2014 IL App (3d) 120947-U

Order filed July 14, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0947 Circuit No. 10-CF-193
GALEN R. MALONEY,	)	The Honorable Ted J. Hamer,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Lytton concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held*: The denial of the defendant's motion to suppress the search of the trunk of his rental car was affirmed because the trial court's findings that the there was no unreasonable delay after the valid stop and the officer's testimony that he smelled raw cannabis was credible were not against the manifest weight of the evidence. Also, the defendant's stipulated bench trial was not tantamount to a guilty plea when his defense counsel conceded possession and intent to deliver based on the amount during arguments, which was not the same as stipulating to the legal conclusion to be drawn from the stipulated facts. However, the defendant's conviction for possession with intent to deliver was reversed because he received ineffective assistance of counsel during the stipulated bench trial when his counsel failed to present any evidence to challenge the intent to deliver.

¶ 2 After his motion to suppress was denied, the defendant, Galen R. Maloney, was found guilty at a stipulated bench trial of unlawful possession of cannabis and unlawful possession with intent to deliver cannabis. The defendant was sentenced to six years in prison. The defendant appealed.

¶ 3 FACTS

¶ 4 After a traffic stop, the defendant was charged by information with: (1) cannabis trafficking, in violation of 720 ILCS 55/5.1 (West 2010); (2) unlawful possession with the intent to deliver cannabis, in violation of 720 ILCS 550/5(g) (West 2010); and, (3) unlawful possession of cannabis, in violation of 720 ILCS 550/4(g) (West 2010). The defendant filed a motion to quash arrest and suppress evidence, arguing that the defendant was subjected to a warrantless search of his person and his vehicle.

¶ 5 Illinois State Trooper Brian Strouss testified at the hearing on the motion to suppress. On June 12, 2010, at approximately 1:48 pm, Strouss initiated a traffic stop of the vehicle driven by the defendant for a Scott's Law (625 ILCS 5/11–907(c) (West 2010)) violation. Strouss had been assisting at another traffic stop, and the defendant failed to yield the closest lane of travel to the troopers. Upon approaching the driver's side of the defendant's vehicle, Strouss did not notice any evidence of alcohol or drugs. He returned to his squad car to process a warning ticket. The defendant lived in San Francisco, but the vehicle was rented in Reno, Nevada.

¶ 6 Clint Thulen, a patrol sergeant with the Illinois State Police, finished a different traffic stop and then proceeded to assist Strouss. Thulen had been a police officer since 1990, had over 900 hours of training for drug interdiction, and was a certified instructor for the U.S. Department of Transportation Drug Interdiction. Thulen was familiar with

the scent of burnt and raw cannabis. Strouss suggested that Thulen approach the defendant's vehicle and talk to him about the Scott's Law violation. Thulen approached the defendant's vehicle. Thulen did not smell any alcohol, but he asked to see the defendant's cup because it appeared to have some sort of plant material suspended in it. The defendant said it was tea, but handed the cup to Thulen. At that time, Thulen smelled raw cannabis, but not from the cup, which contained some kind of green tea. He pointed at his nose after smelling the marijuana, and directed the defendant to get out of the vehicle. Thulen testified that the odor of raw cannabis was "moderately small." Thulen asked the defendant for his keys. Thulen and Strouss searched the vehicle, finding cannabis in a suitcase in the trunk. The material was later tested, and 5,398 grams tested positive for cannabis. The other 4,628 grams were not tested.

¶ 7 The traffic stop was captured on video and Strouss's audio, and was consistent with the testimony of both Strouss and Thulen. It was played in open court, and was entered into evidence at the suppression hearing. After exiting the vehicle, the defendant went to the front of the vehicle, where Thulen conducted a patdown of the defendant. Thulen held up the keys, and Strouss exited his squad car. The officers open the vehicle's trunk, at which time Strouss says that he smells cannabis. The suitcase containing raw cannabis was found in the trunk. The defendant was arrested.

