues (1) he received ineffective assistance of counsel during the hearing on his motion to suppress evidence, (2) the trial court abused its discretion in ordering him to serve consecutive sentences without considering the nature and circumstances of his offenses, and (3) the court erred by relying on an improper sentencing factor that was inherent in the offense of possession with intent to deliver heroin.

¶ 50 A. Ineffective Assistance of Counsel

¶ 51 Defendant argues his attorney provided ineffective assistance at the suppression hearing where counsel failed to argue the strip search violated his rights under the United States Constitution and the Illinois Constitution. Instead of making constitutional arguments in support of suppressing the evidence, defense counsel argued the strip search violated a statute that did not allow for the exclusion of evidence procured from an improper strip search.

¶ 52 Claims of ineffective assistance of counsel are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, the defendant must show defense counsel's performance was deficient and prejudice resulted from that deficient performance. *People v. Houston*, 226 Ill. 2d 135, 143, 874 N.E.2d 23, 29 (2007). Specifically, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767 (quoting *Strickland*, 466 U.S. at 694). Our review of counsel's performance is highly deferential. *Strickland*, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Id.* A defendant is entitled to reasonable representation, and a mistake in strategy or judgment does not, by itself, render the representation incompetent. *People v. Fuller*, 205 Ill. 2d 308, 331, 793 N.E.2d 526, 542 (2002). Both prongs of the *Strickland* test must be satisfied; therefore, a finding of ineffective assistance of counsel is precluded if a defendant fails to satisfy one of the prongs. *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601. "A court may resolve a claim of ineffective assistance of counsel by reaching only the prejudice prong, as a lack of prejudice renders irrelevant the issue of counsel's alleged deficient performance." *People v. Hall*, 194 Ill. 2d 305, 337-38, 743 N.E.2d 521, 540 (2000).

¶ 53 1. *Deficient Performance*

¶ 54 Defendant asserts counsel provided ineffective assistance by primarily relying on an argument that the strip search of defendant violated section 103-1 of the Code (725 ILCS 5/103-1 (West 2016)). Section 103-1(c) provides as follows: "No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance." 725 ILCS 5/103-1(c) (West 2016). Section 103-1(f) requires a police officer to obtain written permission from a supervisor before conducting a strip search. 725 ILCS 5/103-1(f) (West 2016). Consequences when failing to comply with section 103-1 include (1) possible criminal charges against a peace officer or employee of a police department or (2) a possible civil suit. 725 ILCS 5/103-1(h), (i) (West 2016).

¶ 55 Defendant argues defense counsel's reliance on the alleged statutory violation was objectively unreasonable in light of *People v. Calvert*, 326 Ill. App. 3d 414, 760 N.E.2d 1024 (2001). In *Calvert*, officers "saw a truck without a registration plate light traveling on 8th Street in Quincy." *Id.* at 417. Officers initiated a traffic stop and defendant explained he had just purchased the vehicle. *Id.* The officer informed the defendant that a computer check of the license plates showed the registration was suspended for lack of insurance. *Id.* Officers had the defendant step to the rear of the truck, and defendant asked why he was under arrest. *Id.* The officer again advised him the truck's registration was suspended. *Id.* The defendant expressed his confusion and showed the officer his proof of insurance. *Id.* Before the officer could respond, the defendant hit him in the face and attempted to run away. *Id.* Officers subdued defendant and transported him to the Adams County jail, where he was strip searched and a small bag containing contraband was found in his underwear. *Id.*

¶ 56 On appeal, the defendant argued "the strip search was unreasonable and violated his constitutional rights because the officers had no reasonable suspicion or probable cause to believe that he was concealing contraband or weapons on his person." *Id.* at 422. This court relied on the United States Supreme Court decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), where the Supreme Court held that strip searches and visual inspections of the body cavities of pretrial detainees were reasonable responses to legitimate security concerns and did not violate fourth amendment rights. *Calvert*, 326 Ill. App. 3d at 422-23. This court concluded the strip search conducted after the defendant was transported to Adams County jail did not violate his constitutional rights. *Id.* at 424. In so holding, this court wrote:

> "In this case, following defendant's full custodial arrest for aggravated battery and resisting a police officer, the officers took him to the Adams County jail, where he was to be placed among the general jail population. At that point, defendant was subject to those measures adopted for the maintenance of internal security at the jail. Thus, his position was no different, for constitutional purposes, from the pretrial detainees in *Bell*. If anything, the detainees in that case were subject to more onerous conditions, given the greater intrusiveness of a body-cavity search. As discussed above, the Supreme Court nevertheless upheld such searches 'in the light of the central objective of prison administration, safeguarding institutional security.' [Citation.]
>
> The two male correctional officers conducted the strip search of defendant in a holding cell, and defendant was allowed to

