2014 IL App (1st) 122838-U

FIRST DIVISION
DATE FILED: August 18, 2014

No. 1-12-2838

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 12483
	)	
MARCOS LUNA,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

O R D E R

¶ 1 *Held*: Defense counsel did not deprive defendant of his right to testify; though defendant chose not to testify, then to testify, and finally not to testify, the court repeatedly admonished him of his right to testify, gave him multiple opportunities to confer and consider, and inquired each time that his decision was freely made without threat or promise.

¶ 2 Following a bench trial, defendant Marcos Luna was convicted of possession of a controlled substance (900 grams or more of cocaine) with intent to deliver and sentenced to 20

years' imprisonment. On appeal, defendant contends that trial counsel rendered ineffective assistance by depriving him of his right to testify. For the reasons stated below, we affirm.

¶ 3 Defendant and codefendants Ricardo Flores and Mayra Sanchez-Espinoza were charged with possession of a controlled substance (900 grams or more of cocaine) with intent to deliver, allegedly committed on or about June 21, 2010. Defendant's bench trial was held simultaneously with Sanchez-Espinoza's jury trial.

¶ 4 At trial, police officer Edison Cevallos testified that, on the day in question, Flores phoned him to arrange a meeting at 2 p.m. to purchase 2 kilograms of cocaine for $32,000 each. Officer Cevallos drove an unmarked car to the arranged location at Milwaukee and Western Avenues in Chicago. He stayed there until about 2:35 p.m., when Flores phoned him to advise that he was late and that he would call again to inform Officer Cevallos where they would meet. Flores called Officer Cevallos at about 3 p.m. and told him to go to a restaurant nearby on Milwaukee Avenue. Officer Cevallos went there, parked nearby, and walked toward the restaurant. On the way, Flores met him and they exchanged greetings and "small talk." Officer Cevallos saw defendant and Sanchez-Espinoza standing near a parked white car near the entrance to the restaurant parking lot. As Flores and Officer Cevallos approached them, defendant and Sanchez-Espinoza went to the white car, the former to the front and the latter to the back near the trunk. Flores introduced Officer Cevallos to defendant, who then asked "are you ready?" Officer Cevallos said that he was ready, and defendant summoned Sanchez-Espinoza and told her "go show them." As she entered the white car, defendant told Officer Cevallos to "go check them out." With both Officer Cevallos and Sanchez-Espinoza inside the white car, she produced a green brick-like object marked "1060" from behind the driver's seat

and gave it to him. He asked if he could test it, and she nodded. He cut into the brick, found it to contain "high quality" cocaine, and handed it back to her. Officer Cevallos went to defendant and expressed his approval of the cocaine, to which defendant replied "bring the money." As Officer Cevallos walked away from defendant, he phoned other officers to report a successful cocaine purchase.

¶ 5 On cross-examination, Officer Cevallos testified that Flores had not mentioned during their first telephone call that someone other than himself was supplying the cocaine, so Officer Cevallos believed he was meeting Flores alone. He had not spoken with defendant or seen him before arriving at the restaurant, nor did he see defendant driving the white car (or any other car) or inside the white car. There was no recording of Officer Cevallos's conversation with defendant, and he was unsure if anyone but himself, defendant, and Sanchez-Espinoza heard it. During the transaction, he did not see or inspect a second "brick" or ask defendant or Sanchez-Espinoza about a second kilogram of cocaine because he presumed from his conversation with Flores that "there's going to be a second kilo somewhere."

