

SIXTH DIVISION  
March 1, 2002

No. 1-00-4218

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	
	)	
BROSHUNE SPANN,	)	Honorable
	)	William Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE O'MARA FROSSARD delivered the opinion of the court:

Following a bench trial defendant was found guilty of four counts of possession of a controlled substance with intent to deliver and sentenced to 10 years in prison. On appeal defendant contends that the class X sentence was improper because it was based on a defective indictment; the state failed to prove the offenses were committed on a public way; the state failed to prove defendant possessed with intent to deliver the cocaine found in the apartment; and defense counsel was ineffective for not presenting various pre-trial motions. We find ineffective assistance of trial counsel and reverse defendant's convictions and sentence. We remand for retrial.

BACKGROUND

On October 18, 1999, around 11:20 p.m. Chicago police officer Michael Stack was conducting a residential safety check of the Chicago Housing Authority building at 2430 South State Street. The location was known to be an area of high narcotic activity. Upon entering the back of the building, he saw the defendant on the front steps receive an unknown quantity of United States currency from an unidentified individual in exchange for an item that defendant retrieved from inside his mouth. Where the defendant was standing was well lighted, but the vestibule that Officer Stack was coming through was dark. Officer Stack approached the defendant and observed what appeared to be a chunk of suspect crack cocaine in a plastic bag in defendant's mouth. He told defendant to spit it out and defendant complied. Officer Stack recovered the bag and arrested defendant. Both parties stipulated that a chemist would testify the substance recovered from defendant's mouth weighed three grams and tested positive for cocaine.

Officer Stack testified that defendant told him at the police station that he resided at two addresses, one of which was apartment 302 at 2430 South State Street for which he had a key in his possession. Defendant told the officer that he paid rent there and he stayed there with his girlfriend and her child. When Officer Stack asked if defendant had anything at the apartment that he should not have, defendant answered in the negative. Officer Stack asked if defendant was willing to sign a consent to search form and defendant agreed. Stack entered the apartment with defendant's key and found 12 plastic bags of suspect cocaine and \$1,260 in U.S. currency. Both parties stipulated that a chemist would testify the substance recovered from the apartment weighed 3.6 grams and tested positive for cocaine.

Defendant did not testify. The court found defendant guilty of four counts of possession of a controlled substance with intent to deliver one gram or more but less than fifteen grams of a substance containing cocaine. Defendant was sentenced to 10 years in prison. Defendant appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal defendant argues that his trial counsel was ineffective because he failed to present various pre-trial motions. The sixth amendment to the United States Constitution guarantees a criminal defendant the assistance of counsel. U.S. Const., amend. VI. In *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), the United States Supreme Court established a two-prong test that a defendant must meet in order to prove that trial counsel was ineffective. *Strickland* requires the defendant to show deficient performance and that the deficient performance prejudiced defendant. *Strickland*, 466 U.S. at 687, 694, 80 L. Ed. 2d at 693, 698, 104 S. Ct. at 2064, 2068.

Applying *Strickland*, we must examine the "fundamental fairness of the proceeding and consider whether \*\*\* the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696, 80 L. Ed. 2d at 699, 104 S. Ct. at 2069. "At a minimum, defense counsel must act as a true advocate for the accused, subjecting the prosecutor's case to meaningful adversarial testing." *People v. Shelton*, 281 Ill. App. 3d 1027, 1037 (1996).

Under the first prong of the *Strickland* test, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064. The reviewing court, without engaging in hindsight, must presume that counsel's performance fell within the wide range of reasonable professional assistance. *Strickland*, 466 U. S. at 689, 80 L. Ed. 2d at 694, 104 S. Ct. at 2065. The defendant is required to overcome the strong presumption that the challenged action was the product of sound trial strategy and not the result of incompetence. *People v. Harris*, 129 Ill. 2d 123, 156 (1989). Under the second prong of the *Strickland* test, the defendant must show there is a reasonable probability that but for counsel's deficient performance, the results of the proceeding would have been different. *Strickland*, 466 U. S. at 694, 80 L. Ed. 2d at 698, 104 S. Ct. at 2068. Specifically, the defendant must show that defense counsel's deficiencies so prejudiced the defendant as to deprive him of a fair trial with a reliable result. *People v. Caballero*, 126 Ill. 2d 248, 259-60 (1989).

