

No. 1-16-1975

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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, Illinois.
)	
v.)	No. 14 CR 4189
)	
BRANDON BARBER,)	Honorable
)	Timothy J. Joyce,
Defendant-Appellant.)	Judge Presiding.

JUSTICE COGHLAN delivered the judgment of the court.
Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was denied a fair trial where the surveillance location privilege was improperly applied at trial limiting defendant's cross-examination of the only witness who observed him display a fully-exposed handgun in public.

¶ 2 Following a bench trial, defendant Brandon Barber was convicted of the offense of being an armed habitual criminal (720 ILCS 5/24-1.7 (West 2012)) and sentenced to seven years in prison, plus a three-year term of mandatory supervised release. The trial court also imposed various mandatory fines, fees, and costs. Barber appeals his conviction, arguing that his trial counsel provided ineffective assistance by failing to file a motion to quash his arrest and suppress evidence. Barber also challenges the sufficiency of the evidence, asserting that the State failed to prove that he was convicted of the two

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predicate felonies necessary to support an armed habitual criminal conviction. Barber further asserts that the trial court's application of the surveillance location privilege violated his constitutional right to confront witnesses against him. Finally, Barber argues that the trial court erroneously calculated and imposed mandatory fines, fees, and costs. Because we agree that the surveillance location privilege was improperly applied in this case, we reverse and remand for a new trial.

¶ 3 At trial, Chicago police officer Oscar Navarro testified that on November 11, 2013, he was working as a surveillance officer with a team of officers, including Officer Michael Greco, in the area of 3459 West Ogden Avenue, where the Plaza Food and Liquor Store is located. Navarro was surveilling mainly for narcotics, but officers had also been instructed to patrol the immediate area due to anti-police graffiti and violence. Greco's role as an enforcement officer was to detain anyone engaging in criminal activity.

¶ 4 At around 10 p.m., using binoculars and from a distance of about 75 feet, Navarro saw Barber standing with a group of unknown individuals in front of the store. The area outside the store was well-lit and nothing obstructed Navarro's view of Barber. Navarro observed Barber entering and exiting the store multiple times, but could not see him when he was inside the store.

¶ 5 At around 10:30-10:35 p.m., Navarro, still using his binoculars, observed Barber, who was standing outside the store, remove a handgun from his waistband with his right hand, show it to another individual standing with him, and then put the gun back in his front waistband. Nothing obstructed Navarro's view of Barber. He did not observe anyone react to Barber's display of the gun, which he described as measuring about six to eight inches long. He "knew it wasn't a revolver." Navarro radioed the enforcement officers about what he had seen and gave them a description of Barber. Within five minutes, Greco arrived at the scene in an unmarked, undercover vehicle. As Greco pulled up to the store, Barber walked inside and Navarro lost sight of him.

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¶ 6 During cross-examination, when defense counsel asked Navarro to reveal his surveillance location, the following colloquy ensued:

Q: Okay. And now just to explain if you go across the street, I believe I am turned around, but I believe it's northbound at the corner on Ogden and St. Louis, there is an industrial building or a wall that goes for a significant portion of that block, correct?

A: Yes.

Q: And behind that is a parking lot area, right?

A: Yes.

Q: And when you were doing your surveillance, you were in the parking lot area, is that correct?

MS. PILLSBURY: Objection. There is no motion pending to reveal his surveillance location.

MR. GOLDMAN: Judge, this goes to identifying what he could see.

THE COURT: Common practice is usually to bring a pretrial motion to seek to have the surveillance location revealed, then the Court can conduct a hearing oftentimes in chambers with the officer to determine whether the location should be revealed or should not be revealed. I know there is a considerable body of case law in this regard.

MR. GOLDMAN: I would argue that the officer has already opened the door to where he was during his surveillance on Ogden.

THE COURT: He said something—well, he said that in response to your question. He is on Ogden. That's as much as you are getting. Go ahead.

BY MR. GOLDMAN:

Q: Now, during your surveillance without revealing your location, did that wall—did a wall at all affect your ability to see the location?

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A. No.”