> remove his own clothes and hand them to the officers. The correctional officers inspected defendant's items of clothing as he removed them and then looked inside his underwear as he began removing it. The officers did not touch defendant's body or conduct a visual body-cavity search. In light of the substantial need to ensure institutional security, good penal practices not only permit, they require strip searches before placing detainees into the general jail population. Under these circumstances, we conclude that the justification for the strip search far outweighed its invasiveness. Thus, the strip search of defendant was reasonable and constitutional. Indeed, if correctional officers failed to conduct such searches prior to placing detainees into the general jail population, other inmates as well as correctional officers could be at serious risk. [Citation.] Depriving jail and prison administrators of the power to conduct strip searches like that conducted in the present case would seriously impede such administrators as they attempted to protect their inmate populations." *Calvert*, 326 Ill. App. 3d at 423-24.

This court rejected the defendant's reliance on federal appeals court cases "holding that strip and visual body-cavity searches must be justified by at least a reasonable suspicion that the pretrial detainee is concealing contraband or weapons." *Id.* at 424.

¶ 57 Alternatively, the defendant in *Calvert* argued the strip search performed at the Adams County jail violated section 103-1 of the Code. *Id.* at 425. This court noted the

defendant forfeited that argument on appeal by failing to raise it before the trial court. *Id.* However, this court went on to say that a search in violation of the statute did not mean the search also violated a defendant's constitutional rights. *Id.* " '[J]ust because Illinois chooses to regulate police behavior in a certain way does not mean the police officers violate the Constitution by transgressing those rules.' " *Id.* at 426 (quoting *Doe v. Burnham*, 6 F.3d 476, 480 (7th Cir. 1993)).

¶ 58 As noted above, defendant argues defense counsel's decision to primarily rely on the alleged statutory violation was objectively unreasonable in light of *Calvert* because it was unsupported under Illinois law. We note the same argument could be made about reliance on a fourth amendment claim in light of *Calvert*, given how similar the circumstances of that case are to the present case. Nonetheless, defendant argues counsel ignored meritorious constitutional arguments which, if argued, would have had a reasonable probability of success at the suppression hearing. Assuming counsel's decision was objectively unreasonable, we conclude there was no reasonable probability counsel would have prevailed had he relied more heavily on the constitutional arguments.

¶ 59 2. *Prejudice*

¶ 60 The fourth amendment to the United States Constitution, applicable to the states under the fourteenth amendment, in part provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., amend. IV. The Illinois Constitution of 1970 similarly provides, "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means." Ill. Const. 1970, art. I, § 6. The Illinois Supreme

Court has held that the framers of article I, section 6 of our constitution intended for it to have the same scope as the fourth amendment. *People v. Fitzpatrick*, 2013 IL 113449, ¶ 15, 986 N.E.2d 1163.

¶ 61 In considering whether a search violated a defendant's constitutional rights, we must consider the reasonableness of the search. *Calvert*, 326 Ill. App. 3d at 422.

> "The test of reasonableness under the [f]ourth [a]mendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

The Supreme Court, balancing the security interests of a penal institution with inmate privacy interests, has held that routine "visual body-cavity inspections" could "be conducted on less than probable cause." *Id.* at 560. In *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 330 (2012), the Supreme Court considered whether security imperatives involved in jail supervision allowed for strip searches and visual inspection of a detainee's genitals and anus without reasonable suspicion of a concealed weapon or contraband. The Court concluded these searches, even where the detainee was arrested for a minor offense, were reasonable. *Id.* at 335, 339. The Court did not rule on what type of search would be reasonable where a detainee was not put into the general jail population and did not have substantial contact with other detainees. *Id.* at 338.

¶ 62 Based on this case law, defendant argues the strip search performed on him at the Woodford County jail was unreasonable because (1) he was searched before it was definitively determined that he would be placed in the general jail population and he was arrested for driving with a suspended license and lying to officers about his name and (2) the search was not supported by reasonable suspicion or probable cause. Even if we assume, without deciding, that defendant is correct that a search incident to arrest or prior to incarceration requires probable cause or reasonable suspicion, we disagree with defendant's second contention. Accordingly, we turn first to whether the search was supported by reasonable suspicion or probable cause.

¶ 63 Defendant argues the search was unsupported by reasonable suspicion or probable cause because, in part, (1) McWhirter only had a warrant to track the vehicle and the judge who issued the warrant did not find a reasonable basis to believe defendant was involved in drug distribution, (2) McWhirter did not conduct any controlled buys of drugs from defendant on the date in question, (3) any reasonable suspicion Campbell had based on the odor of burnt marijuana dissipated upon his finding of the burnt marijuana cigarettes, and (4) Pyles testified that Campbell informed him officers were looking for "dope" but Campbell did not testify to this.