Defendant argues that his trial attorney's failure to present a motion to suppress the cocaine recovered was ineffective assistance of counsel. We note the record in this case consisted of eight pages of direct examination of Officer Stack by the State, followed by two and one-half pages of cross-examination by defense counsel and a one and one-half page stipulation by both the State and defense to the testimony of the forensic scientist regarding the inventoried cocaine. Defense counsel presented no pre-trial motions, no opening statement, no witnesses, and no evidence.

The decision whether to bring a motion to quash arrest and suppress evidence is considered trial strategy, and trial counsel enjoys the strong presumption that failure to challenge the validity of the defendant's arrest or to exclude evidence was proper. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000). To overcome that presumption, the defendant must demonstrate a reasonable probability that the motion would have been granted and that the outcome of the trial would have been different. *Rodriguez*, 312 Ill. App. 3d at 925. Reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698, 104 S. Ct. at 2068.

In connection with a residential safety check of the building at 2430 South State Street, Officer Stack testified that the defendant was on the front steps of the Ickes Home Development at that address. He testified as follows:

"STATE: As you observed the defendant, what did you see?"

OFFICER: I observed the defendant receive a quantity of United States currency. In turn he took an item from his mouth and tendered it to an individual who then walked into a crowd of people and appeared to have gone northbound from the location.

STATE: After you made that observation, what did you do?

OFFICER: Waited a couple of seconds and then approached Mr. Spann.

STATE: When you approached Mr. Spann, did you observe anything at that time?

OFFICER: Yes, I was able to observe what appeared to be a large chunk of a white rock substance suspect crack cocaine in Mr. Spann's mouth, and I ordered him to spit that out because it was what I believed to be crack cocaine.

STATE: When you ordered him to spit out that item, did he in fact do that?

OFFICER: Yes

STATE: You recovered that item?

OFFICER: Yes.

STATE: Judge, it will be stipulated by and between the parties that that item was subsequently inventoried under 2244133 and submitted to the Illinois State Police. So stipulated?

DEFENSE COUNSEL: Yes

STATE: After the defendant spit that item out, did you place him under arrest?

OFFICER: Yes, ma'am."

On cross-examination, Officer Stack testified as follows:

"DEFENSE: Officer Stack you indicated that you were doing a safety check, is that right?

OFFICER: Yes.

DEFENSE: And you indicated that you saw a person approach my client and that person gave my client money, is that your testimony?

OFFICER: Yes, sir.

DEFENSE: From your vantage point as you were observing this, you couldn't tell what if anything my client gave to that person could you?

OFFICER: No. He just picked something out of his mouth and gave it to him.

DEFENSE: At any time did you attempt to stop the person that you say you saw approach my client?

OFFICER: No.

DEFENSE: At some point you indicated that you walked up to my client and you asked him to spit out what was in his mouth, is that correct?

OFFICER: Yes, sir."

A police officer may make a valid investigatory stop absent probable cause for an arrest, provided that the officer's decision is based on specific, articulable facts which warrant the investigative stop. *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 889, 906, 88 S. Ct. 1868, 1879-80 (1968). The stop is proper if a person of reasonable caution believes the action taken was proper knowing the facts available at the time of the stop. *People v. Rivera*, 212 Ill. App. 3d 502, 504-05 (1995).

Here, at 11:20 p.m. Officer Stack knew the following: (1) defendant was on the front steps of the Ickes Home Development at 2430 South State Street; (2) he was conducting a residential safety check of the building and that

location was an area of high narcotic activity; (3) defendant received money from an individual, took an item from his mouth, and gave it to that individual who then disappeared into a crowd of people; (4) he could not see what the defendant gave to that individual; and (5) he could not tell the amount of money that individual gave the defendant.

There was no challenge by defense counsel to Officer Stack's ability or opportunity to observe the transaction he described. There was no cross-examination as to the nature, extent, or duration of that observation. Moreover, the State failed to demonstrate Officer Stack's experience regarding narcotics investigations or arrests. Officer Stack never testified that based on his experience conducting narcotic surveillance, he suspected the defendant had been involved in a narcotic transaction. There was no testimony by Officer Stack that during previous narcotic surveillance he observed the sale of drugs to take place in the manner described here, with the seller storing the drugs in his mouth. There was no testimony by Officer Stack that previously he had seen similar transactions that led to arrests for unlawful delivery of a controlled substance. See *People v. Stewart*, 217 Ill. App. 3d 373, 374 (1991).

