2017 IL App (1st) 152325-U

No. 1-15-2325

Order filed September 15, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 19312
	)	
TYRONE STONE,	)	Honorable
	)	Erica L. Reddick,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for armed robbery is affirmed over his claim that trial counsel was ineffective for failing to file multiple pre-trial motions.

¶ 2 Following a bench trial, defendant Tyrone Stone was convicted of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)) and sentenced to 21 years' imprisonment. Defendant appeals, arguing that his trial counsel was ineffective for failing to file a pre-trial motion to suppress: (1) evidence discovered as a result of his *Terry* stop (*Terry v. Ohio*, 392 U.S.

1 (1968)), because officers did not have reasonable suspicion to justify the stop; (2) the initial show-up and subsequent in-court identification of defendant by the victim, because the show-up identification procedures were unnecessarily suggestive; and (3) evidence obtained subsequent to his arrest, because the police lacked probable cause to arrest him. For the reasons set forth herein, we affirm the judgment of the trial court. In doing so, we reject defendant's claim that counsel was ineffective for failing to challenge the victim's show-up identification of him, but decline to review defendant's claim that counsel was ineffective for failing to file a motion to suppress evidence as a result of his *Terry* stop and subsequent arrest, because the trial record is insufficient to determine whether the officers had reasonable suspicion to justify the stop or probable cause to justify the arrest.

¶ 3 FACTUAL BACKGROUND

¶ 4 Defendant and co-defendant, Jeryl Bowdery, were arrested on September 10, 2013, and charged with armed robbery and aggravated unlawful restraint. Defendant was represented by a private attorney and he did not file any pre-trial motions *in limine*. Codefendant's counsel filed a motion to sever, which the trial court granted. Defendant and co-defendant each waived their right to a jury trial and the cases proceeded to simultaneous, but severed, bench trials. As defendant does not challenge the sufficiency of the evidence supporting his convictions, we recount the facts here to the extent necessary to resolve the issues raised in this appeal.

¶ 5 At trial, Ayodeji Adeleke, testified that, on September 10, 2013, he was walking near the intersection of Belmont Avenue and North Racine Avenue in Chicago when he saw two men walking on the sidewalk. Adeleke, a church pastor originally from Nigeria, approached the men and asked them if they were from Ghana, because "they looked like people from Africa" and he

wanted to "witness to people on the street." The men did not understand what Adeleke had asked, so he continued walking northbound on Racine. Adeleke testified that this interaction lasted about 20 seconds. After a minute of walking, Adeleke heard someone call "hey, man from Ghana." Adeleke turned around and saw the two men walking toward him, but he continued walking northbound as he was not sure if they were referring to him. Thirty seconds later, he again heard someone call out "hey, the man from Ghana." Adeleke turned and was approached by the men.

¶ 6 The men asked Adeleke how to get to a nearby train station, and he gave them directions. During this conversation, one of the men, whom Adeleke identified in-court as co-defendant Bowdery, pulled out a "brownish small gun." He heard Bowdery cock the gun and ask him for his wallet. Adeleke gave Bowdery his wallet. The other man, whom Adeleke identified in-court as defendant, then asked him for his cellphone, which he gave to defendant. Adeleke described how, while Bowdery was holding the gun, defendant "was standing with his hand in his pocket" as if he also had a gun. Bowdery then told Adeleke to run away. He testified that this second interaction lasted a minute and a half.

¶ 7 Adeleke took a step backward, ducked behind a nearby tree, and shouted "[s]omeone call 911." Defendant and Bowdery ran away down a nearby street. Adeleke then shouted "I was just being [sic] robbed by two black guys and they ran toward this way" and started to chase the men, as people in the area started calling 911. A pedestrian walking on a street down which the men had fled told Adeleke which way they had run. Adeleke circled back around to Belmont Avenue to make sure that the men did not board a bus. There, he saw Chicago police officers and told them about the robbery. The officers told Adeleke "oh, we got one," and led him to an alley "just

behind the building" where the robbery had taken place.[1] There, he identified defendant, who was sitting in the back of a police vehicle, as the man who had taken his cellphone. After being taken to a police station and signing a line-up advisory form, Adeleke identified co-defendant Bowdery from a line-up.

¶ 8 On cross examination, Adeleke explained that the men were "right in front of him" when he spoke to them and that the sun was out during the encounter. He described the lighting as "very bright" and that there was "still a lot of daylight" at the time of this encounter around 7 p.m.