¶ 7 Officer Greco testified that as he entered the store, he saw Barber “exiting out of the rear storage area.” He entered the same storage area moments later and saw the butt of a handgun under a pallet to the right of the room. Greco recovered two guns “close together” from the storage area, a loaded Sig Sauer 9-millimeter semiautomatic handgun with a blue steel finish and a blue-steel .32-caliber Colt semiautomatic handgun, which was noticeably smaller than the 9-millimeter. Greco never saw anyone other than defendant enter the storage area.

¶ 8 After Greco recovered the two handguns, Navarro identified the blue steel 9-millimeter semi-automatic gun as the one he observed Barber holding during his surveillance.

¶ 9 At the conclusion of the State’s case, the parties stipulated to two certified copies of convictions for Barber. One was for a 2004 drug conviction¹ and the other was for a 2008 conviction in Iowa for kidnapping and assault while participating in a felony.

¶ 10 After the State rested, Barber’s motion for a directed finding was denied. Barber moved to admit the video footage taken from inside the store into evidence. The video footage recorded activity from multiple areas within the store, including the back storage area. In the video footage, Barber can be seen wearing a black jacket with a yellow stripe on the sleeves and a black hat with the word “security” written across the front. The video also shows Barber entering the back storage area to retrieve a mop, and entering the storage area again a few minutes later. The second time he walked to the right side of the room which contained some pallets. The video also shows Officer Greco entering the same area within a minute of Barber exiting and emerging shortly thereafter holding two guns.

¶ 11 In closing, defense counsel questioned Navarro’s credibility. He argued that Navarro claimed to have seen Barber “from 75 feet away at night from a location *we’re not able to know* take a firearm out

¹The certified copy of Barber’s 2004 drug conviction stipulated to actually belonged to Barber’s codefendant and brother, James Barber, but Barber’s 2004 drug conviction was accurately reflected in his presentence investigation report.

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of his belt, show it, and put it back in his belt,” but no one near Barber reacted to seeing the gun. (Emphasis added.) Counsel also disputed Navarro’s ability to “truly identify” that the gun recovered in the storage area was the “the same gun he saw from his 75 feet away position that Mr. Barber allegedly had in his waistband.” The trial judge disagreed and found Barber guilty of the offenses of armed habitual criminal, unlawful use or possession of a weapon by a felon, and two counts of aggravated unlawful use of a weapon, which all merged into the armed habitual criminal conviction.

¶ 12 Barber filed a “motion for new trial and reconsideration of denial of defendant’s motion for directed [finding] of not guilty.” The trial court denied Barber’s motion, and Barber timely appealed.

¶ 13 We begin with Barber’s argument that his armed habitual criminal conviction should be reversed because his sixth amendment right to confrontation was violated when defense counsel was prohibited from cross-examining Navarro about his secret surveillance location.

¶ 14 Barber concedes that “this issue was not included by defense counsel in [his] post-trial motion.” *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Ordinarily, forfeiture rules would require this court to refrain from addressing the merits of his claim. However, constitutional issues that were raised at trial but not preserved in a posttrial motion are an exception to normal forfeiture rules. *People v. Palmer*, 2017 IL App (1st) 151253, ¶ 20. Since Barber’s argument implicates his constitutional right to confront witnesses against him, we will review his claim under the plain error doctrine to determine whether the trial court erroneously applied the surveillance location privilege. *People v. Stokes*, 392 Ill. App. 3d 335, 340 (2009). The plain error doctrine permits review of an unpreserved error when either (i) the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice or (ii) the error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); *People v. Herron*, 215 Ill. 2d 167, 187

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(2005). We first determine whether an error occurred, because absent error, there can be no plain error. *Bannister*, 232 Ill. 2d at 65; *People v. Blakenship*, 406 Ill. App. 3d 578, 581 (2010).

¶ 15 The sixth amendment of the United States Constitution (U.S. Const., amend VI) and article 1, section 8 of the Illinois constitution (Ill. Const. 1970, art. I, § 8) guarantee a defendant the right to confront the witnesses against him, which includes the right to cross-examine witnesses. *People v. Sanders*, 2019 IL App (1st) 160718, ¶ 22; *People v. Whitfield*, 2014 IL App (1st) 123135. But a defendant's sixth amendment right only guarantees “ ‘an opportunity for effective cross-examination.’ ” (Emphasis in original.) *People v. Jackson*, 2017 IL App (1st) 151779, ¶ 22 (quoting *People v. Foggy*, 121 Ill. 2d 337, 356 (1988) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985))). Indeed, the trial court has the discretion to place limits on the scope of cross-examination and the court's decision to do so will not be disturbed on appeal absent an abuse of that discretion resulting in manifest prejudice to the defendant. *Sanders*, 2019 IL App (1st) 160718, ¶ 22; *Jackson*, 2017 IL App (1st) 151779, ¶ 22. An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *Peach v. McGovern*, 2019 IL 123156, ¶ 25.