Officer Stack admitted that he did not see what was transferred from defendant to the other unidentified person. Officer Stack failed to testify as to what factors he found significant regarding his decision to approach defendant and conduct further investigation. See *People v. Steels*, 277 Ill. App. 3d 123, 124 (1995). Officer Stack's testimony lacks specific, articulable facts which justify an investigative stop. Based on the record, there is a reasonable question whether at that point Officer Stack had sufficient grounds to make an investigatory *Terry* stop of defendant.

We further note that the conduct of Officer Stack which followed his observations raises the question of whether Officer Stack conducted a *Terry* search when as he testified upon observing "what appeared to be a large chunk of a white rock substance suspect crack cocaine in Mr. Spann's mouth, \*\*\* I ordered him to spit that out because it was what I believed to be crack cocaine." The record further raises the question as to whether the facts known to Officer Stack at that point legally justified a *Terry* stop and search.

This court has previously stated that the sole legal justification for a "search" incident to a *Terry* stop is the protection of the officer and others nearby, not to gather evidence. *People v. Morales*, 221 Ill. App. 3d 13, 17-18 (1991). Here, the officer testified that he ordered defendant to spit out what was in his mouth "because it was what I believed to be crack cocaine." There was no testimony that the officer was concerned about his safety, the safety of others, or concerned that what he believed to be cocaine would be destroyed when he ordered defendant to spit out what was in his mouth.

In connection with this testimony, defense counsel did not test the credibility of Officer Stack's statement that he observed what he believed to be cocaine in defendant's mouth. There was no challenge by defense counsel to Officer Stack's ability or opportunity to observe the contents inside defendant's mouth. There was no cross-examination regarding the nature, extent, or duration of that observation. We are mindful that contraband in plain view of a police officer, who has a right to stop a subject or a right to be in a position to have that view, is subject to seizure and may be introduced into evidence. *People v. Jackson*, 149 Ill. App. 3d 156, 159 (1986). Here, the record does not indicate whether defendant was standing with his mouth gaping wide open exposing the white substance in the bag to plain view or whether he voluntarily revealed the presence of the white substance in the bag to Officer Stack in some other way. Considering the fact that the white substance was illegal contraband, either of these actions would be curious and contrary to common sense and everyday experience. The circumstances surrounding Officer Stack's observation of the contents inside defendant's mouth should have been tested by cross-examination.

The State's entire case was based on the testimony of Officer Stack. The testimony of Officer Stack was not so clear and convincing that it would have been futile for defense counsel to have challenged it. We do not believe that this testimony was so improbable or unsatisfactory that no rational trier of fact could have believed it. However, the testimony, as previously noted, raised several legal and factual questions. Defense counsel through cross-examination and closing argument could have made a strong case that the circumstances surrounding defendant's arrest were not as Officer Stack had described.

*People v. Love*, 318 Ill. App. 3d 534 (2000), oral argument heard No. 90806 (January 15, 2002), is factually similar. In *Love*, the officer observed a pedestrian hand money to a bicyclist. The bicyclist directed the pedestrian toward the defendant who removed an item from her mouth and handed it to the pedestrian. The officer approached the defendant and asked her name. The defendant had difficulty answering so the officer ordered her to spit out what was

in her mouth. The defendant complied and spit out 16 baggies, which the officer testified he believed contained cocaine. The defendant argued that the trial court erred in finding that the officer engaged in a proper *Terry* search when he told the defendant to spit out what she had in her mouth. *Love*, 318 Ill. App. 3d at 536.

In *Love*, the State, similar to its position in this case, argued that the officer never "searched" defendant. *Love*, 318 Ill. App. 3d at 537. In rejecting that position the appellate court in *Love* noted that people have a legitimate privacy interest in protecting themselves from "searches involving intrusions beyond the body's surfaces." *Love*, 318 Ill. App. 3d at 537-38, citing *Schmerber v. California*, 384 U.S. 757, 769-770, 16 L. Ed. 2d 908, 919, 86 S. Ct. 1826, 1835 (1966). The court in *Love* concluded that the officer intruded upon defendant's body by ordering her to spit out what was in her mouth and such conduct was a sufficient intrusion upon defendant's privacy interest to constitute a search under the fourth amendment. *Love*, 318 Ill. App. 3d at 538.

