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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DEMOND J. BOOKER, DOC # 720604,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D18-3063

Opinion filed April 29, 2020.

Appeal from the Circuit Court for Lee County; Mark A. Steinbeck, Judge.

Howard L. Dimmig, II, Public Defender, and Stephania A. Gournaris, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and David Campbell, Assistant Attorney General, Tampa, for Appellee.

SMITH, Judge.

Demond J. Booker appeals his judgment and sentence entered after a jury found him guilty of one count of possession of a controlled substance. In this direct

appeal, Mr. Booker argues trial counsel[1] was ineffective, as shown on the face of the record, for neglecting to move to suppress the fentanyl found in his backpack following his illegal arrest and the search incident to that arrest. We agree and reverse.

I

Generally, claims of ineffective assistance of counsel cannot be raised on direct appeal; rather, claims of ineffective assistance of counsel are properly made by seeking postconviction relief under Florida Rule of Criminal Procedure 3.850. Hills v. State, 78 So. 3d 648, 652 (Fla. 4th DCA 2012) (citing Odeh v. State, 82 So. 3d 915, 923-24 (Fla. 4th DCA 2011)). However, "[o]n rare occasions, appellate courts make an exception to this rule when the ineffectiveness is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable." Corzo v. State, 806 So. 2d 642, 645 (Fla. 2d DCA 2002). "To obtain relief on the basis of ineffective assistance of counsel on direct appeal, the facts upon which the claim is based must be clearly evident in the record." Larry v. State, 61 So. 3d 1205, 1207 (Fla. 5th DCA 2011) (citing Stewart v. State, 420 So. 2d 862, 864 (Fla. 1982)). That is—"so clear that 'it would be a waste of judicial resources to require the trial court to address the issue.' " Larry, 61 So. 3d at 1207 (quoting Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987)).

II

The facts upon which Mr. Booker complains are clearly evident on the face of the record before us. On November 30, 2017, at around 1:30 a.m., a sergeant from the Lee County Sheriff's Office found Mr. Booker sitting at a picnic table under a

[1]We note that Mr. Booker's appellate counsel was not his trial counsel.

pavilion in a public county park in Fort Myers. Mr. Booker was alone with his bicycle and carrying a backpack. The park had posted signs indicating the park's operating hours were from dawn to dusk. The sergeant approached Mr. Booker and explained he was in violation of park rules and as a result was going to be placed under arrest. The sergeant called for backup to make the arrest, explaining that as supervisor he usually gives arrests to the deputies.

When the responding deputy arrived, the sergeant and Mr. Booker were underneath a pavilion engaged in conversation. The deputy was present and it was explained again to Mr. Booker that he was in violation of park rules, which is an arrestable offense. The deputy took over the "investigation," and Mr. Booker was placed under arrest for violation of park rules, at which point the backpack on Mr. Booker's back was searched. Inside the backpack was a small box which contained a plastic bag filled with a white powdery substance. This substance was later determined to be fentanyl. The deputy testified at trial that Mr. Booker was at first reluctant to give up the backpack but was otherwise cooperative, and not aggressive or violent.

Mr. Booker was initially charged with possession of a controlled substance, possession of drug paraphernalia, and a violation of park rules under Lee County ordinance number 06-26- section 10.5. Section 10.5 provides: "No person shall carry on or engage in any activity which is expressly prohibited by a posted sign." The ordinance provides that a violation of section 10.5, Failure to Obey Park Sign, will result in a fine of $150.00 for the first violation, $300.00 for the second violation, and $500.00 for the third violation. See Lee Cty. Ordinance No. 06-26, § X(12.0), Exhibit B. Ultimately, however, the information was amended to include only one count of

possession of a controlled substance.

At no time during the proceedings did defense counsel move to suppress the controlled substance found in the backpack. The jury found Mr. Booker guilty as charged, and he was sentenced to forty-eight months' prison.

Mr. Booker argues trial counsel was ineffective as shown on the face of the record for failing to move to suppress the fentanyl found in his backpack following his illegal arrest and the search incident to that arrest, and on this clear record we agree.

III

"Counsel is said to be ineffective when counsel's performance does not meet the standard of reasonable professional assistance and there is a reasonable probability that the outcome of the trial would have been different but for the unsatisfactory assistance." Forget v. State, 782 So. 2d 410, 413 (Fla. 2d DCA 2001) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). "Under Strickland, we first determine whether counsel's representation 'fell below an objective standard of reasonableness.' Then we ask whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.' " Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (citation omitted) (quoting Strickland, 466 U.S. at 688, 694).

"The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " Id. (quoting Strickland, 466 U.S. at 688). "In any case presenting an ineffectiveness claim,

the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 688. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 571 U.S. 263, 274 (2014).