¶ 64 Defendant asserts the strip search cannot be reasonably justified based on the odor of marijuana and Campbell lacked an independent reasonable suspicion beyond his conversation with McWhirter. We disagree and conclude Campbell had probable cause to stop defendant once he identified him based on the photographs McWhirter showed him and the information that defendant was driving with a suspended license. Once Campbell stopped defendant, he had further probable cause to search defendant's person and vehicle based on the odor of marijuana—an observation corroborated by McWhirter's testimony. The additional strip search

was reasonable when the search of the vehicle and the pat-down search of defendant revealed no contraband.

¶ 65 Defendant cites no authority for his contention that any reasonable suspicion or probable cause Campbell had based on the odor of marijuana dissipated when he found the burnt marijuana cigarettes, patted defendant down, and failed to find additional marijuana. Nor does defendant explain why reasonable suspicion or probable cause based on the odor of marijuana would dissipate upon the finding of the burnt marijuana cigarettes. Nothing in the testimony suggests officers believed the small cigarettes contained the only marijuana defendant possessed. Campbell certainly had—at a bare minimum—a reasonable suspicion that defendant had more marijuana on his person that the pat-down search did not reveal. *People v. Zayed*, 2016 IL App (3d) 140780, ¶ 23, 49 N.E.3d 966 (officer had probable cause to search defendant based on odor of burnt marijuana emanating from vehicle). Indeed, Campbell testified that he knew McWhirter's task force dealt with drugs but he did not really know what he was dealing with when he pulled defendant over. The odor of marijuana and the fact that additional marijuana beyond the small cigarettes was not found either in the vehicle or on defendant's person was sufficient to justify Campbell's instructions to Pyles that he search defendant thoroughly because "We're looking for dope, and we haven't found it yet." See *People v. Ewing*, 377 Ill. App. 3d 585, 593, 880 N.E.2d 587, 595 (2007) ("The focus is on whether the officer on whose instructions or information the actual searching or arresting officers relied had reasonable suspicion to search or probable cause to arrest.").

¶ 66 Turning to the other *Bell* factors, we conclude the search performed in this case was reasonable. Defendant was taken to the shower room of the jail, where Pyles testified he pulled the door as closed as possible. *Cf. Zayed*, 2016 IL App. (3d) 140780, ¶ 25 (strip search

unreasonable where it was conducted on a residential street with passing traffic and in front of police vehicle's headlights for added visibility). Although defendant testified the door was left open, he further testified no one walked by during the search as it was 2 a.m. Pyles avoided touching defendant and never engaged in a visual body-cavity search. See *Calvert*, 326 Ill. App. 3d at 424.

¶ 67 Defendant also argues the privacy clause of article I, section 6 of the Illinois Constitution of 1970 provides a heightened right of privacy in certain areas of the body, separate from the fourth amendment search-and-seizure protections. However, defendant cites no authority for the proposition that the rules for searches incident to arrest or prior to incarceration do not apply under the privacy clause. Moreover, even if we accept for the sake of argument that the privacy clause requires a search to be justified by probable cause, Campbell had probable cause to search defendant based upon the odor of marijuana emanating from defendant's vehicle. *Zayed*, 2016 IL App. (3d) 140780, ¶ 23.

¶ 68 Finally, we note that defense counsel did assert certain aspects of the constitutional arguments for suppressing the evidence. Counsel argued the search was not supported by probable cause, and the trial court clearly disagreed with this argument. Indeed, in its ruling, the court specifically made a finding that Campbell had probable cause when he pulled defendant over, smelled the cannabis, and arrested defendant.

¶ 69 Based on the foregoing discussion, we conclude defendant cannot show prejudice. Even if his counsel had relied more heavily on his constitutional arguments instead of his statutory argument, there is no reasonable probability the outcome of the suppression hearing would have been different. Accordingly, we affirm the judgment of the trial court.

¶ 70 B. Consecutive Sentences

¶ 71 Defendant argues the trial court abused its discretion by sentencing him to consecutive sentences on the possession with intent to distribute convictions because the court failed to consider the nature and circumstances of the offenses. Defendant concedes he has forfeited this claim but asks this court to review the issue under the plain-error doctrine. Alternatively, defendant contends he received ineffective assistance of counsel.

¶ 72 "It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required." *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010). Defendant did not object to the trial court's consideration of section 5-8-4(c)(1) of the Unified Code of Corrections in imposing discretionary consecutive sentences. Nor did defendant file a motion to reconsider his sentence, although the trial court expressly admonished him that filing of a notice of appeal would forfeit any claims of sentencing error. Accordingly, we conclude defendant forfeited this claim of error.