¶ 6 Officer Robert Dembski testified that he worked with Officer Cevallos on the day in question as a surveillance officer. Therefore, he came to the Milwaukee and Western intersection before Officer Cevallos arrived. However, when Officer Cevallos relayed that the meeting location had been changed, Officer Dembski went to that location, arriving before Officer Cevallos. Flores then arrived, and Officer Dembski advised the other officers of this. When Flores met Officer Cevallos, the restaurant was between them and Officer Dembski so he moved to have a better view. He was driving to a new location when he saw Flores and Officer Cevallos approaching the restaurant parking lot and saw defendant and Sanchez-Espinoza

standing near the parking lot entrance; he did not see either defendant or Sanchez-Espinoza before this. Flores and Officer Cevallos approached a parked white car, with defendant approaching the front and Sanchez-Espinoza approaching the rear of the same car. Officer Dembski then lost sight as he drove on, though other surveillance officers were describing events on the radio. First, it was relayed that Officer Cevallos "met with them" in the white car, then an officer relayed that Officer Cevallos reported a successful purchase and directed officers to "move in." By now, Officer Dembski had driven to a location where he could see the scene again, and he saw an officer approach the scene and then did so himself. Flores fled with an officer in pursuit, while defendant and Sanchez-Espinoza remained near the white car. Defendant briefly backed away slowly from Officer Dembski before he and Sanchez-Espinoza were arrested. Inside the white car, Officer Dembski found in a bag behind the driver's seat two brick-like objects wrapped in green plastic, one marked 1060 and the other marked 1066. He believed the bricks to each be a kilogram of cocaine, with the numbers signifying their weight in grams. He recovered and later inventoried the bag and two bricks.

¶ 7 Forensic chemist LeAnn McDowell testified that when she weighed and tested the inventoried "bricks," they weighed 983 grams and 968.5 grams and both contained cocaine.

¶ 8 Motions for directed finding and verdict by defendant and Sanchez-Espinoza respectively were denied by the court, which found that there was evidence that defendant "had participated in a conversation with an undercover officer to sell to the undercover officer cocaine that he, [defendant], directed Ms. Sanchez-Espinoza to show the narcotics to the officer, and then asked an officer for money."

¶ 9 After Sanchez-Espinoza rested her case and waived her right to testify and call witnesses, the court asked defendant (through an interpreter) whether he agreed with his counsel's decision not to call any witnesses, and defendant replied "Yes." When the court admonished defendant that he had the right to testify and that counsel would advise him on his choice but it was defendant's personal choice, defendant asked to confer with counsel. The court agreed and directed the interpreter to join defendant and counsel; counsel Victor Armendariz replied that "I speak Spanish" but the court sent the interpreter to the conference. When defendant and counsel returned from the conference, the court asked defendant if he had adequate time to confer with counsel and whether he wanted to testify, defendant replied "Yes" to both questions. He replied "No" to the question of whether anybody made any threats or promises regarding testifying or not testifying, and replied "Yes" to whether he was making his decision to testify of his own free will, and the court found that his decision was voluntary.

¶ 10 The court held the jury instruction conference for Sanchez-Espinoza. Afterwards, the court asked if defendant's counsel was ready to proceed, and counsel replied that defendant "has indicated that he does not want to testify" and asked the court for admonishments. The court advised defendant that testifying was his decision, though counsel could advise him, and disclaimed that the court has any interest in defendant either testifying or not testifying. The court asked if defendant needed more time with counsel, and he replied "No, it's fine." He replied to the court's questions that he did not want to testify, had not received any threats or promises for his decision, and was deciding of his own free will. The court gave defendant "five more minutes to think about it just to make sure," and asked if he wanted to remain in court or go

outside with counsel. Defendant replied that staying in court was "fine," but then the court directed him to "go in the back with your lawyer in case you want to say something" in private.

¶ 11 When they returned from recess, the court asked defendant if he wanted to testify; he replied "No, it's fine." He denied that he received any threats or promises for his decision and affirmed that he made his decision of his own free will. The court found defendant's decision to be knowing and voluntary, and confirmed from defendant again that he agreed with counsel's decision not to call witnesses.

¶ 12 Following closing arguments of all parties, and the instruction, deliberation, and verdict in Sanchez-Espinoza's case (guilty), the court stated that it was announcing its decision in defendant's case. Through counsel, defendant asked to address the court before judgment, but the court replied that doing so would be inappropriate and that "I gave [defendant] extensive admonitions about whether or not he wanted to testify and he chose not to testify." The court found defendant guilty, finding that he and codefendants "each played a role in possessing two kilograms, two bricks of cocaine over 900 grams each, with intent to deliver them for $32,000 each to an undercover officer on June 21, 2010." While Flores arranged the deal with the officer, he introduced the officer to defendant. Defendant told Sanchez-Espinoza to "show them to him" and then, after she showed the officer the "bricks" and the officer examined one, told the officer to "go for the money." Thus, the court concluded, defendant's constructive possession and intent to deliver the cocaine were proven though he never handled it.