¶ 8 At the suppression hearing, the defendant called James Woodford, PhD, a self-employed research chemist, as an expert in the area of smelling marijuana. Woodford testified that, based on the packaging, in his opinion, the marijuana could not be smelled until the bags were opened. Woodford did not know how Thulen's sense of smell compared to his own, or to those in prior studies.

¶ 9 The trial court denied the motion to quash and suppress. The trial court found that the stop of the defendant's vehicle was valid due to the Scott's Law violation. The trial court found that there was not any undue delay, because Strouss was still writing the ticket while Thulen was talking to the defendant. The trial court found that Thulen was credible, as was his indication that he smelled raw cannabis coming from the vehicle. That gave the officers probable cause to search the vehicle, including the trunk, for cannabis.

¶ 10 The parties proceeded to a stipulated bench trial. The trial court advised the defendant that by entering into a stipulated bench trial, he was agreeing that the facts that the State read into the record would be the facts that it would present. Thereafter, the State read the facts into the record. The defendant did not present any facts. In making closing arguments on the stipulated facts, defense counsel conceded that the defendant had possession. Defense counsel also stated that "with the amount there, I could see how the Court could find him guilty with intent to deliver." The defendant was found guilty of unlawful possession of cannabis (720 ILCS 550/4(g) (West 2010)). Based on the amount of cannabis, the trial court also found the defendant guilty of unlawful possession with the intent to deliver cannabis (720 ILCS 550/5(g) (West 2010)). However, the trial court found that the stipulated facts presented reasonable doubt as to whether the defendant crossed state lines with the cannabis, so it found the defendant not guilty of cannabis trafficking (720 ILCS 55/5.1 (West 2010)).

¶ 11 The defendant's motion to reconsider the motion to suppress was denied, as was the defendant's motion to vacate the conviction on the unlawful possession with intent to deliver. The defendant's motion to declare the sentencing provision of 720 ILCS

550/5(g) unconstitutional was also denied. The defendant was sentenced to six years in the Department of Corrections, and ordered to pay a fine of $110,000 and other fees.

¶ 12 ANALYSIS

¶ 13 I. Motion to Suppress

¶ 14 The defendant contends that the traffic stop, while valid at the outset, became invalid when Thulen further detained the defendant, interrogating the defendant and seizing his cup of tea. Thus, the defendant argues, Thulen's questioning rendered the traffic stop an unreasonable seizure under the Fourth Amendment. The defendant contends that the Constitution requires more than a police officer's uncorroborated sense of smell. The State argues that there was no unreasonable delay while Strouss was still writing the defendant's ticket. Also, the trial court's factual finding that Trooper Thulen smelled raw cannabis was not against the manifest weight of the evidence, and it provided probable cause to search the defendant's vehicle.

¶ 15 On a motion to suppress, the defendant bears the burden of persuasion. *People v. Mott*, 389 Ill. App. 3d 539 (2009). If the defendant makes out a prima facie case of an unlawful search or seizure, the burden then shifts to the State to introduce evidence justifying the search or seizure. *Mott*, 389 Ill. App. 3d at 542. In reviewing a ruling on a motion to quash arrest and suppress evidence, we review factual findings with deference, reversing only when they are against the manifest weight of the evidence, but review the ultimate ruling on the suppression *de novo*. *People v. Jackson*, 232 Ill. 2d 246, 274 (2009)

¶ 16 The state and federal constitutions protect people from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6; *People v. Pitman*, 211 Ill. 2d 502 (2004). Vehicle stops are subject to the Fourth Amendment's requirement of

reasonableness. *People v. Hackett*, 2012 IL 111781, ¶ 20. A police officer may conduct a brief, investigatory stop where the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Id.* The defendant does not challenge the basis for the stop, i.e., his violation of Scott's Law. He alleges that he was then unreasonably detained, and interrogated, without probable cause.