Here, the argument could have been made that Officer Stack lacked legal justification for a *Terry* stop of defendant and engaged in an improper *Terry* search by ordering defendant to spit out what was in his mouth. Defense counsel failed to present by way of a motion to quash arrest and suppress evidence the question of whether the plastic bag inside defendant's mouth was in fact in plain view and whether there was probable cause to associate that property with criminal activity. *Jackson*, 149 Ill. App. 3d at 159.

We are well aware that in order to avoid the "distorting effects of hindsight" reviewing courts indulge in a "strong presumption" that defense counsel's performance "fell within the wide range of reasonable professional assistance." *People v. Patten*, 240 Ill. App. 3d 407, 413, (1992), citing *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694, 104 S. Ct. at 2065. However, Illinois courts of review have found ineffective assistance of counsel, as opposed to trial strategy, when the pretrial motion which counsel failed to present was defendant's strongest defense or "patently meritorious." *People v. McPhee*, 256 Ill. App. 3d 102, 107 (1993).

Regarding that principle, we find *People v. Stewart*, 217 Ill. App. 3d 373 (1991), instructive. In *Stewart*, two police officers observed two men talking on the sidewalk. They observed one man hand the other man an unidentified object. When the officers approached, the men ran. The officers stopped the two men and found cocaine in the defendant's possession. The *Stewart* court found that the question of probable cause was "a close one" and the failure to file a motion to suppress could not have been "trial strategy" where defendant's only defense was to contest the arrest. *Stewart*, 217 Ill. App. 3d at 376.

Here, the failure to present a motion to quash the arrest and suppress evidence does not appear to have been a matter of trial strategy. One of defendant's only viable defenses was to contest the legality of the arrest. For the reasons previously discussed, upon application of the *Terry* principles regarding the legal prerequisites for a stop and search, we find that based on this record, a motion to quash arrest and suppress evidence would have had a reasonable probability of success. We note that had the motion to quash arrest and suppress evidence succeeded, evidence needed for the State to prove possession with intent to deliver would have been eliminated from consideration by the trial court. We find the prejudice prong of the *Strickland* test satisfied because the deficient performance of defense counsel in failing to present a motion to quash arrest and suppress evidence was sufficient to undermine confidence in the outcome of the trial. Our holding is limited to the conclusion that a motion to quash arrest and suppress evidence would have had a reasonable probability of success. We leave for resolution by the trial court the question as to whether the State has sufficient facts based upon the totality of the circumstances to prevail on a motion to quash arrest and suppress evidence.

Defendant further contends that trial counsel provided ineffective assistance by failing to present motions to suppress the key to the apartment, the consent to search, the cocaine found in the apartment, and defendant's statements regarding renting and using the apartment. The importance of the evidence recovered from the apartment in proving the element of intent to deliver was noted by the trial court in reaching the conclusion that defendant was guilty. In response to defense counsel's argument that there was insufficient evidence of intent to deliver the trial court stated as follows:

"[Defense counsel], I would normally agree with you with regard to the possession with intent issue if all I heard today was that the officer saw what he believed was one transaction, but taking the totality of the circumstances of the event that occurred on that night, not only the transaction that was observed by the officer which is unrefuted but the

recovery of more narcotics packaged in a way that we know anybody who works here knows is used to sell on the street together with the recovery of \$1200, I believe the State has established that intent element.

With regard to the possession, the constructive possession or control of the apartment, what I have before me is an unrefuted statement by the officer that Mr. Spann said he not only stayed there, but he paid rent and stayed with his girlfriend and her kid on occasions.

Further he had a key to the apartment which certainly is indicia of control and residence.

Based on the unrefuted evidence that I heard, I feel I have no choice but to find the defendant guilty as charged."

To successfully suppress evidence of the key and the cocaine, defendant needed to demonstrate that his arrest was unlawful and the key and cocaine found in the apartment were the fruits of the arrest. *People v. Williamson*, 319 Ill. App. 3d 891-898 (2001). For the reasons previously discussed, the circumstances surrounding defendant's arrest raise questions concerning its legality. We conclude that the motion to quash arrest and suppress evidence would have had a reasonable probability of success. We make no determination regarding defendant's ultimate success on such a motion.