We first examine the circumstances surrounding Mr. Booker's arrest and the search and seizure of the subject backpack. Here, the sole basis for Mr. Booker's arrest was a violation of Lee County Ordinance No. 06-26, section 10.5—for being present in a city park after closing, which was punishable by a fine up to $500.00 for a third violation. In other words, it was not an arrestable offense.

An arrest incident to a violation of an ordinance which authorizes only the issuance of a citation or summons and complaint for civil infractions, is a violation of the Fourth Amendment and article I, section 12 of the Florida Constitution. See Thomas v. State, 614 So. 2d 468, 471 (Fla. 1993) ("[W]hen a person is charged with violating a municipal ordinance regulating conduct that is noncriminal in nature, . . . [a] full custodial arrest . . . is unreasonable and a violation of the Fourth Amendment and article I, section 12 of the Florida Constitution."); Nelson v. State, 268 So. 3d 837, 838 (Fla. 2d DCA 2019) (reversing convictions for carrying a concealed firearm, possession of cocaine, and possession of marijuana "because law enforcement's search of [defendant] was predicated on a violation of a municipal ordinance banning his presence in a city park after hours, for which the power to conduct a full custodial arrest does not apply"); C.D. v. State, 82 So. 3d 1037, 1039 (Fla. 4th DCA 2011) ("[W]here the penalty for violating a municipal ordinance is a fine, an 'arrest' for the violation of such

an ordinance, as authorized in section 901.15(1), Florida Statutes, permits only a detention for the time necessary to issue a summons or notice to appear, and a full custodial detention and search in these circumstances violates the Fourth Amendment."); Cuva v. State, 687 So. 2d 274, 276 (Fla. 5th DCA 1997) (holding that a "violation of a municipal ordinance is neither a 'crime' nor a 'noncriminal violation' ") (quoting Thomas, 614 So. 2d at 472).

The State argues under section 901.15(1), Florida Statutes (2016), the arrest of Mr. Booker without a warrant was authorized where:

> (1) The person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer. An arrest for the commission of a misdemeanor or the violation of a municipal or county ordinance shall be made immediately or in fresh pursuit.

However, as we recognized in Nelson, this argument was expressly rejected by the Florida supreme court in Thomas. Nelson, 268 So. 3d at 389. "In Thomas, the supreme court held that an 'arrest' under section 901.15(1) does not mean a full custodial arrest and search incident thereto, but rather, that the officers may detain an individual only 'for the limited purpose of issuing a ticket, summons, or notice to appear.' " Id. (quoting Thomas, 614 So. 2d at 471). Mr. Booker was not detained for this limited purpose. Instead, Mr. Booker was placed under arrest by the deputy for the ordinance violation, and then his backpack was seized and searched against his objection. This search, thus, exceeded the scope of any permissible search where the violation was based upon a noncriminal ordinance and the contraband, notwithstanding its illicit nature, was seized in violation of Mr. Booker's constitutional rights.

Having determined that the search and seizure of the fentanyl was illegal we next consider whether trial counsel's failure to file a motion to suppress the fentanyl

constitutes ineffective assistance of counsel. Applying the Strickland standard and considering all of the facts and circumstances here, the answer is quite straightforward—yes. We can think of no strategic rationale or reasonable basis to forego the filing of a motion to suppress where the case law is abundantly clear that law enforcement is not authorized to conduct a full custodial detention and search on a mere county ordinance violation, as such runs afoul of the Fourth Amendment. See Thomas, 614 So. 2d at 471. And while counsel may not have had the benefit of our recent opinion in Nelson, the supreme court's decision in Thomas and the Fourth District's decision in C.D. were certainly existing authorities available to trial counsel during the course of the proceedings. Hence, on the face of this record trial counsel's neglect in failing to file a motion to suppress amounts to deficient performance.

Our analysis does not end here, as it is not enough to establish deficient performance in proving ineffective assistance of counsel under Strickland. Strickland, 466 U.S at 691. Mr. Booker must also "show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Here, the only evidence supporting the charge of possession of a controlled substance is the contraband found in Mr. Booker's backpack. This evidence is dispositive. We therefore conclude that given the prevailing authority under Thomas and the clear record before us, there is more than just a mere reasonable probability a motion to suppress would have been granted and the outcome would have been different for Mr. Booker but for counsel's error.

IV

Finally we note, because trial counsel's "ineffectiveness is apparent on the face of the record [] it would be a waste of judicial resources to require the trial court to address the issue." Blanco, 507 So. 2d at 1384. By addressing this issue now, we can "avoid the legal churning, . . . which would be required if we made the parties and the lower court do the long way what we ourselves should do the short." Mizell v. State, 716 So. 2d 829, 830 (Fla. 3d DCA 1998) (citation omitted).

Accordingly, we reverse Mr. Booker's conviction and sentence for the charge of possession of a controlled substance and remand for discharge.

Reversed and remanded.

KHOUZAM, C.J., and VILLANTI, J., Concur.