¶ 17 A warrantless search of a vehicle is proper when the police have probable cause to believe that it contains contraband. *People v. Schrems*, 224 Ill. App. 3d 988 (1992). Distinctive odors can be persuasive evidence of probable cause. *People v. Stout*, 106 Ill. 2d 77 (1985). Thus, where there is sufficient foundation as to expertise, the smell of cannabis alone is sufficient to furnish probable cause to search a vehicle without a warrant. *People v. Smith*, 2012 IL App (2d) 120307 (2012). The defendant argues that Thulen could not have detected the cannabis, because of the way it was packaged in the trunk. That raises a factual question, and the trial court found that the officer's testimony was credible. Thulen testified that he smelled the "moderately small" smell of cannabis; he also testified that he had 20 years of experience as a police officer and had drug training. The defendant also argues that the officer's sense of smell needed to be corroborated, but that proposition was rejected in *Stout*. The officer's testimony was sufficient to furnish probable cause to search the trunk.

¶ 18 The defendant also argues that, by the time that Thulen allegedly smelled cannabis, his detention had become a custodial interrogation and he was entitled to *Miranda* warnings. He does not actually allege that he was not given *Miranda* warnings, only that there was no direct evidence of such warnings at the suppression hearing. At the suppression hearing, Strouss testified that he believed that Thulen read the defendant

his *Miranda* rights. Thulen was not asked whether he read the defendant his *Miranda* rights. According to the facts read into the record at the stipulated bench trial, Thulen patted the defendant down and read him his *Miranda* rights.

¶ 19 *Miranda* warnings are required only if the person being questioned is in custody. *People v. Slater*, 228 Ill. 2d 137, 150 (2008). The determination of whether a defendant is in custody depends on the circumstances surrounding the interrogation, and given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. *Slater*, 228 Ill. 2d at 150. Six minutes had elapsed from the beginning of the traffic stop until the time when Thulen smelled the cannabis. According to the video, Strouss was still writing the warning ticket in his squad car. The trial court's factual finding that Strouss was still writing the warning ticket when Thulen smelled the cannabis, and there was no unreasonable delay, was not against the manifest weight of the evidence.

¶ 20 The defendant argues that his trial counsel rendered ineffective assistance of counsel when he failed to pursue several arguments at the hearing on the motion to suppress. In the motion, defense counsel argued that the warrantless search of the defendant's cup was illegal, and the cannabis was only smelled after that search. However, at the hearing on the motion, defense counsel only argued that it was not possible for the officer to have smelled cannabis. He failed to question the duration of the stop or *Miranda* warnings. The defendant argues that this demonstrates incompetence, and his counsel's performance was not objectively reasonable. The State contends that the choice of what to argue was a matter of strategy.

¶ 21 In order to succeed on a claim of ineffective assistance of counsel, a defendant must establish that his counsel's performance fell below an objective standard of

reasonableness and there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The claim was not raised in the trial court, so our review is *de novo*. *People v. Berrier*, 362 Ill. App. 3d 1153 (2006). In this case, the defendant did not show prejudice because the trial court's findings that the stop was valid, the cup was not relevant to the search, and there was no unreasonable delay in writing the ticket were not against the manifest weight of the evidence.

¶ 22 II. Stipulated Bench Trial

¶ 23 The defendant argues that he was not proven guilty beyond a reasonable doubt of possession with intent to deliver because the State did not show that the defendant ever intended to sell the cannabis. The State contends that a reasonable trier of fact could infer intent to sell from the mere quantity. Alternatively, the defendant argues that his stipulated bench trial was tantamount to a guilty plea and that he received ineffective assistance of counsel during the stipulated bench trial.