¶ 9 Officer Cerda testified that he and his partner received a dispatch call about a robbery near Belmont and Racine. When the State's Attorney asked Cerda about the contents of the call, co-defendant's counsel objected on hearsay grounds, and the trial court sustained the objection. When he arrived on the scene, Cerda began searching for the offenders. At the mouth of an alley off of Racine Avenue, Cerda's vehicle cut off a "young black man" who had "been running at the alley."

¶ 10 Cerda and his partner exited the vehicle and detained the man, whom he identified in-court as defendant. Within two minutes Adeleke arrived in the alley and "immediately" identified defendant as one of the men that was involved in the robbery. Cerda searched defendant's backpack, which he had been wearing when officers apprehended him, and recovered a cellphone. Adeleke identified the cellphone as the phone that defendant had taken

[1] Counsel for co-defendant Bowdery objected to the statement "[o]h, we got one" as hearsay. The trial court sustained the objection and struck the statement from the record. Defense counsel for defendant did not make any objection.

from him. The officers found Bowdery lying behind a garbage can in the alley. Both men were transported to a police station, where Cerda inventoried defendant's bag and its contents.

¶ 11 On cross-examination, Cerda clarified that he did not see defendant running but could see that "he was still full of sweat" as if he had been running.

¶ 12 Detective Bruce Kischner testified that, on September 10, 2014, he interviewed defendant. After waiving his *Miranda* rights, defendant told Kischner that after Adeleke asked he and his cousin, co-defendant Bowdery, if they were from Ghana and walked away, Bowdery told defendant that he wanted "to poke" Adeleke. Defendant understood "poke" to mean rob. The men then followed Adeleke on Racine. After engaging Adeleke in conversation, Bowdery pulled a gun on him and demanded his wallet. After Adeleke handed his wallet to Bowdery, Bowdery then demanded his cellphone. Adeleke handed his cellphone to defendant, and defendant and Bowdery ran away. The statement was admitted into evidence and was read into the record by Kischner.

¶ 13 Based on this evidence, the trial court found defendant guilty of armed robbery with a firearm and aggravated unlawful restraint. After a hearing, the court merged the aggravated unlawful restraint count and sentenced defendant to 21 years' imprisonment for the armed robbery.

¶ 14 Defendant's Claims on Appeal

¶ 15 Defendant appeals, arguing that counsel was ineffective for failing to file three pre-trial motions. First, he contends that counsel should have filed a motion to suppress evidence discovered as a result of his *Terry* stop because the officers lacked reasonable suspicion to justify the stop based on the limited information the officers had about the suspects. Defendant argues

that, had counsel filed the motion, fruits of his unlawful seizure, including Adeleke's show-up identification of him, the cellphone, and his confession would have been suppressed.

¶ 16 Second, defendant contends that counsel was ineffective for failing to file a motion to suppress Adeleke's show-up and in-court identification of him because the show-up procedures employed by police were so suggestive that both identifications should have been excluded from his trial.

¶ 17 Finally, defendant contends that counsel was ineffective for failing to file a motion to suppress the evidence discovered in his backpack and his post-arrest statements because his arrest was not supported by probable cause. He argues that the officers lacked probable cause to arrest him because the show-up identification by the victim was unreliable, where the show-up was suggestive in nature. Defendant further asserts that, because his arrest was unlawful and the officers did not have a search warrant for the backpack, the officers' search of the backpack was likewise unlawful, and, thus, the evidence secured therefrom should have been suppressed.

¶ 18 ANALYSIS

¶ 19 To prevail on a claim of ineffective assistance of counsel, "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 (quoting *Strickland v. Washington*, 466 U.S. 688 694 (1984)). The failure to establish either prong of the *Strickland* test defeats a claim of ineffectiveness. *People v. Henderson*, 2013 IL 114040, ¶ 11. "Where an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the

unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Henderson*, 2013 IL 114040, ¶ 15. The decision of whether to file a pretrial motion to suppress is considered a matter of trial strategy and counsel's decision is accorded great deference. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004). "Counsel is not required to make futile motions in order to provide effective assistance." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 28.

¶ 20 Motion to Quash Initial Stop and Suppress Evidence

¶ 21 Defendant first argues that counsel was ineffective for failing to file, essentially, a motion to quash his initial stop and suppress evidence as a result of that unlawful stop. This evidence includes: (1) Adeleke's show-up identification; (2) Adeleke's cellphone; and (3) his confession to police. Defendant also claims that, had counsel filed the motion, "the trial court would have to make an additional inquiry into whether the in-court identification of [defendant] should have been suppressed as well."