Regarding the statements made by defendant, if defendant's arrest was unlawful, the question then arises whether defendant's subsequent statements to the police were obtained by exploitation of the illegality of the arrest. *People v. Foskey*, 136 Ill. 2d 66, 85 (1990). To determine whether there is a reasonable probability that defendant's statements were obtained by exploitation of the illegality of the arrest and would have been suppressed as a "fruit of the poisonous tree," we must apply the test established in *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975). The factors to be considered in order to determine whether the confession was a product of the arrest are the temporal proximity of the arrest and the statements, the presence of intervening circumstances, and the purposefulness and flagrancy of the alleged official misconduct. *Brown*, 422 U.S. at 603-04, 45 L. Ed. 2d at 427, 95 S. Ct. at 2261-62.

Applying the *Brown* factors to the facts of this case, we conclude that there is a reasonable probability that a motion to suppress statements as the result of an illegal arrest would have been successful. Defendant made the incriminating statements regarding residency immediately after he was brought to the police station, and there were no intervening circumstances. He told the officer that he resided at two addresses, one of which was apartment 302 at 2340 South State Street. He told the officer that he paid rent there and he stayed there with his girlfriend and her child. He gave the officer a key to that apartment. Those statements elicited from defendant arguably could be found to have been the result of "an expedition for evidence." *Brown*, 422 U.S. at 605, 45 L. Ed. 2d at 428, 95 S. Ct. at 2262. We stress, however, that we do not resolve the question of whether such a motion to suppress statements would have been granted. We limit our finding to the conclusion that based on this record, a motion to suppress statements would have had a reasonable probability of success.

Alternatively, to successfully challenge the consent to search and suppress defendant's statements, the defendant needed to demonstrate that neither the consent nor the statements were given voluntarily. *People v. Williams*, 181 Ill. 2d 297, 309 (1998). Voluntariness of consent to search, as well as the voluntariness of a defendant's statements, is determined by consideration of the totality of the circumstances. *People v. Wegman*, 101 Ill. App. 3d 634, 637 (1981). Factors to consider when determining voluntariness include the defendant's age, education, and intelligence, the length of the detention and the duration of the questioning, whether the defendant was advised of his constitutional rights, and whether the defendant was subjected to any physical mistreatment. *People v. Brown*, 169 Ill. 2d 132, 144 (1996).

Here, the record does not reflect that defendant was advised of his *Miranda* rights at any time before consenting to the search of the apartment, or before making the incriminating statements regarding paying rent and staying at the apartment. We note that Officer Stack testified that defendant agreed to sign the consent to search form, but there was no testimony that defendant ever read the consent form or had the form read to him. The voluntariness of the consent to search and the voluntariness of the statements was never explored because defense counsel made no motion regarding the consent to search the apartment or the defendant's statements. The test for voluntariness includes whether the statement or consent was given freely, without compulsion or inducement, and whether defendant was informed of his constitutional rights. *People v. Martin*, 102 Ill. 2d 412, 427 (1984). The record does not indicate that

defendant was informed of his constitutional rights. The record reflects no evidence of the circumstances surrounding the consent to search and the statements given by defendant.

Here, we find that based on the totality of the circumstances, the failure to present a motion to suppress the key, cocaine, consent to search, and the statements made by defendant was not effective representation by defense counsel. For the reasons previously discussed, the record raises questions as to whether the key, cocaine, statements, and consent to search were subject to suppression. The deficient representation prejudiced defendant because had this evidence been suppressed, defendant could have successfully defeated the element of intent to deliver and thereby reduced his criminal liability.

In addition, there were other trial errors which cast doubt on the effectiveness of defense counsel during the entire proceeding and undermined confidence in the outcome of the trial. A motion could have been made to dismiss two counts of the indictment based on failure to satisfy strict statutory pleading requirements. The second two counts of the four-count indictment charged defendant with Class 1 possession of controlled substance with intent to deliver. The first two counts charged defendant with possession of controlled substance with intent to deliver and tracked language from section 407(b)(1), which provided a Class X penalty. See 720 ILCS 570/407(b)(1) (West 1998). However, the first two counts referenced a violation of section 401(c)(2) in the indictment, which provided only a Class 1 penalty. See 720 ILCS 570/401(c)(2) (West 1998). Although the aggravating factor requiring the offense to be committed on a public way within 1000 feet of Chicago Housing Authority property was charged in the indictment, the incorrect section and subsection alleging a Class 1 rather than a Class X felony was indicated in the body of the first two counts of the indictment. Defendant did not object in the trial court to the erroneous citations, which alleged incorrectly a Class 1 rather than a Class X violation.