¶ 24 When a defendant challenges the sufficiency of the evidence, a reviewing court considers whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Section 5 of the Cannabis Control Act provides that it is unlawful for any person knowingly possess with intent to deliver cannabis. 720 ILCS 550/5 (West 2010). In order to prove possession of a controlled substance with intent to deliver, the State had to show that: (1) the defendant had knowledge of the presence of the narcotics; (2) the narcotics were in the defendant's immediate possession or control; and (3) the defendant intended to deliver the narcotics. *People v. Bui*, 381 Ill. App. 3d 397, 419 (2008) (citing *People v. Robinson*,

167 Ill.2d 397, 407 (1995). The defendant argues that the State failed to prove beyond a reasonable doubt that the defendant ever intended to sell any cannabis. Courts consider a number of factors as circumstantial evidence of a defendant's intent to deliver, see *People v. Robinson*, 167 Ill. 2d 397, 408 (1995) (listing the factors), but the parties agree that the only factor in this case was the quantity of controlled substance.

¶ 25 The State contended that the 5,000 grams of plant material that tested positive for cannabis was too large an amount to be viewed as being for personal consumption, and that was the finding of the trial court based upon the facts presented at the stipulated bench trial. Since the amount of cannabis alone, without any additional evidence, can be sufficient to support a finding of possession with intent to deliver, *People v. Cordle*, 210 Ill. App. 3d 740, 742 (1991), a reasonable trier of fact could infer intent to sell from the mere quantity in this case.

¶ 26 The defendant contends that his defense counsel effectively pled him guilty to both possession and possession with intent to deliver by conceding possession during closing arguments, and stating that with the amount, he "could see" how the trial court could find the defendant guilty of intent to deliver. A stipulated bench trial, in which the defendant preserves a defense for appeal, is tantamount to a guilty plea when a defendant stipulates not only to the evidence, but also to the sufficiency of the evidence to convict. *People v. Horton*, 143 Ill. 2d 11, 20 (1991). In this case, defense counsel stipulated that the facts that the State would read into the record were the facts it would present. Defense counsel did not stipulate to the legal conclusion to be drawn from those facts. See *Horton*, 143 Ill. 2d at 21 (closing arguments are not evidence, so concession during closing that the evidence was sufficient to convict was not tantamount to a guilty plea).

Thus, we do not find that the defendant's stipulated bench trial was tantamount to a guilty plea.

¶ 27 However, we find that the defendant received ineffective assistance of counsel with respect to the stipulated bench trial. As stated above, to prevail on a claim of ineffective assistance of counsel, a defendant must establish that his counsel's performance was deficient and that he was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Defense counsel failed to present any evidence to challenge the intent to deliver. For example, defense counsel did not present the facts that the defendant was not in possession of a weapon, large amounts of cash, or a police scanner at the time of his arrest. Defense counsel also failed to argue caselaw that would support a finding that the quantity could be for personal use, absent other factors that were not present in this case. See *People v. Neylon*, 327 Ill. App. 3d 300, 310 (2002) (quantity alone can be sufficient to prove intent to deliver only when the amount cannot be reasonably viewed as for personal consumption); see also *People v. Ellison*, 2013 IL App. (1st) 101261 ¶ 16 (where amount may be considered consistent with personal use, there should be additional evidence of intent to deliver). To show prejudice, the defendant must show that there is a reasonable probability that, absent the errors, there would have been reasonable doubt regarding guilt. *People v. Horton*, 143 Ill. 2d 11, 26-27 (1991). In the case at bar, had the trial court been presented with evidence that other factors that indicated intent to deliver were absent, there was a reasonable probability that it not have found the defendant guilty of possession with intent to deliver. Thus, we reverse the defendant's conviction on that count and remand for further proceedings consistent with this order. Since we have reversed the defendant's

conviction on this charge, it is not necessary to reach the issue of whether section 5(g) of the Cannabis Control Act is unconstitutional as to the defendant.

¶ 28 CONCLUSION

¶ 29 The judgment of the circuit court of Henry County is affirmed in part and reversed in part, and remanded for further proceedings consistent with this order.

¶ 30 Affirmed in part, reversed in part, and remanded.

¶ 31 JUSTICE SCHMIDT, dissenting.

¶ 32 I respectfully dissent.