¶ 73 1. *Plain Error*

¶ 74 We may review a forfeited claim only if the defendant establishes plain error. *Id.* at 545. This exception to forfeiture is narrow and limited. *Id.* The defendant must first show a clear or obvious error occurred. *Id.* "In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* The defendant bears the burden of persuasion, and if that burden is not met, the procedural default will be honored. *Id.*

¶ 75 We first must determine whether error occurred. Section 5-8-4(c)(1) of the Unified Code of Corrections allows a trial court to impose consecutive sentences "[i]f, having regard to the nature and circumstances of the offense and the history and character of the

defendant, it is the opinion of the court that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record." 730 ILCS 5/5-8-4(c)(1) (West 2016).

¶ 76 Here, the trial court explicitly stated it considered the facts and circumstances of the offense, and it stated more than once it considered the fact that "heroin is an epidemic that is plaguing our society." Defendant argues the court only considered the nature and circumstances of the offense in aggravation and not in determining whether to impose consecutive sentences. This ignores the court's statement that it had tried to state the basis for its decision on the record before expanding upon that basis. The court clearly intended for its discussion of the nature of the offense in aggravation to also serve as part of its basis for imposing consecutive sentences.

¶ 77 The court also explicitly considered defendant's history and character, noting his prior drug convictions and his general disregard for the law. "[I]t is the facts and circumstances of a case *and* a defendant's history and character which a court is required to consider in determining to impose consecutive sentences. [Citation.] As such, that the facts, alone, may not warrant such sentences is unavailing to defendant." (Emphasis in original.) *People v. Douglas*, 208 Ill. App. 3d 664, 677, 567 N.E.2d 544, 552 (1991). Additionally, the court expressly found consecutive sentences were necessary to protect the public from defendant's further criminal conduct. We find the court clearly considered the nature and circumstances of the offense. *Id.* at 676. Moreover, we note the trial court did not sentence defendant to the maximum allowable sentences for either charge. Given the foregoing, we conclude no error, let alone plain error, took place in the court's decision to impose consecutive sentences. The court did not abuse its discretion in sentencing defendant to terms of 20 and 15 years' imprisonment on the two

convictions for possession of controlled substances with intent to deliver. Accordingly, we affirm the court's judgment.

¶ 78 2. *Ineffective Assistance of Counsel*

¶ 79 Defendant alternatively argues we may review this claim as ineffective assistance of counsel because counsel failed to object at sentencing and failed to file a motion to reconsider the sentence. Given our determination that the trial court did not err by failing to consider the nature and circumstances of the offense, counsel's failure to object to the court's consideration of the nature and circumstances of the offense in imposing consecutive sentences was not objectively unreasonable. Additionally, defendant insisted on immediately filing a notice of appeal at the sentencing hearing even though the court warned him that doing so would forfeit any challenge to the sentence. Counsel cannot be found to have provided ineffective assistance by failing to file a motion to reconsider the sentence in this circumstance. Accordingly, we reject defendant's alternative claim of ineffective assistance on this point.

¶ 80 C. Improper Sentence

¶ 81 Last, defendant contends the trial court erred by considering an improper factor inherent in the offense of possession with intent to deliver heroin. Specifically, defendant asserts the court explicitly considered the threat of serious harm as a factor in aggravation. Defendant failed to preserve this issue through a contemporaneous objection or a motion to reconsider the sentence. Accordingly, we conclude defendant has forfeited this claim on appeal. Defendant asks us to review this claim under the plain-error doctrine, as outlined above.

¶ 82 Assuming for the purposes of this claim that the trial court erred by considering a factor inherent in the offense of possession with intent to deliver heroin, we conclude defendant cannot show the error was "so egregious as to deny the defendant a fair sentencing hearing."

Hillier, 237 Ill. 2d at 544. In reviewing the totality of the court's comments at sentencing, it is clear the court primarily based its sentencing decision on defendant's prior criminal history. The court emphasized defendant's numerous prior felonies for possession of controlled substances, including at least one conviction for delivery or manufacture of a controlled substance within a restricted area. The court further emphasized defendant's flagrant disregard for the law and his failure to conform to a law-abiding life, as evidenced by his numerous terms of imprisonment in the Department of Corrections and in county jails. We conclude the trial court did not give undue weight to the threat of serious harm inherent in the offense such that it deprived defendant of a fair sentencing hearing. Accordingly, we affirm the judgment of the trial court.

¶ 83 III. CONCLUSION

¶ 84 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 85 Affirmed.