Defendant raised this issue for the first time on appeal. The point in time at which the indictment is attacked determines what standard the indictment must satisfy in order to survive dismissal. When an indictment is attacked for the first time on appeal, the standard is whether the indictment informed the defendant of the offense charged with sufficient specificity to prepare his defense and plead a resulting conviction as a bar to future prosecutions based on the same conduct. *People v. Thingvold*, 145 Ill. 2d 441, 448 (1991); *People v. Edmonds*, 325 Ill. App. 3d 439, 443 (2001). If the indictment is attacked before trial, the indictment must strictly comply with the pleading requirements of the Code of Criminal Procedure of 1963. 725 ILCS 5/111-3(a) (West 1998); *Thingvold*, 145 Ill. 2d at 448. Defense counsel, by failing to bring a motion to dismiss the indictment before trial, deprived defendant of the benefit of the indictment being required to satisfy the strict statutory pleading standard.

Rather than strictly satisfying statutory pleading requirements, the State was only required to satisfy the less stringent standard because the indictment was attacked for the first time on appeal. Under that standard the State needed only to demonstrate that the indictment informed the defendant of the offense charged with sufficient specificity to prepare his defense and plead any resulting conviction as a bar to future prosecutions based on the same conduct.

There was a further defect in the indictment beyond the reference to the incorrect provision of the Criminal Code. This defect was arguably substantive in nature. Defendant was found guilty of possession with intent to deliver cocaine found in his apartment. However, both count I and count II alleged possession of cocaine with intent to deliver "\*\*\*\* on a public way within 1000 feet of the real property comprising a residential property owned, operated and managed by a public housing agency, the Chicago Housing Authority \*\*\*." Each count used precisely the same language. Defendant's apartment was not located on a public way, but located inside the Chicago Housing Authority building. Neither of the first two counts of the indictment referenced the correct language of the enhanced penalty provision under section 407(b)(1) that the defendant violated "subsection (c) of Section 401 in any \*\*\* residential property owned, operated and managed by a public housing agency\*\*\*\*." 720 ILCS 570/407(b)(1) (West 1998). No motion alleging this substantive defect was ever made.

Regarding that defect, we find *People v. Jones*, 288 Ill. App. 3d 293 (1997), instructive. In *Jones*, the court addressed whether the term "on a public way" is an essential element under section 407(b)(2) for charging the enhanced crime under section 401(d). *Jones*, 288 Ill. App. 3d at 296-98. The court in *Jones* found that "there are two relevant portions to the enhancements in section 407(b)(2), namely, whether the violation of section 401(d) occurred: (1) in "any school \*\*\* the real property comprising any school \*\*\* public housing \*\*\* or public park" or (2) "on any public way within 1,000 feet of the real property comprising any school \*\*\* public housing \*\*\* or public park."

*Jones*, 288 Ill. App. 3d at 298. *Jones* held that the term "on a public way" is an essential element under section 407(b)(2) for purposes of charging an enhanced crime under section 401(d) of the Illinois Controlled Substance Act. *Jones*, 288 Ill. App. 3d at 298; see also *People v. Carter*, 297 Ill. App. 3d 1028, 1032 (1998) (following *Jones*, the court held the "on any public way" element is essential to offense and failure to allege it is fatal to charge; State agreed count lacking that language is void).

Using a similar analysis, for purposes of drafting a legally sufficient indictment in this case, the relevant portions to the enhancements in section 407(b)(1) include whether the violation of section 401(c) occurred: (1) "in any \*\*\* residential property owned, operated and managed by a public housing agency," or (2) "on any public way within 1,000 feet of the real property comprising any \*\*\* residential property owned, operated and managed by a public housing agency \*\*\*." 720 ILCS 570/407(b)(1) (West 1998).