¶ 22 The parties agree that defendant's initial detention is best characterized as a *Terry* stop, which must be supported by reasonable, articulable suspicion. See *People v. Thomas*, 2016 IL App (1st) 141040, ¶ 23 ("To justify a *Terry* stop, officers must be able to point to specific and articulable facts which, considered with the rational inferences from those facts, make the intrusion reasonable"). They disagree, however, about whether the officers had reasonable suspicion to detain defendant. Defendant argues that the evidence in the record does not support reasonable suspicion. Specifically, he contends that the officers only had a vague description of the offenders because the 911 callers did not see the offenders, and only heard Adeleke shout that he was robbed by "two black guys."

¶ 23 The State responds that defendant cannot prove that counsel's representation was ineffective because counsel's decision not to file a motion to quash was based on more information than is in the record. The State notes that this court may decline to consider a defendant's ineffective assistance claims if proper adjudication of these claims requires material that is outside the record. See *People v. Ligon*, 365 Ill. App. 3d 109, 122 (2006) (declining to address the defendant's claims of ineffective assistance, finding that "it could more appropriately be addressed in a proceeding for postconviction relief"). To this end, the State argues that counsel made strategic decisions to not file pretrial motions based on "substantially more information than contained in the record." Alternatively, the State argues that, if we find that there is sufficient evidence to rule on defendant's claims, the evidence supports denial of his claims.

¶ 24 Pursuant to *Terry v. Ohio*, 492 U.S. 1, 19 (1968), "a police officer may conduct a brief, investigatory stop of a person where the officer reasonably believes that the person has committed, or is about to, commit a crime." *People v. Timmsen*, 2016 IL 118181, ¶ 8. To justify such a stop, officers must have reasonable, articulable suspicion that a suspect is or was engaged in criminal activity. *Id*. While reasonable suspicion is a less demanding standard than probable cause, an officer's suspicion must amount to "more than a mere 'hunch.' " *People v. Thomas*, 2016 IL App (1st) 141040, ¶ 22 (quoting *Terry*, 392 U.S. at 27). As relevant here, "[a] general description of a suspect coupled with other specific circumstances that would lead a reasonably prudent person to believe the action taken was appropriate can constitute sufficient cause to stop or arrest." *People v. Ross*, 317 Ill. App. 3d 26, 29-30 (2000).

¶ 25 We initially note that our supreme court has observed that where a defendant's claim of ineffectiveness is based on counsel's failure to file a suppression motion, "the record will frequently be incomplete or inadequate to evaluate that claim because the record was not created for that purpose." *People v. Henderson*, 2013 IL 114040, ¶ 22. Such is the case here where the record is devoid of details regarding the description of the robbery suspects that the officers received before they detained defendant. To support their respective arguments, both parties make assumptions about the contents of the dispatch calls that the police received: the State assumes that these calls contained a more specific description of the offenders; defendant assumes that the calls did not. We decline to participate in such speculation given the record at bar.

¶ 26 Here, after reviewing the record on appeal, we find that it does not contain sufficient information to determine whether the officers had reasonable suspicion to detain defendant. The record shows that Adeleke pursued the men who had robbed him at gunpoint and shouted "[s]omeone call 911, someone call 911 *** I was just being [sic] robbed by two black guys and they ran around toward this way." Officer Cerda testified that police received "several calls" in reference to the robbery. However, Cerda was unable to testify to the contents of those calls. This record is insufficient for us to evaluate defendant's claim of ineffective assistance of counsel. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) (noting the insufficiency of the record); *People v. Evans*, 2015 IL App (1st) 130991, ¶ 34 (declining to consider the defendant's claim of ineffective assistance of counsel "because the record is devoid of evidence that would allow this court to adjudicate whether trial counsel's decision not to file a motion to suppress was strategic,

whether the motion would have been granted, or whether [the police officer] acted lawfully under the circumstances").

¶ 27 As in *Evans*, we are unable, without a more detailed record, to resolve defendant's claim that counsel was ineffective for failing to file a motion to quash arrest and suppress evidence *i.e.* whether the unargued motion is meritorious. Further, without a more detailed record, we cannot determine if, and to what extent, defendant was prejudiced by counsel's alleged deficiency in failing to file the complained-of motion. See *People v. Henderson*, 2013 IL 114040, ¶ 33 ("the fourth amendment violation is deemed the 'poisonous tree,' and any evidence obtained by exploiting that violation is subject to suppression as the 'fruit' of that poisonous tree.").