¶ 13 In his counsel-filed post-trial motion, defendant claimed insufficiency of the evidence, arguing that he was inferred to have constructive possession and knowledge of contraband that he was not seen to touch, and intent to deliver the same, based on a handful of alleged remarks as

described by the undercover officer without recording or other corroboration. At the motion hearing, the court denied the motion, noting that defendant had sent a letter to the court. The court reminded defendant that he had counsel and tendered the letter to defense counsel. (The letter is therefore not in the record.)

¶ 14 In the pre-sentencing investigation report (PSI), defendant stated that he was at the restaurant that day, a block from his home, to buy food. There, he saw acquaintance Flores, who introduced him to a man, followed "not even a minute later" by the arrest of defendant, Flores, and a woman in a nearby car. Defendant denied knowledge of or involvement in any drug transaction, professed to be "simply in the wrong place at the wrong time," expressed his belief that Flores and the woman would have testified to his lack of involvement had counsel called them as witnesses, and noted that "he wanted to testify himself but his attorney advised him against it."

¶ 15 For the sentencing hearing, counsel submitted letters of reference and defendant's written plea for leniency. Following arguments in aggravation and mitigation, the court sentenced defendant to 20 years' imprisonment, rejecting both the State's argument for 25 years and counsel's argument for the minimum 15 years. The court found that the trial evidence contradicted defendant's PSI account and that he acted "sort of like a director on the street directing Ms. Sanchez-Espinoza and asking the undercover officer for the money." Defendant's motion to reconsider his sentence was denied, and this appeal followed.

¶ 16 On appeal, defendant contends that trial counsel deprived him of his right to testify and thereby rendered ineffective assistance.

¶ 17 While a defendant has the constitutional right to testify that only he can waive, that decision should be made with the advice of counsel. *People v. Smith*, 2012 IL App (1st) 102354, ¶ 92. Advice not to testify is a matter of trial strategy and does not constitute ineffective assistance in the absence of evidence suggesting that counsel refused to allow the defendant to testify. *Id.*

¶ 18 Here, defendant argues that "it is easy to see that his right to testify was denied" and proceeds to frame the argument as one of reopening the defense case for his testimony and focuses on the prejudice he suffered from the denial. It is not so obvious to us that defendant was deprived of his right to testify. It is true that defendant first elected not to testify, then to testify, and then not to testify. However, the court repeatedly admonished him that it was his decision whether to testify and gave him multiple and ample opportunities to consult with counsel and consider his decision. After each time defendant announced his decision, the court ascertained from him in open court that his decision was made of his own free will and not the result of threats or promises. The court ably dispelled any (unspoken) belief by defendant that testifying was counsel's decision rather than his own. While defendant argues that his "desire to testify was not simply a vacillation" but "was apparent throughout trial," we find it apparent under these circumstances that he was indeed vacillating on the decision to testify. We further note that we shall not presume, in the absence of any evidence to the contrary, that counsel commanded rather than merely advised his client not to testify. Accordingly, we conclude that defendant has failed to show that trial counsel rendered ineffective assistance by denying him his right to testify.

¶ 19 We note defendant's argument that the court should have allowed defendant to reopen the case for the admission of further evidence. However, counsel did not request to reopen the evidence but merely told the court that defendant wanted to address the court. The court was clearly concerned with the general impropriety of dealing directly with a defendant represented by counsel, and merely reminded defendant that the method for a defendant to state his case is not to address the court but to testify and that he waived that right personally in open court. We see no error here.

¶ 20 Based on the aforementioned reasons, the judgment of the circuit court is affirmed.

¶ 21 Affirmed.