Where here, the defendant was found guilty of possessing with intent to deliver cocaine recovered from his apartment on Chicago Housing Authority property, the argument can be made that one count of the indictment was fatally defective because for purposes of enhancing the offense to a Class X, in connection with the cocaine recovered from the apartment, the indictment incorrectly charged the element of "public way" when in fact the enhancing element was the fact that defendant's 401(c) violation occurred "in \*\*\* residential property owned, operated and managed by a public housing agency \*\*\*." 720 ILCS 570/407(b)(1) (West 1998).

By way of a motion to dismiss the indictment it could have been argued that in connection with the cocaine recovered from inside the apartment, the term "in any \*\*\* residential property owned, operated and managed by a public housing agency" was an essential element under section 407(b)(1) for purposes of charging an enhanced crime under section 401(c), and its absence from the indictment was fatal to the count based on the criminal activity which occurred inside the apartment. The trial court could have found that the term "in \*\*\* residential property owned \*\*\* by a public housing agency" was an element essential to the offense, the count lacking that language was void, and the failure to allege it was fatal to that count.

Based on these defects in the indictment, we find defense counsel was ineffective for failing to present a motion to dismiss various counts of the indictment before trial. Such a motion would have had a reasonable probability of success. We do not, however, resolve the question of whether that motion would have been granted.

Finally, we note that in closing argument, that while defense counsel indicated that the record was insufficient to support a finding of intent to deliver, defense counsel misstated the evidence and conceded defendant's guilt regarding possession of a controlled substance. Specifically, defense counsel summarized Officer Stack's testimony as follows:

"The officer's testimony is that when he approached my client, my client spat from his mouth an item that he recovered. We would concede based on that part of his testimony that my client possessed narcotics, but I believe the record before this Court at this time is insufficient to support a finding of with intent."

That argument completely overlooked the fact that the defendant did not simply spit the item from his mouth, but rather, was ordered to do so by Officer Stack. As previously noted the circumstances surrounding the observations made by Officer Stack immediately before he ordered the defendant to spit out what was in his mouth were never explored by defense counsel, either by way of a motion to quash arrest and suppress evidence, or during cross-examination of Officer Stack. Moreover, defense counsel went on to concede defendant's guilt for possession of narcotics.

We note that the competence of defense counsel is to be determined "from a consideration of the totality of counsel's conduct, not isolated incidents." *People v. McKendrick*, 138 Ill. App. 3d 1018, 1025-26 (1985), citing *People v. Mitchell*, 105 Ill. 2d 1 (1984). We are mindful that a defendant is entitled to competent, not perfect, representation. *People v. Eddmonds*, 101 Ill. 2d 44, 69 (1984). In making a determination of prejudice, the court must examine the totality of the circumstances. *Strickland*, 466 U.S. at 695, 80 L. Ed. 2d at 698, 104 S. Ct. at 2069.

A review of the record demonstrates that defense counsel did not test the credibility of Officer Stack, the only witness offered by the prosecution, and did not attack the strength of the evidence presented. Defense counsel failed to present a motion to dismiss the indictment, quash the arrest, suppress evidence, suppress statements, or contest

defendant's consent to search. Defense counsel failed to make an opening statement, conceded that defendant was guilty of possession of a controlled substance in his closing argument, called no witnesses, presented no evidence, and conducted less than a two and one-half-page cross-examination of the State's only witness, Officer Stack.

While these types of motions and this type of conduct have been presumed to be matters of trial strategy, we cannot conclude, after reviewing the totality of defense counsel's conduct in this case, that his decisions were valid trial strategy. For the reasons previously discussed, each of these motions had a reasonable probability of success. Defense counsel at a minimum failed to act as a true advocate for the defendant and failed to subject the State's case to meaningful adversarial testing. Based on the cumulative impact of the ineffective assistance of counsel, we conclude defendant was prejudiced. The deficient performance of defense counsel was sufficient to undermine confidence in the outcome of the trial. We reverse and remand for further proceedings consistent with this opinion.