¶ 16 In Illinois, courts have recognized a surveillance location privilege for decades, which protects against the disclosure of secret surveillance locations used by the police. *Sanders*, 2019 IL App (1st) 160718, ¶ 24; *Jackson*, 2017 IL App (1st) 151779, ¶ 23; see *People v. Criss*, 294 Ill. App. 3d 276, 281 (1998) (first recognizing the surveillance location privilege).

¶ 17 Barber advocates that the surveillance location privilege should be rejected as a matter of law because (i) creation of the privilege belonged to the legislature, not the judiciary; (ii) the Illinois Supreme Court has not addressed the merits of the privilege; and (iii) the privilege fails to meet the four-part *Birkett* test (*People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521 (1998)) for recognizing evidentiary privileges. Barber acknowledges that this contention has already been considered and

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rejected by this court (*Palmer*, 2017 IL App (1st) 151253, ¶¶ 22-23; *In re Manuel M.*, 2017 IL App (1st) 162381, ¶ 17), but asserts that the doctrine of *stare decisis* does not require one panel of this court to adhere to decisions rendered by other panels.

¶ 18 The doctrine of *stare decisis* is principled on the policy of courts to stand by precedents and not to disturb settled points to ensure that the law will not change erratically. *People v. Espinoza*, 2015 IL 118218, ¶ 26. Although *stare decisis* “is not an inexorable command” (*id.* ¶ 30), departure from a multitude of consistent decisions should not be done absent good cause or compelling reasons (*id.*). See *id.* ¶ 26 (an issue deliberately examined and decided by the courts should be considered settled and closed to further argument). Barber has offered no good cause or compelling reason to depart from the plethora of cases recognizing the surveillance location privilege or to re-examine this precise issue. *Criss*, 294 Ill. App. 3d 276, 280-81 (1998); *In re Manuel M.*, 2017 IL App (1st) 162381, ¶ 18; *Palmer*, 2017 IL App (1st) 151253, ¶¶ 22-23; *People v. Price*, 404 Ill. App. 3d 324, 330-31 (2010); *People v. Bell*, 373 Ill. App. 3d 811, 818 (2017); *People v. Knight*, 323 Ill. App. 3d 1117, 1128 (2001).

¶ 19 As to the merits, Barber contends that the trial court erred in finding that the surveillance location privilege applied based on his failure to file a pretrial motion seeking disclosure of the surveillance location. We agree.

¶ 20 As stated, a qualified privilege regarding the disclosure of secret surveillance locations used by the police exists. *Palmer*, 2017 IL App (1st) 151253, ¶ 22. A defendant may file a pretrial motion seeking disclosure of a surveillance location, but the State may also invoke the surveillance location privilege during trial. Where, as here, the State invokes the surveillance location privilege at trial, it carries the initial burden of proof in demonstrating that the privilege should apply. *Sanders*, 2019 IL App (1st) 160718, ¶ 30; *Palmer*, 2017 IL App (1st) 151253, ¶ 27; *In re Manuel M.*, 2017 IL App (1st) 162381, ¶ 19; *Jackson*, 2017 IL App (1st) 151779, ¶ 25; *Price*, 404 Ill. App. 3d 324, 331 (2010). The

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State may satisfy this initial burden by offering evidence that the surveillance location was either (i) on private property with the permission of the owner or (ii) in a useful location, the utility of which would be jeopardized by disclosure. *Sanders*, 2019 IL App (1st) 160718, ¶ 30; *Price*, 404 Ill. App. 3d at 332.