¶ 28 For these reasons, we believe that defendant's claim of ineffective assistance of counsel, based on counsel's failure to file a motion to quash arrest and suppress evidence, is best suited for a postconviction proceeding, rather than direct appeal. See *Bew*, 228 Ill. 2d at 134 (citing *Massaro v. United States*, 538 U.S. 500, 538 (2003)) (noting that collateral review is often the preferable means to bring an ineffective assistance of counsel claim "where, as here, the record on direct appeal is insufficient to support a claim of ineffective assistance of counsel."). In a proceeding under the Post-Conviction Hearing Act (725 ILCS 5/122 *et seq.* (West 2014)), defendant would have an opportunity to better develop the record to speak to the issue of whether police had reasonable suspicion to stop him. See *Evans*, 2015 IL App (1st) 130991, ¶ 34.

¶ 29 In reaching this conclusion, we are mindful of our supreme court's recent call for reviewing courts to "carefully consider each ineffective assistance of counsel claim on a case-by-case basis" before deferring judgment on the claims to collateral review. *Veach*, 2017 IL

120649, ¶ 48. It is only after careful consideration of the record that we decline to consider whether counsel was ineffective for failing to file a motion to quash his initial *Terry* stop and suppress evidence.

¶ 30 Furthermore, we believe that our inability to determine whether police had reasonable suspicion to stop defendant is inextricably linked to the question of whether police had probable cause to arrest defendant. Therefore, we also decline to address defendant's third claim of ineffective assistance of counsel *i.e.* that counsel was ineffective for failing to file a motion to suppress the evidence discovered in his backpack and his post-arrest statements because his arrest was not supported by probable cause. However, defendant's claim that counsel was ineffective for failing to file a motion to suppress Adeleke's show-up identification raises legal questions separate from that of whether police had reasonable suspicion to detain him. Thus, although we decline to determine whether police had reasonable suspicion to detain defendant, we will address defendant's second claim.

¶ 31 Motion to Suppress Identification

¶ 32 Defendant next contends that counsel was ineffective for failing to file a motion to suppress, both Adeleke's show-up and in-court identifications of him because the procedures employed by the officers conducting the show-up were unnecessarily suggestive. Specifically, defendant argues that the show-up procedures were unnecessarily suggestive because the officers told Adeleke "oh, we got one" before showing him defendant, who was handcuffed in the back of a police vehicle.

¶ 33 As mentioned, "where an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must

demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Henderson*, 2013 IL 114040, ¶ 15.

¶ 34 We employ a two-part test to determine whether an identification procedure comports with due process. "First, 'the defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law.' " *People v. Jones*, 2017 IL App (1st) 143766, ¶ 28 (quoting *People v. Moore*, 266 Ill. App. 3d 791, 797 (1994)). "Second, if the defendant establishes that the confrontation was unduly suggestive, the burden shifts to the State to demonstrate that, 'under the totality of the circumstances, the identification *** is nonetheless reliable.' " *Id.* (quoting *Moore*, 266 Ill. App. 3d at 970). In assessing the reliability of an identification, Illinois courts consider: "(1) the opportunity the witness had to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the identification confrontation, and (5) the length of time between the crime and the identification." *People v. Simmons*, 2016 IL App (1st), ¶ 89 (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

¶ 35 We find that counsel's failure to file a motion, challenging the procedures used in the show-up, did not constitute deficient performance because such a motion would have been meritless. Our supreme court has approved of "showups near the scene of the crime as acceptable police procedure designed to aid police in determining whether to continue or to end the search for the culprits." *People v. Lippert*, 89 Ill. 2d 171, 188 (1982). The fact that defendant was handcuffed in the backseat of a police vehicle was not unduly suggestive. See *Jones*, 2017 IL

(App) 143766, ¶ 30 (show-up not unduly suggestive where the defendant was "obviously in custody, as he was handcuffed and hauled from the back of a squad car"). Further, the officers' indication that they had a suspect in custody did not render the show-up unduly suggestive. See *People v. Rodriguez*, 387 Ill. App. 3d 812, 831 ("if a show-up could be invalidated on the ground that the police indicated that they had found a suspect, then no show-up could pass muster").

¶ 36 Accordingly, because a motion to suppress the identifications would have failed, defendant cannot show that counsel's performance was deficient. Thus, defendant cannot establish a claim of ineffectiveness on this basis.

¶ 37 In sum, we affirm defendant's conviction, and reject his claim that counsel was ineffective for failing to challenge the victim's show-up identification of him as the product of unduly suggestive procedures. We decline to rule on defendant's claim that counsel was ineffective for failing to challenge his stop on the grounds that police did not have reasonable suspicion to detain him where the record on appeal is insufficient to determine whether officers had reasonable suspicion. Also, because the question of whether police had probable cause to arrest defendant is inextricably linked to the reasonable suspicion determination, we decline to address defendant's claim that counsel was ineffective for failing to challenge his arrest. We believe that the disposition of these claims is better suited for postconviction review.

¶ 38 Affirmed.