### SUFFICIENCY OF EVIDENCE

For purposes of double jeopardy, we address the sufficiency of the evidence and the arguments defendant raises regarding evidence sufficiency. *People v. Digirolamo*, 179 Ill. 2d 24, 42 (1997). In reviewing the sufficiency of the evidence to support a criminal conviction, a reviewing court must determine whether the evidence, viewed in the light most favorable to the prosecution, could reasonably support a finding of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact is to assess the credibility of the witnesses, the weight of the evidence, and the inferences to be drawn therefrom. *People v. Brown*, 185 Ill. 2d 229, 250-51 (1998). Discrepancies in testimony do not necessarily destroy witness testimony, but go to the weight to be afforded that testimony. *People v. Tirado*, 254 Ill. App. 3d 497, 513 (1993).

We are mindful that in a bench trial, the trial judge has the responsibility to determine the credibility of the witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidentiary record. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Accordingly, such determinations are granted substantial deference on review and we may not substitute our judgment for that of the trial judge on these matters. *People v. Banks*, 287 Ill. App. 3d 273, 285 (1997).

Defendant contends that the evidence was insufficient to prove that defendant was in possession of the drugs found in the apartment. Possession of a controlled substance may be constructive, as long as the State can prove that defendant had the intent and ability to maintain control over the substance. *People v. Brown*, 277 Ill. App. 3d 989, 997 (1996). Proof of a defendant's control may be demonstrated circumstantially by showing that defendant was aware of the presence of the narcotics at the time they were discovered. *Brown*, 277 Ill. App. 3d at 998.

The fact that defendant stayed in the apartment, payed rent there, and possessed a key to the apartment, demonstrates that defendant had possession of the drugs found in the apartment. Based on the record, there was sufficient evidence to prove that defendant was in possession of the drugs found in the apartment.

Defendant next argues that the evidence was insufficient to prove that there was intent to deliver the drugs found in the apartment. In *People v. Robinson*, 167 Ill. 2d 397, 408 (1995), our supreme court noted that intent to deliver is usually proven through circumstantial evidence because direct evidence of intent rarely exists. A variety of factors have been considered as probative of intent to deliver.

"Such factors include whether the quantity of controlled substance in defendant's possession is too large to be viewed as being for personal consumption (*People v. Berry* (1990), 198 Ill. App. 3d 24), the high purity of the drug confiscated (*People v. Torres* (1990), 200 Ill. App. 3d 253), the possession of weapons (*People v. Dockery* (1993), 248 Ill. App. 3d 59), the possession of large amounts of cash (*People v. Jones* (1991), 215 Ill. App. 3d 652), the possession of police scanners, beepers or cellular telephones (*People v. Lecour* (1988), 172 Ill. App. 3d 1978; *People v. Bradford* (1993), 239 Ill. App. 3d 796), the possession of drug paraphernalia (*People v. McDonald* (1992), 227 Ill. App. 3d 92), and the manner in which the substance is packaged (*People v. Banks* (1992), 227 Ill. App. 3d 950)." *Robinson*, 167 Ill. 2d at 408.

Mindful of these factors, in reviewing this record, including the direct and circumstantial evidence, we find sufficient

evidence probative of intent to deliver. The drugs found inside the apartment were packaged separately and found alongside a large amount of money. Based on the record, the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of possession with intent to deliver.

Officer Stack observed defendant on the steps of the apartment building at 2430 South State Street. He saw defendant receive money from an individual in exchange for an item defendant retrieved from his mouth. Officer Stack recovered a bag that was inside defendant's mouth which contained a substance later confirmed to be cocaine. The defendant told the officer that he stayed in an apartment in that building. Using a key given to them by the defendant, Officer Stack recovered 12 separate packets of cocaine and \$1,260 in United States currency from the apartment.

Based on a complete review of the record, we conclude that the evidence viewed as a whole and in a light most favorable to the State is sufficient to prove defendant's guilt for the charged offenses beyond a reasonable doubt. Therefore, principles of double jeopardy do not bar defendant's retrial. *People v. Porter*, 168 Ill. 2d 201, 215 (1995). We note that we have made no finding as to defendant's guilt that would be binding on retrial. *People v. Jones*, 175 Ill. 2d 126, 134 (1997).

### CONCLUSION

Whether any of the evidence will survive the motions we have previously discussed remains to be determined upon remand. We make no determination regarding defendant's success on any of these motions.

We reverse defendant's convictions and sentence. We remand for further proceedings consistent with this opinion.

Reversed and remanded.

GALLAGHER, P.J., and BUCKLEY, J., concur.