¶ 21 Once the State satisfies its burden of proof at trial, the defense then bears the burden of persuasion, which can be carried by demonstrating that the surveillance location was relevant to the defense or essential to the fair determination of the case. *Jackson*, 2017 IL App (1st) 151779, ¶ 26; *Price*, 404 Ill. App. 3d at 332; *Criss*, 294 Ill. App. 3d at 281. A defendant bears a lower burden to obtain disclosure of a surveillance location when the privilege is invoked at trial. *Palmer*, 2017 IL App (1st) 151253, ¶ 28; *Price*, 404 Ill. App. 3d at 332. In contrast, when a defendant seeks disclosure of the surveillance location pretrial, the defendant must satisfy a more stringent burden, showing that the disclosure was material or necessary to the defense and that the defendant's need to know the location outweighs the public's interest in its secrecy. *Criss*, 294 Ill. App. 3d at 281.

¶ 22 A trial court determines whether the privilege applies on a case-by-case basis, requiring the trial court to balance the public interest in keeping the surveillance location secret against the defendant's right to challenge a witness's credibility by cross-examination. *Sanders*, 2019 IL App (1st) 160718, ¶ 25; *In re Manuel M.*, 2017 IL App (1st) 162381, ¶ 18; *Jackson*, 2017 IL App (1st) 151779, ¶ 23. When performing the balancing test, the trial court must keep in mind that (i) the defendant's right to cross-examine a witness about a surveillance location becomes more critical the more important the witness is to the State's case and (ii) disclosure of a surveillance location is not required if there is no question about a surveillance officer's ability to observe or there is contemporaneous video evidence. *Jackson*, 2017 IL App (1st) 151779, ¶ 24. If the State's case rests almost exclusively on the testimony of one surveillance officer, disclosure of the surveillance location "must 'almost always' be required." *Id.* ¶ 24 (quoting *People v. Knight*, 323 Ill. App. 3d 1117, 1128 (2001)). The trial court may conduct an *in*

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camera hearing, outside the presence of the State and the defense, in deciding whether to apply the surveillance location privilege, which requires the surveillance officer to disclose the surveillance location to the trial court. *In re Manuel M.*, 2017 IL App (1st) 162381, ¶ 20; *Price*, 404 Ill. App. 3d at 332.

¶ 23 Based on the record before us, we find that the State completely failed to meet its burden of demonstrating that the surveillance location privilege should be applied in this case. When Navarro was asked to disclose his surveillance location at trial, the State objected that “there [was] no motion pending to reveal” this information. Contrary to the State’s apparent belief, a defendant’s right to challenge invocation of the surveillance location privilege is not limited to pretrial motion practice. *Sanders*, 2019 IL App (1st) 160718, ¶ 30; *Price*, 404 Ill. App. 3d at 332; see also *In re Manuel M.*, 2017 IL App (1st) 162381, ¶ 19 (referencing that the State invokes the surveillance location privilege). Where, as here, the State invokes the privilege at trial, it still must satisfy its initial burden of demonstrating that the privilege should apply.

¶ 24 In order to meet its burden, the State must show that the surveillance location was either (i) on private property with the permission of the owner or (ii) in a useful location, the utility of which would be compromised by disclosure. *Palmer*, 2017 IL App (1st) 151253, ¶ 27; *Price*, 404 Ill. App. 3d at 332. The burden of persuasion would have only shifted to Barber if the State had carried its initial burden at trial, which it failed to do. Likewise, although an *in camera* hearing is not mandated, the record does not reflect that before applying the surveillance location privilege, the trial court engaged in any balancing of the public’s interest in keeping the surveillance point secret against Barber’s need for disclosure of the surveillance location to effectively cross-examine Navarro.

¶ 25 We find that these errors impermissibly restricted Barber’s constitutional right to confront and cross-examine Navarro, the only witness who actually observed Barber in possession of a fully-

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exposed handgun in public. See *id.* at 333 (trial court erred when it applied the surveillance location privilege without first conducting a balancing inquiry and the State failed to carry its initial burden). Thus, the trial court abused its discretion when it applied the surveillance location privilege in this case without first requiring the State to establish the need to keep the surveillance location secret, especially since the State's case turned almost exclusively on the credibility of Navarro's testimony. This limitation on defense counsel's ability to effectively cross-examine the State's key witness denied Barber a fair trial. Consequently, we reverse Barber's conviction and remand for a new trial. We find no double jeopardy bar to retrial, as the evidence was sufficient to sustain his conviction.

¶ 26 Given our disposition, we need not address Barber's remaining contentions.

¶ 27 Reversed and remanded.